Australian Human Rights Commission

everyone, everywhere, everyday

2008

Complaints by immigration detainees against the Commonwealth of Australia

Report No. 40

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(Department of Immigration and Citizenship, formerly the Department of Immigration and Multicultural and Indigenous Affairs) and GSL (Australia) Pty Ltd

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Desktop Publishing by Jo Clark
Printed by Snap Printing, Castlereagh Street, Sydney

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14 November 2008

The Hon Robert McClelland MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

Pursuant to section 11(1)(f)(ii) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), I attach a report of an inquiry by the former President of the Commission into complaints made by immigration detainees against the Commonwealth of Australia. The former President found that the Commonwealth had breached the human rights of the complainants pursuant to articles 10(1) and 17(1) of the *International Covenant on Civil and Political Rights*.

At the time of finalising this report, the Commonwealth had not informed the Commission what action, if any, it proposed to take as a result of the President's findings and recommendations. By letter dated 10 November 2008, the Department of Immigration and Citizenship provided the following response to the President's findings and recommendations:

> The department has reviewed the findings and accepts that certain acts and/or practices complained of were inconsistent with and contrary to human rights under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
>
> The department acknowledges and accepts the President's recommendations to:
>
> - pay $5,000 in compensation to those complainants who the President found have had their human rights breached as a result of the interviews, being all the complainants except C18 and C20 (see Attachment A);

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- pay an additional $4,000 to those complainants who were placed in separate detention (see Attachment A);
- provide a formal written apology to each of the complainants to whom the President recommended be compensated for the breaches of their human rights identified in the Notice;
- taking all appropriate measures to locate those clients (C1 and C8) in order to make payment of compensation recommended above, as well as to provide them with a copy of the President's report and an apology; and
- only conduct such interviews in future when all other means of ascertaining identity have been exhausted and such interviews to be conducted by the department with the assistance of overseas officials, rather than by overseas officials themselves.
- The department has liaised with the relevant areas to determine the most appropriate method by which to compensate the clients and provide a formal apology, including taking appropriate action to locate those clients offshore. As a result of HREOC's recommendations, we will be pursuing compensation arrangements under the 'Act of Grace' provisions. A submission has been prepared and provided to the Department of Finance and Deregulation, whose approval is required for act of grace payments.

  It should be noted that the interviews conducted by the PRC delegation were in 2005, before the Palmer and Comrie Reports and the subsequent and reform agenda [sic]. Since that time, significant changes have been made to departmental processes and policy, particularly around the investigation of identity. As such, the department would not conduct such interviews currently, or in the future, in the same way in which these interviews took place. These draft guidelines are currently with the Commonwealth and Immigration Ombudsman for comment.

Yours sincerely

The Hon Catherine Branson QC
President

Contents

Part A: Introduction

1. This is a report into three separate complaints lodged with the Australian Human Rights Commission ('the Commission') arising out of the same events. The first complaint was lodged by one detainee on his own behalf and on behalf of 21 other people being detained at Villawood Detention Centre. Subsequently three other detainees requested and were granted leave to be joined to the first complaint. Two other detainees lodged separate complaints relating to the same events.
2. All of the complainants make allegations of breaches of their human rights by the Department of Immigration and Citizenship ('DIAC') (which at the time the complaints were filed was known as the Department of Immigration and Multicultural and Indigenous Affairs ('DIMIA'))[1] and GSL (Australia) Pty Ltd ('GSL').
3. The complaints relate to the following events:
   (i) interviews that each of the complainants participated in, in May 2005, with officials from the Chinese Ministry of Public Security ('MPS officials') that were organised by DIMIA; and
   (ii) the detention of some of these complainants for periods varying from one to fifteen days following the interviews in a different part of the Villawood Detention Centre known as the Manning Unit ('separation detention').
4. As the report discloses that all of the complainants have lodged applications for protection visas I have given all of them pseudonyms. I have, however, given the parties a list of the pseudonyms given to each of the complainants so that they know to whom my findings and recommendations relate.
5. I have also included a glossary at the end of my report that explains all of the abbreviations I have used throughout it.

Part B: Executive Summary

6. I find that DIMIA's acts in relation to the above events breached the human rights of the complainants. These rights are:

   (i) the right to be treated with humanity and dignity (art 10(1) of the *International Covenant on Civil and Political Rights*[2] ('the ICCPR')); and

   (ii) the right not to be subject to arbitrary interferences with their privacy (art 17(1) of the ICCPR).

7. I have not found that the acts of GSL breached the human rights of any of the complainants.

Interviews

No breach of human rights in respect of arranging the interviews

8. I do not find that the act of arranging for the complainants to be interviewed by officials from their country of origin in itself constituted a breach of the complainants' human rights.

9. DIMIA arranged for these interviews to take place so as to expedite the identification of the complainants to enable travel papers to be issued for them necessary to effect their deportation to the Peoples Republic of China ('PRC'). Most of the complainants had been in immigration detention for a considerable period of time. All of the complainants that had applied for visas had had their applications rejected by the Minister and the Refugee Review Tribunal ('RRT'). In the case of most of the complainants, this rejection had taken place more than three years prior to the interviews. Further, apart from C12, none of the complainants at the time of the interviews were awaiting a decision of a court, a tribunal or the Minister in respect of that refusal. Accordingly, in respect of most of the complainants, the Government had been in a position to deport them for a considerable period of time. Due to the large number of detainees suspected to be from the PRC who needed to be identified the interviews were the quickest way of achieving this. In these circumstances, it was not in itself a breach of the human rights of any of the complainants for DIMIA to have arranged the interviews or to have provided the MPS officials with information about the complainants and their families to assist with the identification of the complainants.

10. In the case of C12, at the time of his interview, his protection visa application had been rejected by the Minister and by the RRT but he was awaiting the outcome of an application he had made to the Federal Court for judicial review of the refusal. In his case, there was still a possibility that he may have been granted permission to remain in Australia. If his judicial review application had been successful then DIMIA would not have had to ascertain his identity

in order to return him to the PRC. As such, the interview and disclosure of his personal information to MPS officials would have been unnecessary. Given, however, that his application had been refused by the Minister and the RRT I do not think that subjecting him to the interview or disclosing his personal information to MPS officials for the purposes of the interview amounts to a breach of his human rights.

No breach of human rights in respect of the disclosure of personal information

11. I also accept DIMIA's evidence that the only personal information about the complainants and their families given to MPS officials was information to assist them ascertain the identities of the complainants. In those circumstances the disclosure of such information was not arbitrary and therefore did not constitute a breach of any of the complainants' human rights.

Breaches of human rights arising from the manner in which the interviews were conducted

12. Whilst DIMIA's act of arranging the interviews was not in itself objectionable, what was objectionable and what gave rise to the breaches in this case was the fact that DIMIA did this without taking adequate precautions to protect the rights and interests of the detainees. The manner in which the interviews were conducted breached both the right of the complainants to be treated with humanity and dignity (art 10(1) of the ICCPR) and their right to privacy (art 17(1) of the ICCPR).

(i) Failure to treat the complainants with humanity and dignity (art 10(1))

Finding of breach in relation to the complainants who had made protection visa applications prior to the interviews

13. In respect of the complainants who had made protection visa applications prior to the interviews, I find that DIMIA breached their right under art 10(1) of the ICCPR to be treated with humanity and dignity.

14. I find that DIMIA's failure to take adequate steps to prevent or at least minimise the risk of the complainants disclosing or being asked questions about their protection visa applications amounted to a failure to treat them with humanity and respect for their inherent dignity as human beings. This amounted to a breach of art 10(1) because DIMIA knew there was a risk of such a disclosure and should have known that if such information was disclosed the complainants may be at risk of persecution if they were returned to the PRC and were at risk of becoming distressed as a result of a fear of such persecution. To proceed with the interviews in those circumstances, without taking adequate steps to prevent or minimise that risk, shows a disregard for the rights and interests of the complainants that amounts to a failure to treat them with humanity and dignity.

15. I also find that DIMIA's failure to inform the complainants about the documents it had given to the MPS officials, and its failure to provide the complainants with an adequate explanation of the purpose of the interviews and the identity of the interviewers, demonstrates a disregard for the interests of the complainants that amounts to a failure to treat them with humanity and dignity. I reach this conclusion for the following reasons:

(i) the absence of an explanation about the documents that were given to the MPS officials contributed to the complainants forming the mistaken view that these officials had been given information about their protection visa applications which understandably caused the complainants' distress and fear;

(ii) DIMIA should have recognised the risk that, in the absence of an adequate explanation about the purpose of the interviews, the role of the Chinese officials and the process that had been arranged, the detainees would become anxious and fearful as a result of the interviews and it would increase the risk of the complainants disclosing information about their protection visa applications; and

(iii) the complainants did become distressed and frightened as a result of the interviews and some did disclose information about their protection visas.

Finding of no breach in relation to C18 and C20

16. I do not find that the interviews with C18 and C20 breached their human rights. These complainants had not applied for protection visas prior to their interviews. As such I do not have any evidence upon which to satisfy me that there was a risk that they would have disclosed information during the interviews that may have had adverse consequences for them akin to those faced by the protection visa applicants. Further, I have insufficient evidence about the precise information they disclosed during the interviews to satisfy me that they disclosed information that could have had adverse consequences for them. Whilst the manner in which these complainants were interviewed was still unsatisfactory I do not think that, in those circumstances, it was so unsatisfactory as to have amounted to a breach of their rights under art 10(1).

(ii) Breach of right to privacy (art 17(1))

17. The conduct of the interviews also breached the rights of some of the complainants not to have their privacy arbitrarily interfered with. The breach arose because these complainants divulged personal information about themselves during the interviews, such as information about protection visa applications, that was unrelated to the purpose for which the interviews were being conducted. DIMIA was responsible for the disclosure of this personal information because:

(i) it failed to take adequate measures to ensure or at least minimise the risk of such information being divulged;

(ii) the MPS officials, for whose actions I consider DIMIA to be responsible in the circumstances, sought the disclosure of the information; and

(iii) the MPS officials misrepresented to the complainants the purpose of the interviews, which also contributed to the disclosure of the unrelated personal information.

18. I do not find that all of the complainants had their privacy breached in contravention of art 17(1). I only make this finding in relation to complainants in respect of whom I had sufficient evidence that they disclosed personal information unrelated to the purpose for which the interviews had been conducted. In several cases DIMIA was unable to provide me with transcripts

of the interviews because it could either not locate the recordings of the interviews or the recordings had not worked or were significantly incomplete. In the absence of transcripts of the interviews I do not have sufficient evidence to conclude that these other complainants disclosed unrelated personal information and therefore insufficient evidence to find a breach of art 17(1).

Separation Detention

Failure to treat complainants with humanity and dignity (art 10(1))

19. I find that the separation detention of the complainants constituted a breach of the their right to be treated with humanity and dignity (art 10(1)) for the following reasons:

    (i) DIMIA unnecessarily moved the complainants away from their usual accommodation and imposed restrictions on their ability to correspond with persons outside of the detention centre;

    (ii) DIMIA should have realised that there was a real risk that the separation detention would cause distress to the complainants, because:

        (a) they were not given any adequate explanation about the reason for the separation detention, the conditions in separation detention or its duration;

        (b) the separation detention took place after they had participated in an interview that they did not know the purpose of, with people they suspected to be Chinese Government officials but whose identity was not made clear;

        (c) the complainants were told inconsistent and in some cases incorrect things about the conditions in separation detention; and

    (iv) holding the complainants in separation detention did in fact cause them to feel distressed and frightened.

Not an arbitrary detention (art 9(1))

20. Whilst I consider that DIMIA breached art 10(1) by placing the complainants in separation detention, I do not consider that its acts constituted a breach of art 9(1), which prohibits arbitrary detention. Article 9(1) can be breached if a person already in immigration detention is moved from one part of the immigration detention centre to another part of the centre but only where the move involves a further and serious deprivation of their liberty. In this case I do not consider the difference between the complainants' usual conditions in detention and the conditions in separation detention were so marked and significant that it constituted a further and serious deprivation of their liberty in breach of art 9(1).

Recommendations

Compensation should be paid to the complainants

21. I find that the breaches by DIMIA caused the complainants to be distressed and frightened. This distress and fear was considerable initially and whilst it would have diminished over time it was not merely of a transitory nature.

22. I therefore recommend that the Commonwealth pay $5,000 in compensation to those complainants who I find have had their human rights breached as a result of the interviews, being all of the complainants except for C18 and C20.

23. I also recommend that the Commonwealth pay an additional $4,000 to those complainants who were placed in separation detention being:

    (i) C1;
    (ii) C3;
    (iii) C4;
    (iv) C8;
    (v) C9;
    (vi) C10;
    (vii) C11;
    (viii) C13;
    (ix) C14;
    (x) C15;
    (xi) C17;
    (xii) C18;
    (xiii) C20;
    (xiv) C22;
    (xv) C23;
    (xvi) C21;
    (xvii) C24; and
    (xviii) C26.

Apology

24. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to each of the complainants to whom I have awarded compensation for the breaches of their human rights identified in this report.

Contact with complainants

25. I recommend that the Commonwealth undertake all appropriate measures to locate C1 and C8 in order to make payment of the compensation recommended above, as well as to provide them with a copy of this report and an apology.

Conduct of future interviews of immigration detainees

26. I have also made certain recommendations at the end of my report as to actions that should be taken by DIAC to prevent such breaches in the future.

27. I have recommended that, given the risk of detainees becoming distressed and fearful as a result of these sorts of interviews and disclosing information in breach of their privacy, they should only be conducted when all other means of ascertaining identity have been exhausted. I have also recommended that DIAC consider arranging for such interviews to be conducted by DIAC with the assistance of overseas officials, rather than by the overseas officials themselves.

28. Finally, I have made recommendations as to matters that DIAC should consider if it is to arrange for similar interviews to be conducted by overseas officials in the future.

Structure of this report

29. Following this Executive Summary, **Part C** of this report sets out the background to the complaints. **Part D** then outlines the relevant legal framework for this report. **Parts E-F** of this report set out my findings and have been structured as follows:

The interviews

(i) arranging the interview and the provision of documents about the complainants to the MPS officials – **Part E**; and

(ii) the manner in which the interviews were conducted – **Part F**;

The separation detention – Part G.

30. **Part H** of this report then sets out my recommendations.

Part C: Background

Complaint from C3 and others (first complaint)

31. On 22 November 2005, the Federal Magistrates Court received an application by C14 made on his own behalf and on behalf of the following people who were, at the time, being detained at Villawood Detention Centre:

    (i) C1;
    (ii) C3;
    (iii) C4;
    (iv) XH;
    (v) C6;
    (vi) C7;
    (vii) C9;
    (viii) C10;
    (ix) C11;
    (x) C13;
    (xi) C15;
    (xii) C16;
    (xiii) C17;
    (xiv) C18;
    (xv) C20;
    (xvi) C22;
    (xvii) C23;
    (xviii) C25;
    (xix) C21;
    (xx) C24; and
    (xxi) C26.

    The application was accompanied by a supporting affidavit by C14.

32. The application claimed that GSL and DIMIA had discriminated against the detainees on the grounds of their race and that GSL and DIMIA had treated them in a cruel and inhumane way. The complaints related to the following:

    (i) DIMIA having arranged for the detainees, who were all said to be asylum seekers alleging persecution by the PRC, to be 'interrogated' by four MPS officials;

    (ii) following the interviews, being locked up and isolated for a period of sixteen days in a separate building within the Villawood Detention Centre; and

(iii) mistreatment whilst in separation detention consisting of being locked up for twenty-four hours, being given cold food, being refused medical or legal assistance and being refused any form of communication with people outside the unit.

33. The Federal Magistrates Court returned the application to C14 and informed him in the letter accompanying the returned application that they could not accept it as there had to first be an application made to the Commission.

34. On the same day, 22 November 2005, following receipt of the letter from the Federal Magistrates Court, the application and accompanying affidavit were forwarded to the Commonwealth Ombudsman by facsimile. The facsimile is addressed to the Commonwealth Ombudsman and to the Commission but the Commission did not receive this facsimile.

35. On 24 November 2005, the Commonwealth Ombudsman forwarded the facsimile it received from the Court to the Commission.

36. On 6 December 2005, the Commission received a written complaint from C3 on his own behalf and on behalf of C14 and the other detainees listed above at paragraph 31(i) and (iii)-(xxi). C3's complaint had attached to it the application by C14 and his supporting affidavit. The allegations made in the complaint relate to the same matters as C14's application.

37. On 7 December 2005, an officer at the Commission took a statement from C3 by telephone which provides greater detail about the complaint. The statement makes similar allegations to those made in the affidavit of C14 in relation to the conditions in separation detention.

38. In relation to the interviews C3's statement provided the following more detailed allegations:

(i) the MPS officials refused to inform the complainants where they were from;

(ii) the MPS officials had personal documentation and information about the complainants including wedding certificates and information about their families;

(iii) the MPS officials asked them whether they made applications for protection visas, how much money they had made in Australia, whether they had bought houses in the PRC or sent money back to the PRC;

(iv) the complainants did not know why they were interviewed or why they were separately detained and they felt frightened and threatened as a result of the interviews;

(v) after the interviews some of the families of the complainants in the PRC were 'disturbed' and 'interrogated' by Chinese local police.

39. Initially the complainants were acting for themselves, however, a few months after having filed the complaints a solicitor, Ms Michaela Byers, commenced acting for all of the complainants except for XH and C17. Earlier this year Ms Byers informed the Commission that she no longer acts for C1.

Complaint by C8 (second complaint)

40. On or around 3 December 2006, C8 filed a complaint with the Commission. His complaint concerned his interview with the officials from the MPS and his subsequent separation detention. His complaint also related generally to his detention and the Australian Government's refusal to grant him a visa. The Commission only investigated the complaint in relation to the interview and the separation detention; it did not investigate the complaint in relation to the detention generally.
41. C8's allegations in relation to the interviews were similar to those made in the complaint filed by C3.
42. In relation to the separation detention C8 alleged that following his interview he was placed in a 'prison inside the prison' in which he was isolated from the outside world and not permitted phone calls or visits from his wife.
43. Ms Byers also commenced acting for C8 although at the time of writing this report she no longer acts for C8.

Addition of complainants – C5, C19 and C12

44. On 19 February 2007, Ms Byers wrote to the Commission and requested that the following three detainees be added to the list of complainants:
    (i) C5;
    (ii) C19; and
    (iii) C12.
45. The Commission granted the above complainants' application to be added to the first complaint.

Complaint from C2 (third complaint)

46. On 26 March 2007, C2 telephoned the Commission raising issues about being interviewed by MPS officials. On 27 March 2007, the officer from the Commission dealing with the other complaints returned C2's call and obtained some initial information from him. Following that telephone call C2 forwarded to the Commission a copy of the English translation of the transcript of his interview with the MPS officials.
47. On 5 April 2007, the officer from the Commission again telephoned C2 and obtained more detailed information from him. The Commission officer used the information provided by C2 to prepare a draft statement for him to sign. The draft statement was forwarded to C2 for him to consider and he signed it and returned the executed copy to the Commission. I consider this statement to be C2's complaint.
48. C2 made similar allegations in relation to his interview as those made by the complainants to the first complaint. In particular he alleged that during his interview he was asked whether he had lodged an application for a protection visa.
49. Following the interview, C2 alleges he was taken to a small room and kept there for about half an hour with three other Chinese detainees and then returned to his room.
50. Finally, C2 alleges that since his interview his family in the PRC have been harassed by Chinese authorities and that this was because of the interview.

DIMIA's response to the complaints

51. The Commission informed DIMIA and GSL about all of the complaints and sought their responses. DIMIA provided separate responses to all three complaints.

52. On 5 July 2006, in response to the first complaint, DIMIA provided the Commission with some initial background information about the interviews, the separation detention and the steps that DIMIA was taking as a result of receipt of the complaints ('DIMIA's initial letter to the Commission').

53. On 27 September 2006, DIMIA provided a formal response to the first complaint ('DIMIA's response').

54. On 14 February 2007 and 22 March 2007, DIMIA provided responses to the second complaint ('DIMIA's second response').

55. On 3 December 2007, DIMIA provided a response to the third complaint ('DIMIA's third response').

56. DIMIA conceded that the complainants had been interviewed by MPS officials and that DIMIA had arranged for these interviews to take place. DIMIA said that it had arranged the interviews in order to ascertain the identity of the complainants so as to facilitate their return, if appropriate, to the PRC. DIMIA further said that the only information given to the MPS officials about the detainees was information relating to their identity. DIMIA conceded that some of the complainants had been asked questions that extended beyond matters related to establishing their identity.

57. In response to the third complaint DIMIA further conceded that the arrangements made by it to supervise the interviews were inadequate and that the interview process was flawed.

58. In relation to the separation detention DIMIA conceded that some of the complainants had been taken to a separate accommodation area within Villawood Detention Centre and kept there until after the final interview was conducted at the facility. DIMIA said that this had occurred because the MPS officials had requested it so as to ensure that the detainees who had been interviewed would not convey the questions to those yet to be interviewed. DIMIA, however, denied the allegations of mistreatment of the complainants whilst they were in separation detention.

DIMIA's internal review of the interviews that had been conducted

59. Upon receipt of the complaints DIMIA established a taskforce to review the cases of all of the individuals that had been interviewed by the MPS officials (including detainees who were not complainants). As a result of DIMIA's investigation:

    (i) DIMIA arranged for the tapes of the interviews that could be transcribed to be transcribed and copies of the transcripts (in both English and Chinese) and recordings to be provided to the detainees (some of the recordings could either not be located or were of poor sound quality);

    (ii) DIMIA reviewed the cases of 48 persons who had been interviewed that were still in detention; and

    (iii) DIMIA determined that some of the immigration detainees had been asked inappropriate questions and permitted some of them to submit further visa applications.

60. As at the date of writing this report DIMIA has granted protection visas to 16 of the complainants and a global special humanitarian visa to 2 of them. Of the remaining complainants:

    (i) C12, C6, C7, C13 and C25 have all been granted a Bridging E (WE050) visa and been released from immigration detention. The Minister is considering granting them a global special humanitarian visa but is awaiting the outcome of health and character checks before making his decision;

    (ii) C2 has also been granted a bridging visa and is awaiting a decision from the Minister as to whether he will intervene to grant him a visa; and

    (iii) C1 and C8 were deported.

    Accordingly, following the interviews the majority of the complainants have either been granted protection visas or are in the process of being granted one.

GSL's response

61. GSL has not provided a response to the complaints other than to say that they do not disagree with any part of DIMIA's response.

The complaints the subject of this report

62. The complaints alleged racial discrimination under the *Racial Discrimination Act 1975* (Cth) and breaches of human rights. This report deals only with the human rights issues. The complaints under the RDA are to be determined under the unlawful discrimination regime set up by Part IIB of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act').

63. On 1 November 2007, pursuant to s 20(2)(b) of the HREOC Act, I finalised the complaint filed on behalf of one of the complainants (XH) in so far as it alleged breaches of human rights as the Commission had been unable to contact this complainant. All of the other complaints alleging breaches of human rights have been considered in this report.

Evidence in relation to the complaints

64. I have treated evidence received in respect of each of the complaints as evidence in relation to each of the other complaints.

Recordings of the interviews

65. DIMIA has provided the Commission with the audio recordings and transcripts of all of the interviews that it has been able to locate, including an English translation of the transcripts.

66. The Commission has not, however, received transcripts of the interviews for all of the complainants. This is because DIMIA either could not locate an audio recording for the interviews or the recordings were inaudible. The Commission did not request a copy of the transcript for C17 because it did not have his consent to do so.

67. DIMIA has advised that it could not locate audio recordings of the interviews with:
    (i) C3; and
    (ii) C11.

68. DIMIA has advised that the recordings of the interviews with the following complainants were found to be blank:
    (i) C8;
    (ii) C14;
    (iii) C22; and
    (iv) C25.

69. In relation to the transcripts that were received I note that:
    (i) several parts of the interviews were inaudible so none of the transcripts reflect the full extent of what was discussed in the interviews;
    (ii) in the letter from Patrick Gallagher of DIMIA to the Commission in which he forwarded the tapes of the interviews he states 'we can also provide no guarantees that the recordings which have been provided have captured all interviews in their entirety';
    (iii) it appears from the way that the transcript of the interviews with C6, C18 and C20 read that the transcripts are incomplete and only record a very small part of these interviews (C6's transcript is only two lines long and C18's and C20's transcripts are only one page long). Ms Byers expresses the view that these tapes have been 'tampered' with; and
    (iv) large parts of the transcript of the interview with C23 are inaudible.

70. In a letter from Ms Byers to the Commission dated 5 December 2006 she states that she is instructed that the transcripts

> have been tampered with. For example, the length of the interview is shorter and some transcripts end with a question.

    She does not advise in what respect the transcripts have been tampered with or whether all of the transcripts have been tampered with or if only some of them have been tampered with which ones have been tampered with. As I indicated above, it does appear that the transcripts of the interviews with C6, C18 and C20 are significantly incomplete. Whilst this is concerning, I do not have sufficient evidence upon which to conclude that the transcripts or audio recordings have been tampered with.

71. As several parts of the audio recordings were inaudible I accept that they do not record everything that was said during the interviews. Nonetheless, I think that what is recorded in the translation of the transcripts (apart from those of C6, C18 and C20) largely reflect the matters that were discussed during the interviews.

Part D: Relevant Legal Framework

Human Rights inquiry and complaints function[3]

72. Section 11(1)(f) of the HREOC Act provides that the Commission has the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right. Section 20(1)(b) requires the Commission to perform that function when a complaint in writing is made to it alleging such an act or practice, such as the complaints received in this case.

Act or practice by or on behalf of the Commonwealth

73. The expressions 'act' and 'practice' are defined in s 3(1) of the HREOC Act to include an act done or a practice engaged in 'by or on behalf of the Commonwealth', or under an enactment. Section 3(3) of the HREOC Act also provides that a reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.

74. In previous reports, the Commission has held that an act or practice of Commonwealth employees and of employees of a company contracted by the Commonwealth to provide services on behalf of the Commonwealth, such as GSL, that are discretionary acts or practices are 'acts or practices done on behalf of the Commonwealth' for the purposes of s 3(1).[4] I agree with this view.

75. The Commission has also previously held that unauthorised acts of employees of a company contracted by the Commonwealth to provide services at a detention centre done during an authorised operation in an immigration detention centre fall within the expression 'acts on behalf of the Commonwealth'.[5] Again I agree with this view.

'Inconsistent with or contrary to' any human right

76. The phrase 'inconsistent with or contrary to' any human right in Division 3 of the HREOC Act is not defined or otherwise explained in the Act. In the Commission's report into a complaint by *Mr Huong Nguyen and Mr Austin Okoye Against the Commonwealth of Australia and GSL (Australia) Pty Limited (2008)* (Report No 39) I considered whether there was any distinction between an act being **inconsistent** with a human right and an act that is **contrary** to a human right. As was the case in that report, it is not necessary for me to resolve this question at this time as I am satisfied that no distinction arises in this matter. This is because I am satisfied that the relevant acts the subject of my findings in this report were both inconsistent with **and** contrary to the human rights of the

complainants. The same is true in the case of my findings where no breach of human rights had occurred.

77. For convenience, throughout this report I have referred to an act that is inconsistent with or contrary to a detainee's human rights as a 'breach' of the relevant human right.

'Human rights' relevant to these complaints

78. The expression 'human rights' is defined in s 3 of the HREOC Act and includes the rights and freedoms recognised in the ICCPR, which is set out in Schedule 2 to the HREOC Act. The articles that are of particular relevance to this inquiry are articles 9(1), 10(1) and 17(1) of the ICCPR. These articles provide:

> **Article 9**
>
> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> **Article 10**
>
> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> **Article 17**
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 9(1)

79. Article 9(1) provides that all persons have the right to liberty and security of person. In particular the article prohibits 'detention' that is 'arbitrary'.

Detention

80. The following comment by the United Nations Human Rights Committee ('UNHRC') makes clear that all forms of detention, whether for the purposes of criminal justice or some other reason, are covered by art 9(1):

> The Committee points out that paragraph 1 [of art 9] is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, **immigration control**, etc.[6] (emphasis added)

81. Whilst most cases in which a breach of this article has been alleged have involved criminal detention there are a number of cases in which this article has been considered to be relevant to other forms of detention including, detention for the purposes of immigration.[7]

82. Whilst art 9(1) covers many forms of deprivation of liberty, it does not cover all restrictions on liberty of movement.

83. So, for example, in *Celepi v Sweden*[8] ('*Celepi*') the UNHRC held that art 9 did not apply to Mr Celepi's complaint about the State restricting his movement to certain city limits but which did not prevent him from leaving Sweden. In doing so the UNHRC appeared to accept the State Party's argument that art 9 did not apply to mere restrictions on liberty of movement that are covered by art 12 (which gives people the right to liberty of movement within the territory of a State).

84. Similarly in *Karker v France*[9] ('*Karker*') the UNHRC held that art 9 did not apply to a deprivation of liberty pursuant to a compulsory residence order which restricted Mr Karker's movements within the State.

85. Joseph, Schultz and Castan in their book *The International Covenant on Civil and Political Rights: Cases, Material and Commentary*,[10] conclude based on the decisions in *Celepi* and *Karker* that:

> It seems that article 9 therefore applies only to severe deprivations of liberty, such as incarceration within a certain building…rather than restrictions on one's ability to move freely around a State or an even smaller locality.

86. The view of Joseph, Schulz and Castan also appears to be supported by the decision of the UNHRC in *Vuolanne v Finland*[11] ('*Vuloanne*'). In this case the UNHRC considered the meaning of 'detention' under art 9(4) of the ICCPR and whether it applied to detention for the purposes of military discipline. Article 9(4) of the ICCPR provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

87. The terminology used in this article is, in my view, sufficiently similar to the terminology used in art 9(1) to consider the reasoning of this decision when determining what would constitute 'detention' for the purposes of art 9(1). In *Vuolanne* the UNHRC held that whilst not all restrictions on the freedom of movement of persons in the military services would constitute a 'detention' for the purposes of art 9(1) some could. In this regard the Committee said:

> The Committee acknowledges that it is normal for individuals performing military service to be subjected to restrictions in their freedom of movement. It is self-evident that this does not fall within the purview of article 9, paragraph 4. Furthermore, the Committee agrees that a disciplinary penalty or measure which would be deemed a deprivation of liberty by detention, were it to be applied to a civilian, may not be termed such when imposed upon a serviceman. Nevertheless, such penalty or measure may fall within the scope of application of article 9, paragraph 4, if it takes the form of restrictions that are imposed over and above the exigencies of normal military service and deviate from the normal conditions of life within the armed forces of the State party concerned. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of the execution of the penalty or measure in question.[12]

88. The deprivation of liberty in that case involved Mr Vuolanne being excluded from performing his normal duties, spending a period of 10 days in a cell measuring 2 x 3 metres, being allowed out only for the purposes of eating, going to the toilet and taking air for half an hour every day, being prohibited from talking to other servicemen or making noise in his cell and having his correspondence and personal notes interfered with. Given the circumstances of his detention the Committee concluded that it was a 'detention' for the purposes of art 9(4).

89. None of the cases have, however, considered whether the article applies to moving a person who is already in detention from one part of a facility to another part that involves the imposition of further restrictions on that person's liberty.

90. In the Commission's report of an *Inquiry into complaints by five asylum seekers concerning their detention in the separation and management block at the Port Hedland Immigration Reception and Processing Centre*,[13] the Commission found that art 9(1) of the ICCPR may be breached where a person in immigration detention is moved from one part of the immigration detention centre to another part of the centre that involves a further and serious deprivation of their liberty.[14] The Commission reached this conclusion because it was consistent with the jurisprudence of the UNHRC[15] and the European Court of Human Rights[16] that an initially lawful and not arbitrary detention may come to breach art 9(1) by reason of subsequent events which change the nature of the detention.

91. In that report the Commission concluded that the transfer of the complainants in that case to 'J' block constituted a detention for the purpose of art 9(1) because the:

> transfer significantly altered the nature of their detention…The asylum seekers were held in dim or dark rooms and were only allowed outdoors for a total of 20-25 minutes in the six and a half days of their detention. Only two of the asylum seekers received a change of clothing after almost five days of detention and the others not at all. Each of the asylum seekers were escorted by at least three officers to use the toilet or the shower, causing delays in using these facilities which may have been in excess of ten minutes. The asylum seekers did not have access to the telephone.[17]

92. For the reasons expressed in that report I agree that art 9(1) of the ICCPR may be breached where the transfer of a person in immigration detention from one part of the immigration detention centre to another part of the centre involves a further and serious deprivation of their liberty. I also think that the Commission's view is consistent with and supported by the decision in *Vuolanne* that a deprivation of liberty that may not initially have fallen within the terms of art 9 may, when it increases in severity, become a detention to which this article applies.

'Arbitrary' detention

93. The UNHRC jurisprudence makes clear that the requirement that detention not be 'arbitrary' is separate and distinct from the requirement that a detention be lawful. The jurisprudence further makes clear that whether a detention is 'arbitrary' requires consideration to be given to whether the reasons given by a State party for the detention make the detention appropriate, just, proportionate and reasonable in the circumstances.

94. In *Van Alphen v The Netherlands*,[18] the UNHRC said:

> arbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.[19]

95. A similar view was expressed by the UNHRC in *A v Australia*,[20] in which the UNHRC said:

> the Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.[21]

96. Even a short period of detention may be considered arbitrary. In *Spakmo v Norway*,[22] the UNHRC accepted that the police were justified in arresting and detaining Mr Spakmo in order to stop him carrying out demolition work that they considered to be disturbing the peace. The UNHRC was not, however, satisfied that he needed to be detained for a period of eight hours in order to achieve this aim and as such the detention was arbitrary in violation of art 9(1).

Article 10(1)

97. This article requires consideration of whether the person alleging the breach has been:

(i) 'deprived of their liberty'; and

(ii) 'treated with humanity and with respect for the inherent dignity of the human person'.

Deprivation of liberty

98. In the UNHRC's General Comment 9 on art 10(1) it states that the obligation imposed by this article applies to 'anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals-particularly psychiatric hospitals-detention camps or correctional institutions or elsewhere'.[23] Further, in several cases the UNHRC has held that art 10(1) extends to all deprivations of liberty, including that which occurs when a person enters immigration detention.[24]

Treatment with 'humanity and with respect for the inherent dignity of the human person'

99. The UNHRC's General Comment 9 on art 10(1) states:

> Article 10, paragraph 1, imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7….Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7…but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons…

100. The above comment supports the conclusion that:

(i) art 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons;

(ii) the threshold for establishing a breach of art 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of art 7 of the ICCPR; and

(iii) the article may be breached if the detainees' rights, protected by one of the other articles in the ICCPR, are breached unless that breach is necessitated by the deprivation of liberty.

101. The above conclusions about the application of art 10(1) are also supported by the jurisprudence of the UNHRC[25] which emphasise that there is a difference between the obligation imposed by art 7(1) not to engage in 'inhuman' treatment and the obligation imposed by art 10(1) to treat detainees with humanity and respect for their dignity. In *Christopher Hapimana Ben Mark Taunoa v The Attorney General*,[26] the Supreme Court of New Zealand explained the difference between these two concepts as follows:

> A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment…the words 'with humanity' are I think properly to be contrasted with the concept of 'inhuman treatment'…The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts 'inhuman' with 'inhumane'.[27] (footnotes omitted)

The decision considered provisions of the New Zealand Bill of Rights which are worded in identical terms to arts 10(1) and 7(1) of the ICCPR.

102. Whilst many of the cases brought under art 10(1) involve physical mistreatment or poor conditions in prison the decisions of the UNHRC in *Angel Estrella v Uruguay*[28] ('*Estrella*') and *Zheludkov v Ukraine*[29]('*Zheludkov*') demonstrate that art 10(1) can be breached by a breach of the rights of a detainee that do not involve physical mistreatment or poor prison conditions.

103. In *Estrella* the UNHRC held that the conduct the subject of the complaint constituted a breach of both arts 10(1) and 17. In this case the breach involved censorship and restriction of Mr Estrella's correspondence with his family and friends to such an extent that they considered it to be incompatible with art 17 read in conjunction with art 10(1).

104. In *Zheludkov* the UNHRC held that the State's consistent and unexplained refusal to provide Mr Zheludkov with access to his medical records constituted a breach of art 10(1). The Committee reached this conclusion even though it was not in a position to determine the relevance of the medical records to an assessment of Mr Zheludkov's health or to the medical treatment afforded to him. In a separate concurring opinion Mrs Cecilia Medina expressed the view that the actions of the State constituted a breach of art 10(1) regardless of whether the refusal to provide access had any consequences for the medical treatment of Mr Zheludkov. In reaching this conclusion Ms Medina made the following comments about the obligation that arose under art 10(1):

> Article 10, paragraph 1, requires States to treat all persons deprived of their liberty 'with humanity and with respect for the inherent dignity of the human person'. This, in my opinion, means that States have the obligation to respect and safeguard all the human rights of individuals, as they reflect the various aspects of human dignity protected by the Covenant, even in the case of persons deprived of their

> liberty. Thus, the provision implies an obligation of respect that includes all the human rights recognized in the Covenant. This obligation does not extend to affecting any right or rights other than the right to personal liberty when they are the absolutely necessary consequence of the deprivation of that liberty, something which it is for the State to justify.
>
> A person's right to have access to his or her medical records forms part of the right of all individuals to have access to personal information concerning them. The State has not given any reason to justify its refusal to permit such access, and the mere denial of the victim's request for access to his medical records thus constitutes a violation of the State's obligation to respect the right of all persons to be 'treated with humanity and with respect for the inherent dignity of the human person', regardless of whether or not this refusal may have had consequences for the medical treatment of the victim.[30]

105. Both *Zheludkov* and *Estrella* demonstrate that art 10(1) is not confined to cases involving poor physical conditions of detention facilities or physical maltreatment of detainees, but extends to respecting the rights and interests of detainees. The decision in *Zheludkov* even suggests that the mere denial of a right, even if it is not proven to have adverse consequences for the detainee, is sufficient to constitute a breach of art 10(1). I do not express a view about whether the mere breach of a detainee's rights would be sufficient to also constitute a breach of art 10(1) but note that the decision in *Zheludkov* demonstrates the potential breadth of the actions caught by art 10(1).

106. It is not possible to comprehensively identify all of the situations that will constitute a breach of art 10(1). Ultimately, whether there has been a breach of this article will require consideration of the facts of each case. The question to ask is whether the facts demonstrate a failure by the State to treat detainees humanely and with respect for their inherent dignity as a human being.[31] In determining this question regard should be had to the types of conduct that the UNHRC has found to demonstrate such a failure ranging from physical or mental abuse of detainees to a breach of their rights that has not been proven to have adverse consequences for the detainee.

Article 17(1)

107. Article 17(1), relevantly for the purposes of this complaint, prohibits 'arbitrary' 'interferences' with a person's 'privacy'.

'Arbitrary'

108. The UNHRC in General Comment 16 on art 17(1) states that the 'concept of arbitrariness is intended to guarantee that even interferences provided for by law should be in accordance with the provisions, aims and objectives of the [Covenant] and should be…reasonable in the particular circumstances'.[32]

109. In relation to the meaning of 'reasonableness', the UNHRC said the following in *Toonen v Australia*:[33]

> The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.[34]

110. An interference with privacy will therefore be arbitrary if it is not reasonable. Reasonableness is assessed by considering whether the interference is necessary and proportional to achieving the purpose of the interference.

'Interferences'

111. Manfred Nowak in *UN Covenant on Civil and Political Rights CCPR Commentary*,[35] says in relation to the obligation imposed on State parties by art 17(1) in respect of detainees that:

> Special obligations to fulfill the right to privacy by means of positive action and to protect it against interference by private parties arise in relation to persons deprived of personal liberty and other persons in a vulnerable position, such as children, the elderly…Typical examples are the duty to ensure to prisoners and detainees a right to correspondence and communication with the outside world and to provide them with a minimum of privacy, intimacy and respect for their honour and reputation against interferences by prison wardens and other inmates alike.[36]

112. Further in General Comment 16 the UNHRC has expressed the following view about the right recognised by art 17:

> The obligations imposed by this article require the State to adopt legislation and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.[37]

113. Based on the passage from Nowak and the General Comment a State may breach art 17(1) if it is aware or should be aware that there is a risk of a detainee's privacy being breached and fails to take adequate steps to prevent this.

Privacy

114. The UNHRC has not comprehensively defined the word 'privacy' in either its General Comment or in case law but it would clearly include the right to have personal information protected from disclosure.[38]

Standard of Proof

115. In making my findings, I have applied the civil standard of proof, namely the balance of probabilities. When assessing the evidence required to satisfy me of the matters alleged by the complainants to the requisite standard of proof I have, in accordance with the principles identified by Dixon J in *Briginshaw v Briginshaw*[39] and the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,[40] taken into account the seriousness of the allegations made in this matter and the potential consequences that may flow to DIMIA, GSL and their staff from adverse findings. Bearing these matters in mind I have taken particular care in assessing the evidence before making my findings.

Part E: Arranging the interviews and provision of information about the complainants to MPS officials

Evidence

Who arranged the interviews?

116. DIMIA does not dispute that between 11 May 2005 and 4 June 2005 the complainants were interviewed by MPS officials and that it arranged for the interviews to take place.

117. This is confirmed by the terms of the written invitation issued by DIMIA to the MPS in relation to the interviews ('invitation'). The invitation records the agreement reached between DIMIA and the MPS about the conduct of the interviews. The invitation states the following about who instigated the interviews:

> After discussion between the MPS and …First Secretary (Immigration), Australian Embassy Beijing, the following agreement has been reached between DIMIA and the MPS:
>
> DIMIA has invited three experts from Fujian, Jiangsu and Liaoning provinces of China…The Chinese experts are invited by DIMIA to assist DIMIA in verifying the identity of people who may come from China and who are to be repatriated.
>
> DIMIA will select 65 people who are believed to come from China and who are to be repatriated. The experts will interview these individuals.

Purpose of the interviews

118. DIMIA's response states that the purpose of the interviews was to assist with the identification of detainees who had been in detention for some time so that travel documents might be obtained, if appropriate, to enable their return to the PRC.

119. In DIMIA's initial letter to the Commission in relation to the complaints it states:

> The interviews were the first time outside the parameters of a formal memorandum of understanding that Australia had undertaken such an approach, as usual practice has been to work with the appropriate local consulate. On this occasion, due to the large number of PRC detainees whose identities the department was unable to establish, it was decided that a visit by a PRC delegation would expedite the process.

120. In DIMIA's response it states that consular officials had not been able to identify the individuals to enable the issue of travel documents. It further states that the detainees who were interviewed were refusing to cooperate with the Department in verifying their identities for the purpose of facilitating the issue of travel documents.

121. According to DIMIA's response this approach had been used in the past by the UK and The Netherlands in returning unlawful non-citizens to the PRC and also by Australia in identifying unlawful non-citizens from Afghanistan, Pakistan and Vietnam. DIMIA did not provide any details about these visits apart from saying that in the case of the visits arranged by Australia these took place because of the large numbers of detainees that had to be identified.

122. The invitation issued by DIMIA to the MPS in relation to the interviews states:

> DIMIA has invited experts from MPS to Australia to assist in identifying illegal immigrants who are believed by DIMA to be nationals from China.
>
> …
>
> …The experts will interview these individuals. Following the interview the experts will provide DIMIA with a written report for each interview. DIMIA will then include the experts' reports with documents to be submitted to the Chinese Embassy in Australia according to the current procedures. The reports will be used by the Chinese Embassy as references for the verification for the above mentioned people.

123. The invitation supports DIMIA's assertion that the purpose of the interviews was to expedite the identification and repatriation of the complainants.

Status of visa applications of complainants at the time of the interviews

DIMIA's evidence

124. In DIMIA's response it states that the people interviewed were thought to be nationals of the PRC who were found conclusively not to be owed protection. DIMIA says two of the detainees were subsequently identified as having litigation on foot at the time of the visit but neither of these were complainants.

125. DIMIA provided the Commission with information about the immigration status of some of the complainants in an attachment to its initial response and has provided additional information about the balance of the complainants in response to subsequent requests for additional information made by the Commission.

126. DIMIA has advised that all of the complainants except C18 and C20 had filed protection visa applications prior to their interview.

Migration status of C18 and C20 at the time of the interviews

127. C18 entered Australia on 23 April 1998 on a Visitor (Short Stay) Visa and he had subsequently been granted a Visitor (Long Stay) Visa that was valid until 23 October 1998. Following his application for a Visitor (Long Stay) Visa and prior to his interview he had not made any other applications for any type of visa. On 8 February 2005, C18 was located by DIMIA officers and placed into detention and he was interviewed on 30 May 2005. Accordingly, at the time of his interview he had only been in immigration detention for a relatively

short period of time. Following his interview, on 28 March 2006, C18 lodged a protection visa application.

128. C20 claims to have arrived in Australia on 1 October 1998 with a tourist visa. DIMIA could not locate any record of a visa being granted to him nor of his travel movements in Australia. C20 was located by DIMIA officers on 6 February 2004 and was placed in immigration detention on that date. Accordingly, at the time of his interview he had been in immigration detention for almost a year and had not in that time made any applications for visas. On 3 June 2005, following his interview, C20 filed an application for a protection visa.

Status of visa applications by the other complainants

129. Based on the information provided by DIMIA the status of the visa applications of the complainants that had filed protection visa applications prior to their interviews was as follows:

(i) All of them had had their applications refused and the RRT had affirmed this decision. Some of the complainants had even had appeals to the Federal Court and the High Court dismissed.

(ii) In the case of 15 of the complainants the last decision made by a court, tribunal or Minister to refuse the complainants' protection visa applications was three or more years prior to their interview. No application had been made by any of these complainants in that three year period for further reviews of the decision in respect of the refusals.

(iii) In the case of the following complainants the last date on which their applications for protection visas had been refused by either the Minister or a court or tribunal prior to the interview varied between two years to less than a month. The dates were as follows:

(a) C21 – on 19 February 2003 the RRT affirmed the Minister's refusal;

(b) C24 – on 3 February 2004 the RRT affirmed the Minister's refusal;

(c) C4 – on 13 April 2004 the RRT affirmed the Minister's refusal;

(d) C9 – on 4 May 2004 the Minister had refused to consider a request for intervention pursuant to s 417 of the *Migration Act 1958* (Cth) ('Migration Act');

(e) C19 – on 16 September 2004 his request pursuant to s 417 of the Migration Act had not been referred;

(f) C23 – on 9 December 2004 the RRT affirmed the Minister's refusal;

(g) C14 – on 22 April 2005 his application to the Federal Court was dismissed; and

(h) C16 – on 27 April 2005 her appeal to the High Court was dismissed.

(iv) In the case of C12 he had only lodged his protection visa application on 22 February 2005 and the refusal to grant him a visa was under judicial review at the time of his interview.

Evidence in the transcripts of the interviews

130. The transcripts of interview with some of the complainants record them suggesting that they were awaiting the outcome of review proceedings at the time of their interviews:

(i) in the interview with C4 he said (at pp.3 and 7 of the transcript) that his case had just gone to the RRT – according to the information provided by DIMIA the RRT had affirmed the refusal to grant him a protection visa on 13 April 2004 and he had no application pending at the time of his interview;

(ii) in the interview with C16 she said (at p.2 of the transcript) that she is able to stay in Australia because her court case is not complete – she does not say which court case. According to the information from DIMIA her appeal to the High Court was refused on 27 April 2005 (she was interviewed on 31 May 2005) and the date of her subsequent application in relation to her visa status was on 8 June 2005 (following the interview) when she made a request for Ministerial intervention pursuant to s 48B of the Migration Act.

Complainants' evidence

131. In C3's statement dated 13 December 2005 he says (at [2]):

> Most of us are asylum seekers currently waiting the outcome of protection visa applications.

Provision of documents about the detainees to the MPS officials

DIMIA'S evidence in respect of the general type of information given to MPS officials

132. DIMIA has advised that it only provided the Chinese delegation with information to assist the delegation in identifying the detainees. It denies that it provided C8's or any other detainee's DIMIA file to the MPS officials.

133. Apart from in relation to C8, DIMIA did not advise precisely what information it provided in respect of each individual complainant nor did it provide the Commission with a copy of the documents that it gave to the MPS officials in respect of each complainant. DIMIA has informed the Commission that it provided the following type of information in respect of the complainants, assuming it had the information, to the MPS officials:

(i) full names and aliases;
(ii) date of birth;
(iii) place of birth;
(iv) address in country of origin;
(v) previous employment address;
(vi) education details (school and town);
(vii) details of family members, including close family, parents, siblings (details of children were not divulged if it appeared that there were several, or that a previous protection claim may have related to the number of children);
(viii) arrival details and type of entry (eg, tourist, business visitor);
(ix) detention date;
(xi) in a few cases the place at which the complainants had been located by DIMIA was given where this may have been relevant to nationality – eg, located in Chinese restaurant;
(xii) any passport details;
(xiii) any known identity card details; and
(xiv) photocopies of passport, identity card or other identity documents where available.

DIMIA's evidence as to the documents provided to the MPS officials in respect of C8

134. DIMIA provided the Commission with a copy of the following documents that it says it gave to MPS officials in relation to C8:

(i) a bio-data form with space for the MPS officials to include their written assessment;

(ii) a short questionnaire completed by C8;

(iii) a computer print-out of the information submitted by C8 with his subclass 300 spouse application lodged in Beijing in 1998;

(iv) a PRC passport application form completed by C8 in March 2004;

(v) hand-written notes in English on C8's address in China, details of his education and employment in China, the names and dates of birth of his parents and siblings and the details of his arrival in Australia and of his location by DIMIA officials prior to his detention; and

(vi) a copy of four pages from C8's expired PRC passport.

135. All of the documents DIMIA provided to the MPS officials in respect of C8 contained the type of information that DIMIA says it provided to the MPS officials in respect of each of the complainants (see [133]). The only additional information was contained in the short questionnaire completed by C8 which sought details of:

(i) employment and study undertaken in Australia; and

(ii) details of relatives and friends in Australia.

Complainants' evidence

136. The complainants assert that the MPS officials had documentation and information about them. The complainants say the MPS officials knew they had sought asylum and had the marriage certificates of some of the detainees.

137. In C3's original complaint he said 'we shock about that four MPS officials knew all details of us, including whether we had seeked asylum before, even marriage certificates of some detainees'.

138. C3 in his statement says that '[t]he MPS officials had documents and copies of documents that were personal for example some had marriage certificates that belonged to the detainees'.

139. C8 in his complaint says that the officials who interviewed him had his file – 'I could see that they were carrying my file in their hands'.

140. Ms Byers also provided the Commission with a copy of a letter from Michelle Campbell, the DIMIA Assistant Manager at the Villawood Detention Centre, to a District Registrar of the RRT in which she encloses a copy of the forms DIMIA gave to the MPS officials in respect of each of the complainants. The forms enclosed with Ms Campbell's letters were:

(i) a bio-data form – this was identical to the bio-data form that DIMIA gave to the MPS officials in respect of C8; and

(ii) a short questionnaire which she says the detainees were asked to complete at the beginning of the interview – she said that this was a voluntary request. This was identical to the short questionnaire completed by C8 that DIMIA gave to the Commission.

Evidence in the transcripts of the interviews

141. I have received transcripts of the interviews for 19 of the complainants and three of these transcripts were clearly only very partial transcripts of the interviews. Of the 16 transcripts that appear to be mostly complete only 6 of them record the complainants being asked questions about their protection visa applications. Three of them were asked about this issue without having volunteered information about it. In the case of the other three, however, the provision of the information about their protection visa applications was not made in response to a direct question about this issue. Below are the excerpts from the transcripts of the interviews with these complainants in which the issue of protection visas arose.

C26 (C26 is Male 2)

Page 31

Male 1:	For example, have you ever applied for refugee status?
Male 2:	My children did.

C15 (C15 is Male 2)

Page 2

Male 1&3:	What do you have in your mine (sic)? So you want to continue to stay in Australia and get a visa? Do you think you are eligible?
…	
Male 1:	Have you thought of…Have you lodged an application for a protection visa?
Male 2:	Yes, I have lodged the application.
Male 1:	On what grounds?
Male 3:	Where has it gone to?
Male 1:	Where is your case up to?
Male 2:	eh, it is hard to say…

C10 (C10 is Male 2)

Page 9

Male 1:	…Do you still have a passport?
Male 2:	No
Male 1:	…(inaudible)
Male 2:	They applied for a temporary one for me.
Male 1:	Was it given to you by the Australian government or you got another one…

Page 10

Male 2:	It was a temporary visa given by the Australian government.
Male 1:	Temporary visa. You used your original passport to apply. Since you didn't have a passport, you applied for a protection visa…so…(inaudible)…On what grounds did you apply for a protection visa?
Male 2:	Because I was unemployed, I was a refugee

C23 (C23 is Male 2)

Page 1

‘Male 1:	What have you been doing?
…	
Male 1:	What kind of work have you done?
Male 2:	Building.
Male 1:	Is it O.K. Is it O.K. for such a long time?
Male 2:	It is O.K. (I) have mainly been running a court case. And now…
Male 1:	Running a court case?
Male 2:	Um.
Male 1:	What kind of court case is it?
Male 2:	Well.
Male 1:	What kind of court case is it?
Male 2:	Fighting for refugee status.
Male 1:	Fighting for refugee status?
Male 2:	Yeah, fighting for refugee status.
Male 2:	Oh you want to be a refugee?

C21 (C21 is Male 2)

Page 17

Male 1:	What should they do now, they also need to, for example, issue a factual statement to you or…, if you are freed, then how is your family, they are also worried about that, they also need to take actions in compliance with the law…(interrupted)
Male 2:	If I can apply for a refugee status, I am a refugee.
Male 1:	Ah! You are a refugee.
Male 2:	Eh, right. We applied for a Falungong website in China, so I am a Falungong refugee here. They should not treat me like that, isn’t that right?

C9 (C9 is Male 2)

Page 5

Male 1:	So now, (inaudible), what are you going to do?
Male 2:	I am going to, this, to lodge appeal.
Male 1:	To appeal? What is your grounds?
Male 2:	Refugee.
Male 1:	Ah?
Male 2:	Refugee.
Male 1:	Refugee? What kind of refugee?
	… [He is then asked questions about the appeal]

C16 (C16 is Female 1)

Page 1

Male:	What kind of visa did you have?
Female 1:	Was it something called 757 in China? I am not so sure.
Male:	457.
Female 2:	Which year?
…	
Male:	[inaudible]
Female 1:	At the time I was applying for refugee status. Applying for refugee status means that my visa would not expire…

C7 (C7 is Male 2)

Page 7

Male 1:	It is impossible to talk with you!
Male 2:	People are allowed to… (inaudible) ….cannot treat in such a way, **to refugees**, some foreigners inside also say what this Chinese person thinks about. I also do not know how to show my intentions…(interrupted) (emphasis added)

C2 (C2 is Male 2)

Page 4

Male 1:	You came here with someone else's passport, right?
	(Background noise, inaudible) You came here with someone else's passport?
Male 2:	(Background noise, inaudible).
Male 3:	Probably with…passport.
Male 2:	Yes, it was his when I applied for refugee.
Male 3:	Did you use it to apply for refugee or to come here?
Male 2:	I used his to apply.
Male 3:	For entering Australia (interrupted by Male 2)

Submissions

Complainants' submissions

142. Ms Byers' submissions about breaches of the complainants' human rights focus primarily on the manner in which the interviews were conducted rather than the fact that they were organised or the provision of personal information about the complainants by DIMIA to the MPS officials. The only specific comment made by Ms Byers in relation to either of these issues is a submission that '[a]llowing PBS officials to interview detainees and access their information has endangered their lives and returning any of them to China will place them in danger and violate art 33 of the Refugee Convention et al'. Article 33 of the *Convention relating to the Status of Refugees*[41] ('the Refugee Convention') provides:

> ***Article 33 – Prohibition of expulsion or return ("refoulement")***
>
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

DIMIA's submissions

143. DIMIA in its response refers to the requirement imposed by s 198 of the Migration Act that unlawful non-citizens in particular circumstances be removed from Australia as soon as reasonably practicable.

144. The sub-section which is most likely to have applied to the complainants is s 198(6) which provides:

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

Findings of Fact

Who arranged the interviews?

145. DIMIA admits and I find that DIMIA initiated and arranged for the interviews to take place.

Purpose of the interviews

146. Based on DIMIA's response, DIMIA's initial letter to the Commission and the invitation issued by DIMIA to the MPS in relation to the interviews I find the purpose of the interviews was to enable DIMIA to ascertain the identity of people in immigration detention:

(i) who had been in immigration detention for some time;

(ii) who were suspected to be PRC nationals;

(iii) who were not cooperating with DIMIA in ascertaining their identity;

(iv) whose identities DIMIA had not been able to ascertain sufficiently; and

(v) who were ready to be deported upon their identity being sufficiently ascertained.

I find that DIMIA needed to identify the complainants so as to apply for travel documents to be issued for them so that DIMIA could arrange their return, if they were found to be PRC nationals, to the PRC. I further find that the interview method was used because of the large number of immigration detainees who were suspected to be from the PRC and because the interviews would expedite the process of arranging for travel documents to be issued.

147. I further find that:

(i) DIMIA's usual practice is to ascertain the identity of immigration detainees with the assistance of the appropriate local consulate;

(ii) the interviews the subject of this complaint were the first time outside the parameters of a formal memorandum of understanding that DIMIA had arranged such interviews to assist in the identification of immigration detainees;

(iii) the interview process used in this case had been used in the past by the UK and The Netherlands in returning unlawful non-citizens to the PRC – I do not, however, find that the interview method used by the UK and The Netherlands was the method used in this case because I do not have any details of the way in which those interviews were conducted;

(iv) DIMIA had, in the past, arranged visits by delegations of officials from Afghanistan, Pakistan and Vietnam to assist with the identification of unlawful non-citizens suspected to be from those countries.

Status of complainants' visa applications at the time of their interview

148. I find that apart from the following complainants, all of the complainants, had filed protection visa applications prior to being interviewed by the MPS officials:

(i) C18; and

(ii) C20.

In the case of the above two complainants, at the time of their interviews, neither of them had any outstanding visa applications and both had been in Australia without lawful authority for a considerable period of time.

149. In the case of the other complainants, based on the information provided by DIMIA, I find that at the time they were interviewed:

(i) they had had their applications for protection visas refused and that refusal had been affirmed by the RRT;

(ii) none of them, except for C12, were awaiting the outcome of any sort of decision in respect of the refusals to grant them visas; and

(iii) in the case of most of them, the most recent refusal was several years prior to the interviews.

150. I find that C12's application for a protection visa had been refused by the Minister and that refusal had been affirmed by the RRT but that at the time of his interview he was awaiting the outcome of judicial review proceedings in relation to the refusal.

Provision of information about the complainants by DIMIA to the MPS officials

(i) Information as to the complainants' protection visa applications

151. The complainants assert that the MPS officials knew that they had made protection visa applications. DIMIA denies this allegation. The complainants do not state the basis for this allegation so it is difficult to test its veracity. Further, none of the transcripts of the interviews suggest that the MPS officials knew, prior to the interviews, about their protection visa applications. Of the 16 relatively complete transcripts only 6 of them record the complainants being questioned about their protection visa applications and in the case of

three of the complainants the issue arose because of information volunteered by the complainant, not in response to a direct question about this issue.

152. Whilst I accept the complainants' evidence that they believed that the MPS officials had been given information about their protection visa applications I do not find that this in fact occurred. I infer from the fact that the complainants formed a mistaken belief as to the type of information given to the MPS officials that DIMIA did not inform them at the time of the interviews what information it had given to the MPS officials.

(ii) The provision of other information about the complainants by DIMIA to the MPS officials

153. The complainants also suggest that the MPS officials had 'documents' and 'information' about them. The complainants do not provide any details about what these documents or information were apart from saying that the officials knew that they had sought asylum and had the marriage certificates of some of the detainees. Above I have commented on the allegation about the provision of asylum information to the MPS officials. A marriage certificate is a document that would assist in ascertaining the identity of a person and the provision of such information is consistent with DIMIA's evidence that it gave the MPS officials information about the complainants that would assist them with the identification of the complainants. Accordingly, on the basis of the complainants' evidence I could find no more than that the MPS officials had information and documents about the complainants.

154. C8 goes further than the other complainants and asserts that the MPS officials had his 'file' by which I assume he is referring to his DIMIA file. C8 does not state the basis for that belief or describe the document that he saw that was his 'file' and it may be that what he thought was his 'file' was simply a file containing the forms that DIMIA admit having given to the MPS officials. I do not think that C8's evidence, given its general nature, is sufficient to satisfy me that the MPS officials had his DIMIA file.

155. I am, however, satisfied that DIMIA gave the MPS officials the following type of information about the complainants and their families in so far as they had it:

(i) full names and aliases;

(ii) date of birth;

(iii) place of birth;

(iv) address in country of origin;

(v) previous employment address;

(vi) education details (school and town);

(vii) details of family members, including close family, parents, siblings – although I accept DIMIA's evidence that if a complainant had more than one child the additional child's details were not disclosed;

(viii) arrival details and type of entry (eg, tourist, business visitor);

(ix) detention date;

(x) in a few cases the place at which the detainee was located by DIMIA officials was given where this may have been relevant to nationality – eg, located in Chinese restaurant;

(xi) any passport details;

(xii) any known identity card details;

(xiii) photocopies of passport, identity card or other identity documents where available;

(xiv) details of employment or studies in Australia; and

(xv) details of relatives and friends in Australia and their contact numbers.

156. I find that the above type of information was relevant to ascertaining the identity of the complainants.

Conclusions regarding alleged breaches of Human Rights

157. The human rights I have considered to be relevant to assessing DIMIA's acts of arranging the interviews and providing the MPS officials with personal information about the complainants are arts 10(1) and 17(1) of the ICCPR. As I have said earlier, art 10(1) is breached if the Commonwealth fails to treat detainees with humanity and respect for their dignity. Article 17(1) is breached if the Commonwealth arbitrarily interferes with the privacy of the detainees. I consider these below.

Arranging the interviews

Findings in respect of complainants other than C12

158. I do not find that merely arranging the interviews in itself constituted a breach of the complainants' human rights under either arts 10(1) or 17(1) because:

(i) DIMIA had a legitimate purpose for arranging the interviews; and

(ii) the interviews were a reasonable means of achieving that purpose.

159. The purpose of the interviews was to identify the detainees as quickly as possible so as to facilitate their return to the PRC. It is, in my view, desirable that once it is definitively determined that a person is not entitled to remain in Australia, the Australian Government acts to remove them as soon as reasonably practicable so as to ensure that they are not held in detention for any more time than is absolutely necessary.[42]

160. I think that achieving that purpose through the use of the interviews in this case was reasonable because:

(i) DIMIA had a large number of detainees suspected to be from the PRC to identify and the majority of whom had been in immigration detention for some time;

(ii) in the case of all of the complainants who had applied for protection visas they had had their applications for protection visas refused by the Minister and that refusal had been upheld by the RRT and none of them, except for C12 were awaiting any decision in relation that refusal;

(iii) DIMIA had been unable to sufficiently ascertain the identity of the complainants;

(iv) the conduct of interviews by PRC officials was the quickest way of identifying them; and

(v) a similar process had in the past been used by the UK and The Netherlands in returning unlawful non-citizens to the PRC.

DIMIA's provision of personal information about the complainants to the MPS officials

161. I do not find that DIMIA's provision of personal information about the complainants to the MPS officials constituted a breach of either arts 10(1) or 17(1). Whilst the giving of the personal information about the complainants and their families to the MPS officials interfered with their privacy I do not think that this constituted an 'arbitrary' interference. The interference was not arbitrary because DIMIA had a legitimate purpose for disclosing the information, namely to assist in the identification of the complainants. For the same reasons I also do not think that the provision of the information constituted a breach of art 10(1).

Findings in relation to C12

162. In the case of C12 he was, at the time of his interview, still awaiting the outcome of judicial review proceedings. Therefore in his case DIMIA did not, at the time of his interview, necessarily have an obligation or an entitlement to deport him. If his application for review had been successful DIMIA would not have had to ascertain sufficient information about his identity to secure travel papers for him. The interview and the disclosure of his information may therefore have been unnecessary. The interview and the disclosure of his personal information and that of his family was, however, arguably reasonable because:

    (i) there was a reasonable chance he would still have to be deported given that judicial review proceedings are only successful in limited circumstances and even if successful it does not necessarily result in a person being granted a protection visa; and

    (ii) the MPS officials were only in Australia for a limited period of time and would not necessarily return to conduct further interviews.

163. I am not satisfied, on the balance of probabilities that arranging the interview with C12 and disclosing his personal information and that of his family was so unreasonable as to constitute a breach of arts 10(1) or 17(1).

Part F: Manner in which the interviews were conducted

Evidence

Preparation prior to interviews

164. In DIMIA's response it states as follows:

> Departmental liaison officers met with the [Chinese] delegation… discussed with its members the type of questioning they could employ in interviews. Members of the delegation were informed that they should restrict questioning to matters used for identity verification and that they were not to ask detainees about their immigration history. The departmental officers were confident that members of the delegation understood these guidelines. There was however, no formal briefing or written guidelines on the interview protocols and the procedures to be used in the identification process.

165. DIMIA does not set out the conversation the departmental officers had with the members of the Chinese delegation in full nor does it set out the circumstances of the conversation. Further, it does not advise of the basis upon which the DIMIA staff formed the view that the members of the delegation understood the guidelines given to them by DIMIA staff.

What the complainants were told about the purpose of the interviews and the identity of the officials conducting the interviews

Complainants' evidence

166. In C3's statement dated 13 December 2005 he states (at [3]):

> On 13 May 2005, I and 21 other Chinese detainees were called for interviews…We believed that DIMIA would be interviewing us and making assessments of our visa applications. Instead four MPS officials interrogated us…

at [4]

> We asked the MPS officials where they were from, if they were from the Embassy or Consulate, but they would only tell us that they were from 'China'. We asked the MPS officials for identification but they would not provide this, they only had a Visitors Pass from VIDF.

and at [5]

> We do not know why we were interrogated by four MPS officials instead of DIMIA officers.

167. In C3's original complaint to the Commission he said:

> We have to doubt the real background of four MPS officials as we know and Australian media reported, Chinese consulate in Sydney didn't know where they are from.

168. In C14's affidavit affirmed 22 November 2005 he states (at [4]):

> We believed that the Department of Immigration & Multicultural and Indigenous Affairs would interview us and make assessments of our visa applications and not MPS officials.

at [6]

> the complainants were called 'for interrogation with what the Department of Immigration & Multicultural and Indigenous Affairs called interrogators'

and at [8]

> It is not clear why we were interrogated by these four officials instead of Department of Immigration & Multicultural and Indigenous Affairs officials.

169. In C25's statement dated 19 December 2006 she states (at [1]):

> I have heard from some other fellow Chinese detainees that some Stage 2 and Stage 3 Chinese detainees were interviewed by an unknown group of Chinese people. On that morning one GSL officer called me to go to DIMIA interview room. One fellow detainee warned me that there is a rumour in detention that some underground Chinese Government officials are trying to force some Chinese detainees to sign some documents. I was warned that this interview might be the one and to be careful as they work for the Chinese Government.

at [2]

> I tried to enquire what it is all about. They are an Australian Chinese cultural exchange group or something like that; I did not understand exactly who they are.

170. In C2's statement he states (at [3]):

> I was not told why I was being interviewed.

at [4]

> I was interviewed by four MPS officials…They did not provide me with their names. They only said that they were from the Chinese consulate. I later learnt that they were from the Chinese national security bureau.

171. In a letter sent on behalf of C2 to the then Minister for Immigration and Citizenship dated 12 October 2007 seeking Ministerial intervention in relation to the refusal to grant C2 a protection visa it states:

> C2 explained that he was terrified throughout the interrogation because at the very beginning of the interview the MPS officials had threatened that if he lied they would know because they have all his details. Hence C2 thought it was better to say too much than too little, C2 outlined what happened at the start of the interview and said something to the effect:
>
> > *They pushed very hard and terrified me. They already knew a lot about me. They said 'We know everything about you in detail so you must tell us everything and do not lie. This way it will be better for you and for your family too. We know everything you have done in China and Australia.*

172. The letter goes on to suggest that the transcript of the interview with C2 does not record what C2 was told at the beginning of the interview with the MPS officials. It is said:

> It is questionable why the beginning of the tape was not transcribed since, from C2's account, it would explain why he appeared to volunteer information which would place him and his family in great danger.

173. The transcript of the interview with C2 does not record him being told anything about the identity of the officials interviewing him or the purpose of the interviews but the way the transcript begins suggests that perhaps not all of the first part of the interview was recorded. The transcript of his interview commences:

> Male 1: We can't probably match what you just said, you see (interrupted by Male 2)
>
> Male 2: Then (interrupted by Male 1)
>
> Male 1: There is nothing. You can write (inaudible), but the problem is. You can write whatever you like. What's your home address?

DIMIA'S response

174. In a letter from DIMIA to the Commission dated 19 March 2008 it states:

> The department concedes that the complainants were not provided with an adequate explanation of the purpose of the interviews or an appropriate explanation of the identity of the interviewing officials.

175. In terms of the identity of the officials who conducted the interviews the evidence from DIMIA is as follows.

176. According to DIMIA the interviews were conducted by 3 identity verification experts from the MPS and a locally engaged Departmental staff member from the Australian Consulate-General in Shanghai (she was a Chinese local working for the Australian Consulate-General but still in the employment of the Chinese government).

177. The locally engaged Departmental staff member was originally only going to stay for the first three days of the MPS officials' visit, however, as the MPS officials did not speak very good English she remained to act as an interpreter for them. DIMIA had requested that the MPS officials who were to conduct the interviews have a good grasp of English. DIMIA's request was not met and the MPS officials who were sent to conduct the interviews did not have a good grasp of English. At such short notice DIMIA was unable to arrange any other suitably qualified Chinese language speaker to act as a translator so the locally engaged Departmental staff member stayed for the duration of the visit to act as an interpreter.

178. The invitation issued by DIMIA to the MPS in relation to the interviews states the following in relation to the ability of the MPS officials to speak English:

> at least one of them [the experts] will be able to speak English to communicate with colleagues from DIMIA.

179. The Department's Principal Migration Officer – Compliance from Shanghai was present during the first interview, however, the members of the Chinese delegation expressed concerns about the cramped conditions of the interview room and requested that the number of interview participants be reduced. The Departmental officer agreed to this request and sat outside but just next to the door to the room and visually monitored the interview. Two DIMIA officers took turns sitting outside the room. Neither of them spoke Mandarin and they were not accompanied by an interpreter.

Evidence in the transcripts of the interviews

180. The transcript of the interview with C12 discloses that he was not told anything about the identity of the officials interviewing him or the purpose of the interviews because he refused to be interviewed until he had spoken to an immigration officer.

181. The transcript of the interview with C2 does not record him being told anything about the purpose of the interview or the identity of the officials but, for the reasons explained above, this may be because this part of the interview was not recorded.

182. According to the transcripts with the other complainants that were available they were told varying things about the identity of the interviewers and the purpose of the interviews.

183. Some were not told anything about the identity of the interviewers, some were told they were from the Chinese government or mainland China and some were told that they were employed by DIMIA to conduct the interviews.

184. All of them were told varying things about the purpose of the interviews, but what each of them was told suggested that the interview was a general chat to ascertain the situation of the complainant and an opportunity for the complainant to share any concerns that they had about their situation or their detention and that the interviewers were there to assist the complainants. None of the complainants that the Commission has the transcripts of interviews for was clearly told that the purpose of the interview was to assist the Australian Government confirm their identity to enable travel documents to be issued for them. The following is a summary of the varying things the complainants were told about the purpose of the interviews and the identity of the interviewers:

    (i) Six of the complainants (C24, C5, C19, C1, C13 and C21) were not given any information about the identity of the interviewers and were told little about the purpose of the interviews. These complainants were asked questions about their conditions in detention and the interviewers expressed concern for their welfare. The questioning by the MPS officials and the expression of concern by them for the complainants' welfare would have given them the impression that the purpose of the interviews was to ascertain whether they were being treated properly and to assist them with any concerns that they had.

    (ii) Four of the complainants (C26, C9, C23, and C10) were told that the interviewers were from mainland China and that they were there to find out about the complainant's situation and any concerns they had, and, if possible, to assist them. C26 was told that the interviewers had nothing to do with DIMIA, whereas some of the other complainants were told that the interviewers were assisting DIMIA.

    (iii) Four of the complainants (C15, C4, C16, C7) were told that the interviewers were employed by DIMIA to conduct the interviews. They were further told that the interviewers wanted to learn about the complainant's situation and concerns and the complainants should tell them anything they wanted DIMIA to know about their situation. Again the interviewers gave the complainants the impression that they were there to assist them.

Invitation issued by DIMIA to the MPS in relation to the interviews

185. The invitation that records the agreement between DIMIA and the MPS about the interviews states the following about the MPS officials who conducted the interviews:

> The Chinese experts will work 5 days a week, for 8 hours a day. A payment equivalent to DIMIA officer's salary of $A77 per day and a standard DIMIA travel allowance of $A88.55 (which includes meals and incidentals) will be paid by DIMIA to the Chinese experts. If working overtime is requested by DIMIA, an agreement will be reached between DIMIA and the Chinese experts and the standard DIMIA overtime allowance will be paid to the experts. DIMIA will meet the experts' international travel costs.
>
> DIMIA will provide the Chinese experts with communication (fax and telephone) and working facilities as well as relevant expenses for work as allowed under DIMIA conditions of service. If necessary, the Chinese experts may contact the Chinese Embassy in Australia and their work unit which despatches them. DIMIA will take the same steps to ensure the personal security of the Chinese experts in Australia as it does for its own staff…Travel insurance will be provided to the Chinese experts by QBE Insurance…DIMIA will meet the experts' travel costs and will provide suitable accommodation as near to their working place as possible…
>
> Officers from DIMIA will be present throughout the interviews with the Chinese experts. If DIMIA is not satisfied with the work of the Chinese experts, DIMIA will first advise the Chinese side of reasons in detail and then resolve the issue through consultation by both sides.

Manner in which interviews were conducted

186. In its response to the third complaint DIMIA concedes that its arrangements for supervision of the interviews were inadequate and that the process was flawed.

187. DIMIA also say, however, that the two DIMIA officers who sat outside the room did not observe any behaviour during the interviews that caused concern and that the locally engaged Departmental staff member from China was questioned about the interviews both during and after the delegation visit and she stated that she did not witness any inappropriate questioning or harassment.

188. DIMIA concede, however, that the DIMIA officers did not understand Mandarin and were not accompanied by an interpreter and as such were unable to discern whether any verbal harassment or inappropriate questioning was taking place.

189. Further, DIMIA concede that the ability of the locally engaged Departmental staff member from China to judge whether inappropriate questions were being asked and whether any harassment was taking place was impaired by:

    (i) the nature of her employment arrangements – that is that she was an employee of the Chinese government;

    (i) she had limited knowledge of the protection visa regime and what type of questions would and would not be appropriate; and

    (iii) it was unclear whether she was given a clear explanation of her role.

190. In DIMIA's initial letter to the Commission it states that the Department's standard practice for interviewing detainees was not followed and the consent of the individuals for tape recording was not obtained and dual tape recordings were not made. It also concedes that the detainees were not provided with a copy of the recording at the time or shortly after the interviews.

Information disclosed during the interviews

Complainants' evidence

191. In C3's statement he says (at [4]:

> They [the MPS officials] asked us whether we had made applications for protection visas and also how much money we had made in Australia, whether we had bought houses in China or sent money back to China and a lot of questions and some detainees refused to answer their questions. They knew my family members details but they asked us to tell them again.

192. In C25's statement she says she was asked and answered the following questions during her interview:

(at [5])

(a) When did I come to Australia?
(b) How did I come to Australia?
(c) Do I have a Chinese passport?
(d) How long I stayed in detention?
(e) What job I used to do outside for living?
(f) Why did not I give my Chinese ID to DIMIA?

(at [6])

(a) How much money I earned in Australia?
(b) How much money I paid to travel in Australia?
(c) Could I give him the contact details of that person who helped me to get a false Thai passport and visa?

193. In C2's statement (at [5]) he says:

> The MPS officials asked me questions about my family situation, my address in China and background details of my time in China. They also asked me questions about how I arrived in Australia and what I have been doing in Australia. The MPS officials asked me whether I had lodged an application for a Protection Visa. I don't think I had any on-going visa applications at this time.

DIMIA's response

194. DIMIA admits that '[i]n some interviews, questions asked extended beyond matters related to establishing identity' (DIMIA's initial letter to the Commission) and that 'in some cases, the questions asked by the delegation were broader than intended' (DIMIA's response).

Evidence in the transcripts of the interviews

195. The transcript of the interview with C12 discloses that he was not asked any questions apart from whether he had spoken to an immigration officer lately. The transcript discloses that this was because he refused to answer any of the MPS official's questions prior to speaking to an immigration officer.

196. The transcripts for the other complainants that the Commission has disclose that these complainants were all asked for personal information about themselves and their families, including, names, dates of birth and contact details of family members, information about the complainants' occupations in China and in Australia, details about the complainants' spouse's occupations, details about the health of their parents and of the complainants and who was looking after their parents in China and how they came to be in Australia.

197. Further the following complainants disclosed the following type of information in response to their questioning:

(i) What they intended to do in the future in relation to remaining in Australia or not – C5, C19, C13, C21 and C15.

For example:

C5

Page 3

Male 1: 'What did you intend to do here (Inaudible)?

Male 2: Ah (inaudible).

Male 1: You are staying here. Do you want to go out, want to go back to China or want to apply for residence?'

C19

Page 12

Male 4: In your heart you really don't want to go back, is that it?

C13

Page 14

Male 1: What is your plan for the future? Do you want to go back to your country or you want to stay at home, or…

C21

Page 14

Male 1: Do you want to return to China?

C15

Page 2

Male 1&3: What do you have in your mine (sic)? So you want to continue to stay in Australia and get a visa? Do you think you are eligible?

(ii) Visa applications they had made since arriving in Australia – C5, C26 and C24.

For example:

C5

Page 3

Male 1: 'Have you applied for a bridging visa?' (p.3)

C26

Page 31

Male 1: Since your arrival (in Australia), have you ever applied for migration with the Department of Immigration?

Male 2: No

C24

Page 4

Male 1: Ooh…what is your thought? (not audible). Are you taking any legal action?

[He was then asked questions about his bridging visa]

(iii) Whether they had applied for a protection visa – C26, C15 and C10.

For example:

C26 (C26 is Male 2)

Page 31

Male 1: For example, have you ever applied for refugee status?

Male 2: My children did.

C15 (C15 is Male 2)

Page 2

Male 1&3: What do you have in your mine (sic)? So you want to continue to stay in Australia and get a visa? Do you think you are eligible?

…

Male 1: Have you thought of…Have you lodged an application for a protection visa?

Male 2: Yes, I have lodged the application.

Male 1: On what grounds?

Male 3: Where has it gone to?

Male 1: Where is your case up to?

Male 2: eh, it is hard to say…

Page 3

Male 1&3: Which court are you up to? Still at…? Have your case gone to the federal Court yet? Or it is still…

C10 (C10 is Male 2)

Page 9

Male 1: … Do you still have a passport?

Male 2: No

Male 1: … (inaudible)

Male 2: They applied for a temporary one for me.

Male 1: Was it given to you by the Australian government or you got another one …

Page 10

Male 2: It was a temporary visa given by the Australian government.

Male 1: Temporary visa. You used your original passport to apply. Since you didn't have a passport, you applied for a protection visa…so…(inaudible)…On what grounds did you apply for a protection visa?

Male 2: Because I was unemployed, I was a refugee.

(iv) Questions concerning their protection visa applications. As I indicated earlier in some of the cases where the detainees disclosed information about their protection visa applications it was not in response to a direct question on this issue. In these cases, however, the MPS officials continued to ask the detainees about their applications. The complainants who were asked for information about their protection visa applications were C23, C21, C9, C16, C7 and C2. I have previously set out excerpts from the transcripts that record some of the questioning about this issue (see [141]).

(v) Court proceedings commenced by the detainees in Australia – C26.

For example:

C26 (C26 is Male 2)

Page 5

Male 1:	Why did you come to Australia?
Male 2:	Originally…because I had a daughter already, China does not allow (people) to have two children.
Male 1:	I see, so you came to Australia to have a second child.
	…
Male 1:	Where is your wife now – also in Australia?
	…
	[Asked some questions about where wife is located and then ...]
Male 2:	(We) lost the court case.
	…
Male 1:	What is the legal case about?

Page 6

Male 2:	My children were born here.

(vi) Their religious beliefs – only five detainees were asked questions about this – three were Falungong followers, one was a Catholic who was a member of an underground Church in China and in the case of the fifth complainant his answer to the question about his religious beliefs is recorded as being 'inaudible'.

The detainee whose answer to the question was not audible was directly asked about his religious beliefs.

In the case of the other detainees they were not directly asked about this issue but the information came out in their response to a question about a different topic. Nonetheless, once the information had been provided the MPS officials continued to ask two of them further questions about this topic. In the case of one of the detainees he had been told by the MPS officials that they were employees of DIMIA and he should tell them anything he wanted DIMIA to consider.

The complainants who were asked about their religious beliefs were – C23, C21, C4, C19 and C2.

For example:

C23 (C23 is Male 2)

Page 1

Male 1: What is your reason as a refugee?

Male 2: Um.

Male 1: What is your reason…as a refugee?

Male 2: Falungong.

Male 1: (Laughing). Have you done it?

Male 2: Well?

Male 1: Have you done it?

Page 6

Male 1: Do you know how to practice Falungong, I wonder?

Male 2: Um?

Male 1: Do you know about Falungong?

C21 (C21 is Male 2)

Page 17

Male 1: What should they do now, they also need to, for example, issue a factual statement to you or…, if you are freed, then how is your family, they are also worried about that, they also need to take actions in compliance with the law…(interrupted)

Male 2: If I can apply for a refugee status, I am a refugee.

Male 1: Ah! You are a refugee.

Male 2: Eh, right. We applied for a Falungong website in China, so I am a Falungong refugee here. They should not treat me like that, isn't that right?

Male 1: Ah, you are…(inaudible)…?

Male 2: Eh, I am a member of Falungong

Page 18

Male 1: Eh, you are a member of Falungong?

Male 2: Eh, yes.

…

Male 1: Eh I see. Are you still practising Falungong?

…

Page 19

Male 1: Did you bring any Falungong materials with you when you left China ?

…

Male 1: Did you practice Falungong before or after you came here?

…

C4 (C4 is Male 2)

Page 7

Male 1: Ah! How do you feel now? Do you think you have any hope of getting out?

Male 2: I think so. To tell you the truth, I have never had so big hope.

Male 1: What (inaudible) I can do to help in the legal perspective?

Male 2: Because they haven't accepted my case now because I haven't handed in my passport. They have just accepted my application at RRT with the help of many people, the church and friends outside. Because I am a catholic originally at home, I was a member of the underground church and the priests and sisters back home all knew it. You also know the current situation in mainland China where people with religious opinions are badly persecuted. This is not that I tell you as it is the true situation. The priests and sisters in Australia have also proved my religious belief.

C19 (C19 is Male 2)

Page 12

Male 4: In your heart you really don't want to go back, is that it?

Page 30

Male 3: Religious beliefs. Churches.

(Translator's Note: There are 30 seconds of conversations between Male 2 and Male 3 which are inaudible.)

C2 (C2 is Male 2)

Page 8

Male 1: In the name of which reason did you make the refugee application?

Male 2: In…name.

Male 1: No, not in whose name, but in the name of which reason?

Male 2: For the reasons of a deserter and Fa Lun Gong.

Male 3: (laughs) Fa Lun Gong.

Male 1: You had already left the army before you left China, right?

(vii) C26 was questioned about the number of children that he had contrary to the policy in the PRC that is commonly referred to as the one child policy. As was the case with the questioning in relation to protection visa applications and religious beliefs this information was not disclosed in response to a direct question about the issue. Below is the extract from part of the transcript of C26's interview where this issue was discussed.

C26 (Male 2 is C26)

Page 5

Male 1: Why did you come to Australia?

Male 2: Originally…because I had a daughter already, China does not allow (people) to have two children.

Male 1: I see, so you came to Australia to have a second child.

Male 2: At that time (we) didn't intend to come here to have more children. We wanted to made some money and then go home. Then (we) gave birth to one, to two children.

Page 9

Male 1: …You might as well write down the names of your children. Here too, name (of you child) in China. Were the children born here?

Male 2: Yes.

Male 1: How many were born here – one or two?

Page 10

…

Male 2: Two.

Male 1: Write down also the name of the child in China. Are all three of them yours?

Male 2: Yes. Ah, not the male in the middle.

Male 1: Ah.

Male 2: (not audible).

Male 1: Are all three of them yours?

Male 2: Yes. (not audible). Huan, Huan

…

Page 16

…

Male 1: (not audible) It also wastes our time, doesn't it? (If you lie) we not only are not able to help you, but also it will make matters worse.

Male 2: I don't want to go back because there will be penalties in relation to my children. Family planning fines are very hefty.

Male 1: Why should you be fined since both your children were born here?

Male 2: Yes. I will be fined if I return.

Male 1: Will you be penalized for having your children here?

Male 2: Yes. Yes. Yes. The newspaper here reported…

Male 1: You won't be penalized if the children were born overseas.

Male 2: What?

Male 1: Maybe you won't be penalized if born overseas.

…

(viii) C2 was questioned about his conviction for criminal offences in Australia. The information he disclosed about the offence during the interview was as follows:

(Male 2 is C2)

Page 8

Male 1: Were you locked in other places?

Male 2: Yes, in prison.

Male 1: Also in prison?

Male 2: Yes.

Male 1: How come?

Page 9

Male 2: Because how should I explain this? Because that person I (inaudible) a person who is resident here is a very good friend of her. I was originally doing importing and exporting in trading business, from and to China (inaudible).

Male 1: Ok.

Male 2: As I am not a resident, so the business should be controlled by a resident…After the company is registered, I just transfer my money into her account, we cooperate together.

Male 1: Ok.

> Male 2: However, (inaudible) that day I came across her, (inaudible) I asked her for the money back, and she said she wouldn't give me back. I said (inaudible), and then hit her once, once. She said 'ok, ok I would, and would give the money right now'. I said you'd better ask your parents out and we could talk about this, as we were all there, together with so many people. I said to ask your boyfriend and parents out and talk together about how to return this amount of money. It was difficult to return immediately at such a young age. This amount of money you know? She said ok. Later (inaudible), said nothing, went to Chinatown. And the next day I was sued for kidnapping and robbery.

The above excerpts from the transcripts are not a complete record of the discussion of these issues, they only record part of the discussion of these issues.

Allegations of what happened to family members of detainees after interviews

198. C3 alleges in his statement (at [7]) that following the interviews some of the families of detainees in China 'had been disturbed and interrogated by Chinese local police'.

199. C25 alleges in her statement (at [13]-[14]) that following the interview MPS officials visited friends of her parents and asked them about her whereabouts. Her mother also received unidentified phone calls from a person alleging to be her friend and asking for information about her. C25 further alleges that Chinese officers interrogated her parents for more than 12 hours following her interview.

200. C2 says in his statement (at [9]):

> Since the interviews, my family in China has been harassed by Chinese authorities. I believe that this is directly connected to the interview that was conducted in May 2005. Chinese police officers have gone to my parent's home on many occasions and smashed their property. In January 2007 I was issued a summons from Chinese authorities so they could interrogate me. This summons was sent to my family's home in China. Because I was not in China, the summons was issued to my parents and they were interrogated. I have only had occasional contact with my parents as I do not want them to be harassed by Chinese authorities.

Impact of interviews and separation detention on the complainants

201. In the initial complaint received from C3 he said:

> Manning detainees were bogged down in pain and horror. Felt betrayed by DIMIA and fear to suffer political persecution if we are deported to China.

202. In C14's affidavit he states ([15] and [16]):

> We felt threatening and frightened.
>
> We could not eat or sleep since we did not know what would happen to us.

203. In C25's statement ([4]) she says that during the interview she stopped filling out the form she was asked to complete:

> Out of fear of deportation…I had fear for my family too. I suspected that if I fill out the family details column of that form they might persecute my family too.

204. C2 in his statement says (at [7]):

> I was scared sitting in front of the MPS officials and nervous about answering their questions.

205. Ms Byers advises that since the interviews the complainants have lived in fear of deportation and the affects on family members in China.

Submissions

Complainants' submissions

206. Ms Byers in her letter to the Commission dated 30 October 2006 states that 'DIMA was negligent in how MPS officials were allowed to run the interviews for the following reasons:

(i) the interviews did not meet Australian laws, for example, interviews were taped without consent;

(ii) there were no interview guidelines or protocols and procedures to be used in the identification process;

(iii) no DIMIA official was present during the interviews to ensure questions were only asked about identity;

(iv) there was no need to have the locally engaged Departmental staff member involved in the interview process and DIMIA has not provided an explanation for her presence;

(v) no vetting of interviewees to ensure no one had any matters outstanding in the Federal/High Court or Australian-born children outside the One Child Policy was interviewed;

(vi) the interview transcripts have been tampered with; and

(vii) DIMIA cannot guarantee that the MPS officials and the locally engaged Departmental staff member did not take their information back to China.'

207. In a subsequent letter from Ms Byers to the Commission dated 5 December 2006 she adds the following matters as forming the basis of her clients' complaint:

(i) DIMIA failed to use an independent accredited interpreter during the interviews;

(ii) DIMIA did everything that the MPS officials wanted without any consideration of the rights of the detainees;

(iii) the MPS officials misinformed the detainees by telling them that they will never be released from detention without a passport, they had no future in Australia, they will stay in detention forever, the One Child Policy has been relaxed in China and there are not fines for 'black children', the detainees were causing trouble for the Embassy and the Chinese Government, they were employees of the Australian immigration department, that ordinary Falun Gong practitioners are not persecuted in China.

208. Further, in Ms Byers' letter to the Commission dated 5 December 2006 she asserts that DIMIA breached the confidentiality of the detainees in that it allowed MPS officials to interview the detainees without any direct supervision, guidelines or protocols to access information from detainees that did not relate to their identification. She then refers to ss 336E and F, 431, 439 and 91 X of the Migration Act. Ms Byers does not explicitly state that DIMIA breached these sections. I understand her to be referring to these sections more to emphasise that the sections disclose a recognition by Parliament of

the confidential nature of information provided by applicants for protection visas. These sections provide as follows:

Section 336E

Section 336E provides that a person commits an offence if they cause the disclosure of 'identifying information' and the disclosure is not a permitted disclosure.

Section 336F

Section 336F gives the Minister the power to authorise the disclosure of identifying information in certain circumstances.

Section 431

Section 431(1) prohibits the RRT from publishing any statement which may identify an applicant or any relative or other dependent of an applicant.

Section 439

Section 439 prohibits the disclosure of information or a document concerning a person that is obtained by a member or acting member of the RRT, an officer of the RRT or a person providing interpreting services in connection with a review by the RRT in the course of performing their functions or duties or exercising their powers under the Act. The section also provides that such persons cannot be compelled to produce such documents or information.

Section 91X

Section 91X provides that the Federal Court, High Court and Federal Magistrates Court must not publish the names of applicants for protection visas.

209. Ms Byers also cites extracts from the United Nations High Commission on Refugees Representation in Japan's *Advisory Opinion on the rules of confidentiality regarding asylum information* dated 31 March 2005 ('the UNHCR Advisory Opinion') as evidencing the risk faced by asylum seekers if their confidential asylum seeker information is disclosed. She cites the following passages:

> 12. Regarding persons found not to be in need of international protection (that is, rejected cases after exhaustion of available legal remedies), the limited sharing of personal data with the authorities of the country of origin is legitimate in order to facilitate return, even if this is without the consent of the individuals concerned. Such cases usually arise when nationality is in question and/or the individual has no national travel or identification documents. However, disclosure should go no further than is lawful and necessary to secure readmission, and there should be no disclosure that could endanger the individual or any other person, not least disclosure of the fact that the individual has applied for asylum. Moreover, in the first instance everything should be done to secure the voluntary nature of return.
>
> …
>
> 16. Secondly, sharing with the country of origin, information about the asylum seeker, including the fact itself that the person applied for asylum, may constitute an aggravation of the person's position vis-à-vis the Government alleged to be responsible for his persecution. In a situation where the initial elements of the claim presented by the asylum-seeker would not lead to inclusion, sharing of confidential information with the country of origin, could well lead to the asylum seeker becoming refugee *sur place.*

> 17. Thirdly, this practice may endanger any relatives or associates of the asylum seeker remaining in the country of origin and may lead to a risk for retaliatory or punitive measures by the national authorities against them.
>
> …
>
> 23. UNHCR shares the legitimate concern of States to clearly distinguish between persons who need international protection and those who have no valid claim for refugee status. It is a State's prerogative, and in fact its duty, to make a determination on refugee status based on all available evidence presented in the case. Human rights standards prescribe the State's obligation to protect the right to privacy of the individual and its inherent protection against information reaching the hands of persons not authorized to receive or use it. The possible risks to the individual asylum-seeker caused by information reaching the wrong people, but also the detrimental effect of misuse of information to the asylum system as a whole are very serious in nature. Consequently, strict adherence to the fundamental principles and refugee protection is vital, and exceptions should only be allowed under well-defined and specific circumstances.

210. Ms Byers also refers to art 25 of the Refugee Convention which provides:

> ***Article 25 - Administrative assistance***
>
> 1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.
> 2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

211. Finally Ms Byers submits that as a result of the detainees participation in the interviews they fear persecution if returned to the PRC and have become refugees *sur place*.

DIMIA's submissions

212. DIMIA has not provided any detailed legal submissions. DIMIA denies that in relation to any of the detainees who were interviewed the evidence available supports a conclusion that Australia's international obligations have been breached.

Findings of Fact

Complainants who were interviewed

213. It is not in dispute and I find that all of the complainants were interviewed by the MPS officials.

214. All of the complainants except for two had filed protection visa applications prior to being interviewed. I have not been provided with details of the complainants' protection visa applications. By their very nature, however, I am prepared to find that those applications claimed that each of the complainants had a well-founded fear of being persecuted in the PRC for reasons either of their race, religion, nationality, membership of a particular social group or political opinion.

Preparation prior to interviews

215. Based on the material provided by DIMIA I make the following findings about DIMIA's briefing of the MPS officials for the conduct of the interviews.

216. I find that the only discussion that took place between DIMIA officials and the MPS officials who conducted the interviews about the manner in which the interviews were to be conducted and the types of questions that were to be asked was the informal briefing that took place shortly before the interviews. I also find that apart from this informal briefing the MPS officials were not given any written guidelines or protocols on the interview process.

217. On the basis of the evidence from DIMIA about this informal briefing I find that DIMIA did direct the MPS officials only to ask questions necessary to ascertain identity and not to ask questions about the immigration status of the detainees. I further find that apart from these directions the MPS officials were given no other guidance about the parameters of the questioning.

What the complainants were told about the purpose of the interviews and the identity of the officials who interviewed them

218. I find that the complainants were not provided with an adequate explanation about the purpose of the interview or the identity of the officials who interviewed them. I also find that there was considerable confusion amongst the complainants about the purpose of the interviews and the identity of the interviewers.

219. Based on the transcripts of the interviews that I have, I find that the impression that was conveyed to the complainants was that the interview was an opportunity for the detainee to share any concerns that they had about their situation with the interviewers and that the interviewers where there to assist the detainees. I also find that none of the detainees were clearly told that the purpose of the interview was to assist the Australian Government confirm their identity to enable travel documents to be issued for them.

220. I do not have transcripts of all of the interviews nor evidence about what some of the complainants were told during the interviews. Nonetheless, based on the consistency of what the detainees were told about the purpose of the interviews in the transcripts available and given the obvious confusion amongst the complainants about the purpose of the interviews that is apparent from their evidence I find that all the complainants were misled about the purpose of the interviews.

Who conducted the interviews and the manner in which they were conducted?

221. Based on DIMIA's material and in particular on the contents of the invitation issued by DIMIA to the MPS in relation to the interviews I make the following findings.

222. The interviews were conducted by 3 identity verification experts from the Chinese Ministry of Public Security and the locally engaged Departmental staff member. The 3 identity verification experts were not employees of DIMIA but they were engaged by DIMIA to conduct the interviews.

223. A DIMIA staff member was only present during the first interview. Apart from that first interview a DIMIA staff member was not present in the interview room during any of the other interviews but was sitting in the doorway to the room from which they could visibly observe what took place. None of the DIMIA staff who observed the interviews could speak Mandarin and the interviews were conducted entirely in Mandarin.

224. I accept that the reason the DIMIA staff member sat outside the room was because the interview room was too small to comfortably accommodate them in addition to the other people that had to be present during the interview.

Tape recording of interviews

225. I note DIMIA's concessions made in its initial letter to the Commission that its standard practice for interviewing detainees was not followed, the consent of the individuals for tape recording was not obtained and dual tape recordings were not made. I also note the concession that detainees were not provided with a copy of the recording but that after DIMIA received the complaints made to the Commission, arrangements were made to provide detainees with a copy of the recording of their interviews.

226. Based on the fact that several of the tape recordings were inaudible in whole or in part I also find that the taping facilities used to record the interviews were inadequate.

227. Based on the fact that several of the audio recordings could not be located I find that there were inadequate steps taken to secure the audio recordings.

228. Finally, based on the fact that transcripts of the interviews were only ordered after DIMIA received the complaints and that DIMIA only discovered, at that stage, that the audio recordings were inaudible in part or in whole I infer that the audio recordings were not checked by any DIMIA official at the time or shortly after any of the interviews.

Information disclosed during the interviews

Disclosure of personal information related to ascertaining identity

229. Based on the transcripts of the interviews I find that all of the complainants for whom I have transcripts were asked for personal information about themselves. Further I find that all of the complainants for whom I have transcripts, except for C12, who refused to answer any questions, were asked for personal information about their families.

230. In the case of the complainants in respect of whom I do not have transcripts nor evidence of precisely what they were asked I cannot make findings as to specific information they provided during the interviews nor as to specific questions they were asked. I can and do, however, find that they were asked personal questions about themselves and their families relevant to ascertaining their identity.

Disclosure of personal information by C26

231. I find that C26 disclosed during his interview that he had a number of children whilst in Australia and his concern that he would be fined as a result of this if he returned to the PRC. This information may have been relevant to ascertaining his identity, however, the disclosure of this information placed him at risk if he was returned to the PRC. The United States Department of State says the following in its Country Report on Human Rights Practices in the PRC for 2004 (released on 28 February 2005) ('the US Country Report on the PRC') (noting that C26 is from Guangdong) about the PRC's family planning laws:

> Under the country's family planning law and policies, citizens in 6 of the country's 31 provinces still were required to apply for government permission before having a first child, and the Government continued to restrict the number of births. Penalties for out-of-plan births still included social compensation fees and other coercive measures.
>
> …
>
> The law requires counties to use specific measures to limit the total number of births in each county…The law requires couples who have an unapproved child to pay a 'social compensation fee', which sometimes reached 10 times a person's annual income, and grants preferential treatment to couples who abide by the birth limits…
>
> The law delegates to the provinces the responsibility for drafting implementing regulations, including establishing a scale for assessment of social compensation fees. The National Population and Family Planning Law requires family planning officials to obtain court approval for taking 'forcible' action, such as confiscation of property, against families that refuse to pay social compensation fees.
>
> The one-child limit was more strictly applied in the cities, where only couples meeting certain conditions (e.g., both parents are only children) were permitted to have a second child. In most rural areas (including towns of under 200,000 persons), where approximately two-thirds of citizens lived, the policy was more relaxed, generally allowing couples to have a second child if the first was a girl or disabled…In remote areas, limits often were not enforced, except on government employees and Party members.
>
> …
>
> …The fees were assessed at widely varying levels and were generally extremely high. According to provincial regulations, the fees ranged from one-half to 10 times the average worker's annual disposable income. Local officials have authority to adjust the fees downward and did so in many cases. Additional disciplinary measures against those who violated the child limit policy by having an unapproved child or helping another to do so included job loss or demotion, loss of promotion opportunity, expulsion from the Party (membership in which was an unofficial requirement for certain jobs), and other administrative punishments, including, in some cases, the destruction of property…
>
> …An additional 10 provinces--Fujian, Guizhou, **Guangdong**, Gansu, Jiangxi, Qinghai, Sichuan Shanxi, Shannxi, and Yunnan--require unspecified 'remedial measures' to deal with out-of-plan pregnancies… (emphasis added)

The information contained in the US Country Report on the PRC is not sufficient for me to make a finding as to what would have occurred to C26 had he been returned to the PRC. It is, however, sufficient for me to find that there was a real risk that had C26 been retuned to the PRC with his family he may have had an onerous fee imposed on him or been subject to other disciplinary measures as a result of the disclosure of the information about the birth of the additional children in Australia.

Disclosure of information unrelated to ascertaining identity

232. I find that the following complainants were asked for or volunteered the following types of information during their interviews and that this information was unnecessary to assist in their identification:

(i) what they intended to do in the future in relation to remaining in Australia or not – C5, C19, C13, C21 and C15;
(ii) their visa applications they had made since arriving in Australia – C5, C26 and C24;
(iii) whether they had applied for a protection visa – C26, C15 and C10;
(iv) the nature of their protection visa applications – C21, C9, C16, C7 and C2;
(v) court proceedings commenced by the detainees in Australia – C26, C4 and C16;
(vi) their religious beliefs and membership of certain religious groups being an underground Catholic Church and Falun Gong – C23, C21, C4, C19 and C2; and
(vii) criminal convictions in Australia – C2.

233. Support for Ms Byers' submission of the risk of persecution faced by the complainants as a result of the disclosure of information about their protection visa applications is contained in the US Country Report on the PRC where the State Department express the following view about the PRC Government:

> The Government severely restricted freedom of assembly and association and infringed on individuals' rights to privacy. The authorities harassed and abused many who raised public grievances, including petitioners to the Central Government…
>
> While the number of religious believers in the country continued to grow, the Government's record on respect for religious freedom remained poor, and repression of members of unregistered religious groups increased in some parts of the country. Members of unregistered Protestant and Catholic congregations, Muslim Uighurs, and Tibetan Buddhists, including those residing within the TAR (see Tibet Addendum) experienced ongoing and, in some cases, increased official interference, harassment, and repression. …The Government detained and prosecuted a number of underground religious figures in both the Protestant and Catholic Church...
>
> …Religious worship in many officially registered churches, temples, and mosques occurred without interference, but unregistered churches in some areas were destroyed, religious services were broken up, and church leaders and adherents were harassed, detained, or beaten. At year's end, scores of religious adherents remained in prison because of their religious activities… …The Government continued its crackdown against the Falun Gong spiritual movement, and tens of thousands of practitioners remained incarcerated in prisons, extrajudicial reeducation-through-labor camps, and psychiatric facilities. Several hundred Falun Gong adherents reportedly have died in detention due to torture, abuse, and neglect since the crackdown on Falun Gong began in 1999.

Allegations of what took place to family members of detainees after interviews

234. I accept the complainants' evidence that some of them were told that their families in the PRC 'had been disturbed and interrogated by Chinese local police' following their interviews and that they were all fearful and concerned about their families in the PRC as a result of this. The evidence is, however, hearsay and I do not consider that it is sufficient evidence upon which to base a finding that their family members were in fact disturbed or interrogated by Chinese local police. I therefore make no finding as to whether their family members were in fact disturbed or interrogated by Chinese local police as a result of the information disclosed by complainants during the interviews.

Impact of interviews on the complainants

235. I accept the complainants' evidence that as a result of the interviews and in particular as a result of their confusion about the purpose of the interviews and the identity of the interviewers they were frightened and concerned not only for themselves but also for their families still in the PRC. In particular they feared that they would be persecuted if they were returned to the PRC as a result of the interviews. Given the information that several of them disclosed during the interviews (referred to above) and given the PRC's record in relation to human rights abuses (referred to above) it was understandable that they were frightened and distressed.

236. I am satisfied that the distress and fear of the complainants would have been considerable initially and whilst it would have diminished over time it would not have been of a transitory nature.

Conclusions regarding alleged breaches of Human Rights

Acts/practices in respect of which the Commission has jurisdiction to investigate

237. I find that the following acts (including failures to act)[43] fall within the scope of the Commission's functions with respect to human rights:

    (i) the acts of DIMIA staff in organising the interviews;
    (ii) the acts of GSL staff; and
    (iii) the acts of the MPS officials.

238. Both GSL staff and the MPS officials who conducted the interviews were engaged by the Commonwealth to perform the acts that are the subject of this complaint. Further the acts that are the subject of this complaint are discretionary acts, in that the manner in which the interviews were conducted was not mandated by any legislation. Accordingly, the acts of both the MPS officials and the GSL staff that are the subject of this complaint are acts done on behalf of the Commonwealth and are acts in respect of which the Commission has jurisdiction to inquire.

239. For the reasons set out in Part D above, I find that unauthorised acts done in the course of an event done on behalf of the Commonwealth are also acts included in the scope of s 11(1)(f). Therefore, to the extent that the MPS officials acted outside the terms of their engagement by DIMIA their acts were still 'on behalf of the Commonwealth' for the purposes of this inquiry.

Acts in respect of the manner in which the interviews were conducted that constituted breaches of human rights

240. For the reasons below I think that the actions of DIMIA and of the MPS officials in relation to organising and conducting the interviews breached art 17(1) of the ICCPR and art 10(1) of the ICCPR.

Article 17(1) – Right to privacy

241. DIMIA breached the following complainants' right to privacy under art 17(1) of the ICCPR:

(i) C2;
(ii) C5;
(iii) C4;
(iv) C7;
(v) C9;
(vi) C10;
(vii) C13;
(viii) C15;
(ix) C16;
(x) C19;
(xi) C21;
(xii) C23;
(xiii) C24; and
(xiv) C26.

242. The privacy of the above complainants was arbitrarily interfered with because they were asked questions and/or disclosed the following information about themselves during the interviews that was unnecessary for determining their identity:

(i) their future intentions in relation to trying to remain in Australia or not;
(ii) the visa applications they had made since arriving in Australia;
(iii) whether they had applied for a protection visa;
(iv) the nature of their protection visa applications;
(v) court proceedings commenced by the detainees in Australia; and
(vi) their religious beliefs.

Below I identify the acts that constituted the interferences and explain why I consider the interferences to have been arbitrary.

Interference with their privacy

243. The privacy of the above complainants was interfered with by virtue of the following acts that caused or contributed to the disclosure of the personal information outlined in paragraph 242:

(i) the questioning by the MPS officials in relation to the personal information;

(ii) DIMIA's failure to take adequate steps to ensure that the privacy of the detainees was not breached during the interviews – I set out below my findings of DIMIA's failure; and

(iii) the misrepresentations by the MPS officials about the purpose of the interviews.

Questioning by MPS officials

244. The transcripts of the interviews with these complainants disclose that the MPS officials questioned the complainants about personal matters not relevant to determining their identity. Whilst in some cases the complainants had disclosed the personal information in response to seemingly unrelated questions, the MPS officials still continued to ask questions about this information following the initial disclosure.

DIMIA's failure to take adequate steps to prevent the complainants' privacy from being breached

245. As I said in Part D of my report in relation to art 17(1), this article can be breached by a State's failure to prevent or at least take adequate steps to try and prevent a detainee's privacy from being breached in circumstances where the State party is aware or should be aware that there is a risk of such a breach.

246. For the reasons I set out below I find that:

(i) DIMIA was aware of the risk that the interviews may result in the disclosure of personal information about the complainants that was not required to identify the complainants including information about the complainants' protection visa applications; and

(ii) it failed to take adequate steps to try and prevent the complainants' privacy from being breached during the interviews.

247. I infer from the fact that DIMIA took the following, albeit inadequate steps, to protect the privacy of the complainants that DIMIA recognised that there was a risk that the complainants' privacy would be breached during the interviews by the disclosure of unrelated information including information about protection visa applications:

(i) DIMIA arranged for one of its officers to be present during the interviews; and

(ii) informed the MPS officials that they should restrict questioning to matters used for identity verification and that they were not to ask detainees about their immigration history.

248. The measures taken by DIMIA were, for the following reasons, inadequate to prevent or significantly reduce the risk of the complainants' privacy being infringed.

(i) There were no measures in place to ensure that an interview could be stopped if inappropriate questioning commenced. Whilst there were DIMIA officers present they sat outside the room and they could not understand the language in which the interviews were conducted. As such they had no way of knowing what was being said and therefore would have had no basis for stopping an interview.

(ii) DIMIA gave the MPS officials little guidance as to the parameters of the questioning that could occur. No formal briefing of the MPS officials took place, nor were there any written guidelines or interview protocols as to the procedures to be used in the identification process.

(iii) Further:

(a) inadequate steps were taken to ensure that the interviews were properly recorded – tapes were lost, several tapes were completely or partially inaudible; and

(b) the recordings that were made were not reviewed whilst the interviews were occurring.

Had DIMIA ensured that the interviews were being properly recorded and had they reviewed the tapes shortly after the interviews and prior to all of the interviews being complete DIMIA could at least have taken steps to prevent further interviews from occurring or from further inappropriate questioning taking place.

(iv) DIMIA did not inform the complainants about the purpose of the interviews and the identity of the people conducting the interview. Had the complainants been properly informed about these matters they would have been in a position to make an informed decision as to what type of information to provide. In the absence of such an explanation the risk of the complainants disclosing unnecessary personal information was significantly increased.

Misrepresentations by the MPS officials about the purpose of the interviews

249. I have found that all of the complainants were misled into thinking that the purpose of the interviews was to allow them to ventilate any concerns and the interviewers were there to assist the complainants. The misrepresentations by the MPS officials about the purpose of the interviews also constituted an interference with the complainants' privacy because in the absence of these misrepresentations I find that the complainants were unlikely to have volunteered unrelated personal information about themselves, particularly the information about their protection visa applications and their religious beliefs.

Arbitrary interference

250. Article 17(1) of the ICCPR prohibits 'arbitrary' interferences with a person's privacy. As I have explained above in Part D, an interference with privacy will be 'arbitrary' if it is not reasonable or necessary in the particular circumstances.

251. The sole purpose of the interviews was to obtain information that would assist DIMIA in identifying these individuals. Given this purpose, questioning of the detainees on unrelated issues was unnecessary and therefore constituted an arbitrary interference with their privacy.

Findings in relation to the other complainants

252. I have only made a finding of breach of privacy in the case of the complainants in respect of whom I have transcripts that evidence that they disclosed personal information about themselves during the interviews that was unrelated to ascertaining their identity.

Findings in relation to complainants for whom I have transcripts of their interviews which do not disclose a breach of their privacy under art 17(1)

253. Of the complainants for whom I have transcripts of their interviews only two of them were not asked questions that arbitrarily breached their privacy – C1 and C12. As the transcripts of the interviews with C1 and C12 do not disclose that they were asked questions unrelated to ascertaining their identity I cannot conclude that their privacy was arbitrarily interfered with. In the case of C12 this appears to be because he refused to cooperate with the interviewers or participate in the interview.

Finding in relation to C25

254. In the case of C25 she said she was asked the following:

(a) When did I come to Australia?
(b) How did I come to Australia?
(c) Do I have a Chinese passport?
(d) How long I stayed in detention?
(e) What job I used to do outside for living?
(f) Why did not I give my Chinese ID to DIMIA?
(g) How much money I earned in Australia?
(h) How much money I paid to travel in Australia?
(i) Could I give him the contact details of that person who helped me to get a false Thai passport and visa?

The above is the only evidence I have as to the questions she was asked during her interview as I do not have a transcript of her interview. I accept that she was asked these questions. However, I think that all of the above questions may in some way assist in identifying C25. Though some questions may appear to of limited relevance I am not satisfied that as part of a process of questioning, they were of no relevance. I therefore do not find that the manner in which her interview was conducted infringed her right to privacy under art 17(1).

Findings in relation to the balance of the complainants

255. In relation to C6, C18 and C20 I have transcripts of their interviews but the transcripts record very little of the interview. In the case of C6 the transcript is two lines and in the case of the other two complainants the transcripts are only a page long. Accordingly, the transcripts for these complainants contain very little evidence about what was discussed during their interviews.

256. In relation to the balance of the complainants the only evidence that I have about the questions they were asked and the information that they disclosed during their interviews is the following passage from C3's statement:

> They [the MPS officials] asked us whether we had made applications for protection visas and also how much money we had made in Australia, whether we had bought houses in China or sent money back to China and a lot of questions and some detainees refused to answer their questions. They knew my family members details but they asked us to tell them and again.

257. C3 gives only general evidence about the types of questions the complainants were asked. He asserts that all of the complainants were asked whether they made applications for protection visas. This assertion is not supported by the transcripts of the interviews that the Commission does have. On the basis of

the transcripts of the interviews that the Commission does have I find that whilst some of the complainants were asked about protection visa applications, not all of them were, and that in many of the cases where protection visas were discussed, it was not as a result of the MPS officials having directly raised this topic.

258. In relation to the complainants in respect of whom I do not have transcripts or only partial transcripts of their interviews I do not consider that I have sufficient evidence upon which to make any findings about the specific types of questions they were asked or the information they gave. Whilst I can conclude, given the nature of the interviews and on the basis of the transcripts that I have, that they would have been asked for personal information about themselves and their families I cannot conclude that they were asked or disclosed personal information about themselves or their families unnecessary to ascertaining their identity. It may in fact be the case that the privacy of these other complainants was arbitrarily infringed but I unfortunately have insufficient evidence upon which to reach such a conclusion.

Article 10(1) – Humanity and Dignity

259. The obligation arising under art 10(1) of the ICCPR applies in respect of all of the complainants because as they were all in immigration detention they were all 'deprived of their liberty' for the purposes of art 10(1). The only question that arises is whether the manner in which the interviews of the complainants were organised and conducted constitutes a failure to treat them with humanity and respect for their dignity.

Findings in relation to the complainants who had made protection visa applications prior to the interview

260. I find that DIMIA's failure to take adequate steps to prevent or at least minimise the risk of these complainants disclosing or being asked questions about their protection visa applications amounted to a failure to treat them with humanity and respect for their inherent dignity as human beings because:

    (i) DIMIA placed them in a situation where this risk arose;

    (ii) DIMIA knew about the risk; and

    (iii) DIMIA should have been aware that if the risk eventuated it may cause them the following harm:

        (a) it may place them at risk of persecution if they were returned to the PRC (the risk of persecution has been documented in the US Country Report on the PRC and the UNHCR Advisory Opinion); and

        (b) cause them to be anxious and distressed as a result of a fear of such persecution.

261. Knowing the risks faced by these complainants and failing to take adequate steps to minimise those risks shows a disregard for their rights and interests that amounts to a failure to treat them with humanity and dignity.

262. I also find, in the circumstances of this case, that DIMIA's failure to inform them about the documents it had given to the MPS officials and its failure to provide them with an adequate explanation of the purpose of the interviews and the identity of the interviewers amounted to a failure to treat them with humanity and dignity.

263. The absence of an explanation about the documents that were given to the MPS officials contributed to these complainants forming the mistaken view that these officials had been given information about their protection visa applications which caused them to be frightened and distressed. The fear and distress was compounded by the absence of an adequate explanation of the purpose of the interview and the identity of the interviewers. The failure to provide such an explanation amounted to a failure to treat them humanely because:

    (i) DIMIA should have recognised the risk that, in the absence of an adequate explanation about the purpose of the interviews, the role of the MPS officials and the process that had been arranged, the complainants would become unnecessarily anxious and fearful as a result of the interviews;

    (ii) the interviews did cause them to become frightened and distressed; and

    (iii) the absence of an explanation increased the risk of them disclosing information about their protection visa applications.

264. DIMIA should have recognised the risk of these complainants becoming frightened and distressed about the interviews in the absence of an explanation because:

    (i) these complainants were applicants for protection visas who were alleging that they had reasonable grounds to fear persecution in the PRC;

    (ii) the interviews were conducted by PRC officials; and

    (iii) they were going to be questioned about the circumstances surrounding their arrival in Australia and other personal information about themselves and their families.

265. The failure on the part of DIMIA to inform these complainants of the information provided to the PRC officials and the failure to adequately explain the interview process to them further demonstrates a disregard for the rights and interests of the complainants that amounts to a failure to treat them with humanity and dignity.

Findings in relation to C18 and C20

266. In the case of C18 and C20 I do not find that the manner in which their interviews were conducted breached their rights under art 10(1) because:

    (i) as they had not applied for protection visas I do not have any evidence upon which to conclude that DIMIA should have been aware that the disclosure of information by these applicants during their interviews would have had adverse consequences for them; and

    (ii) I have insufficient evidence to conclude that their privacy was breached or that they disclosed any information to the MPS officials that would have had adverse consequences for them.

    Accordingly, whilst the manner in which these complainants were interviewed was still unsatisfactory, for the above reasons, I do not think that it was so unsatisfactory as to amount to a breach of their rights under art 10(1).

Part G: Separation Detention

Evidence

Length of detention and who was detained

267. DIMIA admit that following the interviews the following male complainants were taken to a different part of the detention centre known as the Manning Building where they were held for the following periods of time:

(i) C1 – detained from 16 May 2005 to 31 May 2005 (interviewed on 13 May 2005);

(ii) C3 – detained from 17 May 2005 to 31 May 2005 (interviewed on 17 May 2005);

(iii) C4 – detained from 30 May 2005 to 31 May 2005 (interviewed on 30 May 2005);

(iv) C8 – detained from 17 May 2005 to 30 May 2005 (interviewed on 17 May 2005);

(v) C9 – detained from 16 May 2005 to 31 May 2005 (interviewed on 16 May 2005);

(vi) C10 – detained from 16 May 2005 to 31 May 2005 (interviewed on 13 May 2005);

(vii) C11 – detained from 16 May 2005 to 31 May 2005 (interviewed on 12 May 2005);

(viii) C13 – detained from 16 May 2005 to 31 May 2005 (interviewed on 13 May 2005);

(ix) C14 – detained from 19 May 2005 to 31 May 2005 (interviewed on 18 May 2005);

(x) C15 – detained from 31 May 2005 to 31 May 2005 (interviewed on 31 May 2005);

(xi) C17 – detained from 19 May 2005 to 31 May 2005 (interviewed on 18 May 2005);

(xii) C18 – detained from 30 May 2005 to 31 May 2005 (interviewed on 30 May 2005);

(xiii) C20 – detained from 17 May 2005 to 31 May 2005 (interviewed on 17 May 2005);

(xiv) C22 – detained from 16 May 2005 to 31 May 2005 (interviewed on 16 May 2005);

(xv) C23 – detained from 18 May 2005 to 31 May 2005 (interviewed on 17 May 2005);

(xvi) C21 – detained from 16 May 2005 to 31 May 2005 (interviewed on 13 May 2005);

(xvii) C24 – detained from 30 May 2005 to 31 May 2005 (interviewed on 30 May 2005);

(xviii) C26 – detained from 16 May 2005 to 31 May 2005 (interviewed on 12 May 2005).

Reason for detention

268. DIMIA's response states as follows as to the reason for the separation detention:

> The delegation requested that those clients who had been interviewed be kept away from the general population while the interviews were ongoing. This was requested so that those clients who had been interviewed could not relay the questions asked by the delegation to others. The delegation was briefed on Australia's laws and our obligations to detainees and that arrangement for separation was not a standard operating procedure.
>
> However the delegation insisted on separation and a concern arose that the interview visit may be aborted. Agreement was reached that the protocols adopted for separation during entry screening of unauthorised arrivals would be used.

What were the detainees told about the separation detention

DIMIA's evidence

269. In a letter from DIMIA to the Commission dated 19 March 2008 it states:

> the department also concedes that the clients were not provided with an adequate explanation of the purpose of the detention, the anticipated duration of the detention or the reasons for the conditions of such detention.

Evidence from the transcripts

270. Only the transcript of the interview with C9 records any discussion about the separation detention. None of the other transcripts record any conversation taking place about the separation detention (apart from the detainees relaying what they had heard about it from other detainees). C9 was told as follows (at p. 20 of his transcript of interview)

Female 2:	(inaudible) people who have already been interviewed are being moved to the main building in stage two for a short term stay (English voice).
Female 2:	That is to say, just let you know, those who have been interviewed, later one will be taken to stage two, to stay there for a short while.
Female 2:	There will be someone taking them there now. They will be there for just a short term stay, a few weeks. But they won't be allowed any phone calls or visitors (English voice).
Female 1:	That is to say someone is going to take you there in a minute, to stage two. You are going to stay there for a few weeks, only a few weeks. There, you will be taken there. During that period you are not allowed to make phone calls, just this few weeks. The rest is the same.
	(background voice inaudible)
Female 2:	(inaudible)
Female 1:	That is to say someone is here to take you there. He is going to take you there. You are going to stay there for a few weeks.
	(background voice inaudible)

Conditions in separation detention

Complainants' evidence

271. The complainants allege as follows about the conditions in which they were kept:

(i) the Manning Building was surrounded by a fence and was constantly staffed by security guards;

(ii) the detainees were 'placed in separate rooms. We were isolated in these rooms for 24 hours per day' (C3's statement – [6]). Although in C14's statement he says (at [10]) 'we were located in one building, surrounded by fence and security for 24 hours for 16 days';

(iii) they were not permitted to make or receive any phone calls or faxes;

(iv) they were denied visitors;

(v) in C3's statement he says 'we were denied all communications including talking to other detainees, or a doctor or a nurse or lawyers'. In C14's affidavit he says they were denied communications and that included talking to other detainees from in the fence. He further states '[i]n some cases, most all, were told by GSL officials not to talk to a doctor or nurse' ([14]); and

(vi) meals were taken to the detainees rooms – they were given cold food.

DIMIA's evidence

272. DIMIA advised that as it did not have any written procedures for the detention that took place DIMIA requested that GSL generally follow the Operation Procedure OP 5.1 – Separation Detention; and OP 10.5 – Access to Outside Representatives and Interested Bodies. DIMIA's response does not advise who within DIMIA made this request or precisely what GSL was told nor has DIMIA provided any evidence of what the GSL employees who were working in Manning at the time of the separation detention were told about the conditions of the separation detention.

273. In relation to the two operational procedures that DIMIA states GSL were asked to follow I note the following:

(i) the purpose of the separation detention procedure is to 'maintain the integrity of Australia's protection visa determination process' ([1.1] OP 5.1);

(ii) Clause 4.3.2 of the performance standard (set out in cl. 3 of OP 5.1) provides:

> In order to protect the integrity of Australia's visa assessment process, detainees in separation detention do not, except with the Department's approval:
>
> - Have contact with detainees in open detention;
> - Receive personal visits or have community contacts;
> - Have access to telephone/faxes for incoming or outgoing calls/messages; or
> - Have access to incoming mail.
>
> However, visits and communications between detainees in Separation detention and the Commonwealth Ombudsman or Human Rights and Equal Opportunity Commission are permitted in accordance with the standards applying to other detainees.

(iii) Clause 4.1.3 of OP 5.1 provides:

> Upon arrival in Separation Detention, staff will read from the DIMIA script to explain the reasons for separation detention in a language and terminology detainees can understand. It may be preferable to use an interpreter for this purpose, whether on-site or the Telephone Interpreter Service…Detainees will be given every opportunity to ask questions about their circumstances.

(iv) Clauses 4.2.1 and 4.2.2 of OP 5.1 provide:

> 4.2.1 Whilst accommodated within Separation Detention, except with the written approval of the DIMIA Centre Manager, detainees will **not** be permitted to:
>
> - Have access to detainees in open detention or members of the public
> - Make or receive telephone calls
> - Have access to faxes for incoming or outgoing messages
> - Correspond with people in the Australian community
> - Have access to incoming mail*
> - Have access to a computer with a modem
> - Have access to television, radio, newspapers or magazines
>
> *Correspondence received for detainees located within the separation detention unit will be forwarded to the DIMIA Centre Manager, who will then decide if the mail is to be forwarded to the detainee in question.
>
> 4.2.2 However, detainees **will** be permitted to:
>
> …
>
> - Associate freely with other detainees in Separate Detention…
> - Access the full range of detention facilities and services including…

(v) Neither OP 5.1 nor OP 10.5 provide that a detainee has a right to visits from legal representatives.

274. DIMIA advises in its response that detainees did receive visitors even though OP 5.1 would seem to prohibit this so it appears that OPs 5.1 and 10.5 were not entirely adhered to.

275. DIMIA's response to the specific allegations were as follows:

(i) the Manning Building is a normal accommodation block within Villawood Detention Centre;

(ii) restrictions on meeting other clients were not in place at the time of the separation detention;

(iii) GSL has advised DIMIA that those clients who requested visits while in separation detention received visits – they have provided a table listing visitor dates and the name of the complainants who received visits, they have also provided visitor records for C8 which show that he received one visit from his wife whilst he was in separation detention;

(iv) GSL has advised DIMIA that whilst the complainants were kept in separation detention they were not denied access to medical staff or legal representatives. Further DIMIA in their response say that the International Health and Medical Services (IHMS) 'has notified the department that none of the detainees accessed medical services in the two weeks after they were interviewed';

(v) meals were delivered to the Manning Building and rooms were set up to enable detainees to consume meals and access coffee, tea, juice and prepare food between meal times. DIMIA's response does not indicate whether the food was hot or cold; and

(vi) additional televisions sets and other equipment were given to the detainees.

276. DIMIA did not respond to the allegation that the complainants were not permitted to make or receive any phone calls or faxes.

Impact of separation detention on the complainants

277. C14 and C3 both state that the detainees felt threatened and frightened and they could not eat or sleep because they did not know what would happen to them.

Submissions

278. Ms Byers submitted that the separation detention constituted a breach of art 10(1) of the ICCPR. She submitted it breached art 10(1) because it demonstrated a disregard for the dignity and the physical and mental integrity of the complainants.

279. DIMIA has not provided any direct submissions on this issue.

Findings of Fact

Length of detention and who was detained

280. I accept DIMIA's evidence that following the interviews the complainants listed in paragraph 267 were held in separation detention for the periods identified in that paragraph.

281. Further, based on the information provided by DIMIA, I find that not all of the complainants were separately detained. For example C6 and C25 who were interviewed on 18 May 2005 were never separately detained. Further:

(i) all of the complainants who were interviewed on 12 and 13 May 2005 were not separately detained until 3 or 4 days after their interviews;

(ii) those interviewed on 18 May 2005 were not separately detained until the day after their interviews; and

(iii) C23 was not detained until the day after his interview.

Reason for separation detention

282. Based on DIMIA's response I find that DIMIA's reason for separately detaining these complainants was because the MPS officials had requested them to do so and DIMIA was concerned that if it refused the MPS officials would not proceed with the interviews. I accept DIMIA's evidence that the reason the MPS officials gave for requesting the separation detention was their concern that those detainees that had been interviewed would relay the questions asked by the delegation to the others. I infer from this that the MPS officials were of the view that if the detainees knew the questions in advance then it may frustrate their ability to obtain the necessary information to identify the detainees.

283. I find that the separation detention of the complainants was not reasonably necessary to secure the integrity of the interview process given the following:

(i) DIMIA has not claimed that it thought that separation detention was reasonably necessary to achieve this;

(ii) it is not standard operating procedure to separately detain detainees in such situations;

(iii) DIMIA originally resisted the request for separation detention and had 'briefed [the MPS officials] on Australia's laws and our obligations to detainees and that arrangement for separation was not a standard operating procedure';

(iv) DIMIA permitted the complainants who were in separation detention who requested visitors to have visitors; and

(v) DIMIA did not separately detain all of the complainants – some of the complainants interviewed on 18 May 2005 were never separately detained and several of the complainants were not separately detained until the day after or a few days after their interviews. If DIMIA had real concerns about the separation detention being necessary then presumably the separation detention would have occurred immediately following the interview with each of the complainants.

284. I also find, for the following reasons, that it was not reasonably necessary for DIMIA to have separately detained the complainants simply to ensure that the MPS officials would proceed with the interviews:

(i) if the interviews had not proceeded there were other ways in which DIMIA could have identified the complainants – for example DIMIA officials could have conducted the interviews and could have been briefed by the MPS officials as to appropriate questions to ask; and

(ii) the MPS officials conducted interviews on 12 and 13 May 2005, even though none of the complainants were separately detained until 16 May 2005. If the MPS officials had been intent on not proceeding with the interviews if the separation detention did not take place they would not have conducted any interviews until such time as DIMIA agreed to the separation detention.

What the complainants were told about the separation detention

285. Given DIMIA's admission referred to at [269] above and given the evidence of the complainants on this issue I find that DIMIA failed to give the complainants an adequate explanation about the reason for the separation detention, the duration of the separation detention and the conditions in separation detention.

286. Based on the evidence of the complainants and the evidence of DIMIA as to what the complainants were permitted to do whilst in separation detention I also find that there was considerable confusion amongst the detainees as to what they were and were not permitted to do whilst in separation detention. I find that this confusion was caused by the failure to provide them with an adequate explanation of the conditions and because they were told inconsistent things about what they could and could not do whilst in separation detention.

Conditions in separation detention

287. DIMIA admits and I find that the complainants held in separation detention were moved away from their usual accommodation area to a separate part of the detention centre.

288. I accept DIMIA's evidence that the following were the conditions in separation detention:

    (i) the Manning Building is a normal accommodation block within Villawood Detention Centre;

    (ii) restrictions on meeting other clients were not in place at the time of the separation detention;

    (iii) whilst the complainants were kept in separation detention they were not denied access to medical staff or legal representatives and none of them accessed medical services whilst in separation detention;

    (iv) meals were delivered to the Manning Building and rooms were set up to enable detainees to consume meals and access coffee, tea, juice and prepare food between meal times;

    (v) additional television sets and other equipment were given to the detainees.

289. Based on the visitor records from the detention centre provided by DIMIA I find that the complainants were not prevented from having visitors whilst in separation detention. I do find, however, based on the complainants' evidence and based on the excerpt from the transcript of the interview with C9 set out above at [270] that at least some of the complainants placed in separation detention were told either by GSL staff or DIMIA officers that they were not able to have visitors whilst in separation detention.

290. I do, however, find that the complainants were prohibited from making or receiving telephone calls and facsimiles and making or receiving other forms of correspondence without the prior consent of the DIMIA Centre Manager. Operation Procedures OP 5.1 (Separation Detention and Operational Procedure) and 10.5 (Access to Outside Representatives and Interested Bodies) require such restrictions to be imposed on detainees held in separation detention. Further, DIMIA did not deny this allegation in its response.

291. In summary I find that the complainants held in separation detention:

(i) were moved from their usual accommodation in the detention centre to a different part of the detention centre; and

(ii) they were prohibited from making or receiving telephone and facsimiles and making or receiving other forms of correspondence without the prior consent of the of the DIMIA Centre Manager, a restriction that did not usually apply to their detention;

but

(iii) they were permitted visitors if they requested it;

(vi) they did have access to other detainees;

(v) they were not restricted to their rooms;

(vi) they had access to televisions and other equipment;

(vii) they were given food although some of the food may have been cold; and

(viii) they had access to a kitchen and were provided with facilities to make themselves food and drink.

Impact of separation detention on the complainants

292. I accept the complainants' evidence that being placed in separation detention caused them to feel distressed and frightened.

Conclusions regarding alleged breaches of Human Rights

293. For the reasons discussed below I do not find that the complainants placed in separation detention had their rights under art 9(1) of the ICCPR breached but I do find that their rights under art 10(1) were breached.

Article 9(1) – Arbitrary Detention

294. Relevantly, for the purposes of this complaint, art 9(1) prohibits 'detention' that is 'arbitrary'.

295. In Part D I concluded that art 9(1) can be breached where a person in immigration detention is moved from one part of the immigration detention centre to another part of the centre but only where the move involves a further and serious deprivation of their liberty. In this case the only difference between the conditions of the complainants' detention after they were placed in separation detention is that they were in a different part of the detention centre and they had restrictions placed on their ability to correspond with persons outside the detention centre. Whilst I do not think the move or the restrictions were necessary, given that the complainants were still able to have visitors and communicate with other detainees and had access to television and other amenities I do not think the difference between their usual conditions in detention and the conditions in separation detention were so marked and significant that it constituted a breach of art 9(1).

Article 10(1) – Humanity and Dignity

296. As I have found earlier, all of the complainants were deprived of their liberty for the purposes of art 10(1) by virtue of the fact that they were in immigration detention. The only question therefore that arises is whether any aspect of the separation detention could warrant a finding that DIMIA failed to treat the complainants in separation detention with humanity and respect for their dignity.

297. I find that DIMIA failed to treat these complainants with humanity for the following reasons:

(i) DIMIA unnecessarily moved the complainants away from their usual accommodation and imposed restrictions on their ability to correspond;

(ii) given the following circumstances DIMIA should have realised that there was a real risk the separation detention would cause distress and fear to the complainants:

(a) they were not given any adequate explanation about the reason for the separation detention, the conditions in separation detention or its duration;

(b) the separation detention took place after they had participated in an interview they did not know the purpose of with people they suspected to be Chinese government officials but whose identity they were not entirely certain of; and

(c) the complainants were told inconsistent and in some cases incorrect things about the conditions in separation detention; and

(ii) the separation detention did in fact cause the complainants to feel distressed and frightened.

298. Given the above I find that DIMIA breached the rights of the complainants under art 10(1) of the ICCPR when it placed them in separation detention.

Part H: Recommendations

Remedy sought by the complainants

299. The complainants seek the following remedies:

(i) that they be released from immigration detention under s 48B of the Migration Act; and

(ii) that they each be paid $24,000 in compensation.

300. I do not have the power to grant the complainants the first remedy that they seek. This is only something that can be done by the Minister for Immigration. Further I note that the majority of the complainants have been or are in the process of being released from immigration detention.

301. I consider the claim for compensation below.

Power to make recommendations

302. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.[44] The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.[45]

303. The Commission may also recommend:

(i) the payment of compensation to, or in respect of, a person who has suffered loss or damage; and

(ii) the taking of other action to remedy or reduce the loss or damage suffered by a person.[46]

Compensation

Compensation should be paid to the detainees

304. I am satisfied that DIMIA breached the rights of all of the complainants under either or both (in some cases) arts 10(1) and 17(1) of the ICCPR.

305. Further, as I said earlier, I am satisfied that the above complainants experienced feelings of distress and fear as a result of being subjected to the interviews and as a result of being placed in separation detention. I am therefore satisfied that it is appropriate that compensation be paid to these complainants.

Calculation of compensation

306. In the Commission Report, *Report of Complaint by Mr Huong Nguyen and Mr Austin Okoye Against the Commonwealth of Australia and GSL (Australia) Pty Ltd*,[47] I concluded that, so far as is possible by a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.[48]

307. Compensation for the complainants' distress and fear would, in tort law or unlawful discrimination law, be characterised as 'non-economic loss'. There is no obvious monetary equivalent for such loss and courts therefore strive to achieve fair rather than full or perfect compensation.[49]

308. In unlawful discrimination and sexual harassment cases, which involve a form of a breach of human rights, the courts whilst cautioning against too excessive an award for non-economic loss have also cautioned against awarding too low an amount.[50] The courts have also emphasised that ultimately the amount awarded depends on the facts of each case and is a matter of judgment for the judicial officer hearing the matter.[51] In *Hall v Sheiban*,[52] a sexual harassment case, Wilcox J cited with approval the following statement of May LJ in *Alexander v Home Office*:[53]

> As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution…For the injury to feelings however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.[54]

309. In a range of unlawful discrimination cases and sexual harassment cases the amounts awarded for non-economic loss for hurt, humiliation and distress where there is no finding that the applicant suffered from a psychological or medical illness as a result of the unlawful conduct has ranged from $500 to $20,000.[55] Whilst I am determining the amount of compensation based on the facts of this complaint I do that bearing in mind the quite varied amounts that Australian courts have awarded for actions involving a beach of human rights.

310. In reaching an appropriate figure, I have taken into consideration the following factors:

    (i) That the events did not merely cause the complainants considerable distress but also caused them to be fearful.

    (ii) The exacerbation of that distress and fear caused by the separation detention.

    (iii) The fear and distress diminished over time but would have persisted for a period that would not have been transitory or insignificant.

    (iv) The fact that none of the complainants have suffered any physical injury as a result of the interviews or separation detention.

    (v) There is no evidence that the complainants suffered from any psychological or medical condition as a result of the conduct.

(vi) Most of the complainants have now been granted protection visas so this has, in part, remedied the danger posed to the safety of the complainants who disclosed information about their protection visa applications during the interviews.

(vii) There is no evidence to suggest a claim for loss of earnings or medical treatment costs.

311. Whilst the harm suffered by each of the complainants arising from the interviews and the separation detention may have varied from person to person I find that the differences would not be so significant as to warrant an individual assessment of the harm. Further, as I said above when awarding compensation for non-economic loss courts seek to achieve fairness rather than full and perfect compensation. Accordingly, I have calculated compensation on an equality basis and awarded each of the complainants the same amount in respect of the human rights breaches arising from the interviews and those arising from the separation detention.

312. Taking into account all of the above matters, I recommend that the Commonwealth pay $5,000 in compensation to each of the following complainants who had their human rights breached as a result of their participation in the interviews:

(i) C1;
(ii) C2;
(iii) C3;
(iv) C4;
(v) C5;
(vi) C6;
(vii) C7;
(viii) C8;
(ix) C9;
(x) C10;
(xi) C11;
(xii) C12;
(xiii) C13;
(xiv) C14;
(xv) C15;
(xvi) C16;
(xvii) C17;
(xviii) C19;
(xix) C21;
(xx) C22;
(xxi) C23;
(xxii) C24;
(xxiii) C25; and
(xxiv) C26.

313. I recommend that the Commonwealth pay an additional $4,000 to each of the following complainants to compensate them for the additional distress they suffered as a result of the breaches of their human rights associated with the separation detention:

(i) C1;
(ii) C3;
(iii) C4;
(iv) C8;
(v) C9;
(vi) C10;
(vii) C11;
(viii) C13;
(ix) C14;
(x) C15;
(xi) C17;
(xii) C18;
(xiii) C20;
(xiv) C21;
(xv) C22;
(xvi) C23;
(xvii) C24; and
(xviii) C26.

Additional recommendations

Apology

314. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to each of the complainants to whom I have awarded compensation for the breaches of their human rights identified in this report. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.[56]

Contact with complainants

315. Two of the complainants have been removed from Australia – C1 and C8.

316. I recommend that the Commonwealth undertake all appropriate measures to locate C1 and C8 in order to make payment of the compensation recommended above, as well as to provide them with a copy of this report and an apology.

Conduct of future interviews of immigration detainees

317. Given the risk that such interviews will cause unnecessary distress and agitation to detainees and may result in arbitrary breaches of detainees' privacy they should only be conducted when all other means of ascertaining identity have been exhausted. Further if such interviews are to be arranged DIAC should consider conducting the interviews itself with the assistance of overseas officials, rather than arranging for the overseas officials to conduct them.

318. If DIAC is to arrange for overseas officials to conduct such interviews in the future I would recommend that it consider the following matters which would help address any risk posed by the process:

(i) DIAC should have regard to the UNHCR Representation in Japan's *Advisory Opinion on the rules of confidentiality regarding asylum information* and ensure it acts in accordance with this opinion.

(ii) The overseas officials should give DIAC a list of the possible questions they may ask during the interviews in advance of the interviews and DIAC should review the information they have about the detainees to consider whether the questions are necessary to ascertain identity and even if they are whether the likely responses to the questions (given the information DIAC has on the detainees) would have unduly adverse consequences for the detainees.

(iii) DIAC should inform the detainees who will be interviewed of the purpose of the interviews and the identity of the interviewers.

(iv) There should be clear written guidelines about the manner in which the interviews are to be conducted, the types of questions that can be asked and what is to happen to detainees following their interviews (ie whether they are to be separately detained) prepared by DIAC and given to the overseas officials sufficiently in advance of the interviews so that DIAC can discuss any issues with the overseas officials prior to them being conducted.

(v) At least one DIAC official should be present throughout the interviews and that official must be able to understand what is being discussed and be properly briefed as to what questions are and are not permissible. The guidelines for the interviews should clearly provide the DIAC official with the right to direct the overseas officials not to proceed with an impermissible question and to terminate an interview if necessary.

(vi) The detainees should be permitted to have support people present during the interviews.

(vii) DIAC's standard practice for interviewing detainees which requires detainees' consent to the recording of interviews to be obtained, dual tape recordings to be made and detainees being given a copy of the recording should be followed.

(viii) The detainees should not be separately detained unless DIAC determines that such separation is reasonably necessary. If DIAC does consider it to be reasonably necessary it should:

(a) prepare guidelines in advance of the interviews setting out the conditions of separation detention – no additional restrictions should be placed on the detainees other than those which DIAC considers to be reasonably necessary;

(b) ensure detention staff are informed of the guidelines so that they clearly understand what the conditions are to be; and

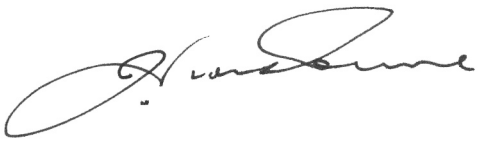
(c) inform the detainees of the purpose of the separation detention, the likely duration and the conditions that will govern their detention.

(ix) If a detainee's English is not sufficiently proficient any explanation provided to them about the interviews or the separation detention should be translated.

DIAC's response

319. By letter dated 11 August 2008, DIAC was requested to advise the Commission whether it has taken or is taking any action as a result of my findings and recommendations and, if so, the nature of that action. DIAC was requested to provide its response by 25 August 2008, and an extension was subsequently granted to 1 September 2008.

320. DIAC has informed the Commission that it proposes to provide a response. However, as my term as President of the Commission is to expire on 8 September 2008, it is necessary to finalise this report. As at the date of this report, a response from DIAC has not been received.



John von Doussa
President
8 September 2008

Annexure A: Functions of the Human Rights and Equal Opportunity Commission

The Commission has specific legislative functions and responsibilities for the protection and promotion of human rights under the HREOC Act. Part II Divisions 2 and 3 of the HREOC Act confer functions on the Commission in relation to human rights. In particular, s 11(1)(f) of the HREOC Act empowers the Commission to inquire into acts or practices of the Commonwealth that may be inconsistent with or contrary to the rights set out in the human rights instruments scheduled to or declared under the HREOC Act.

Section 11(1)(f) of the HREOC Act states:

> (1) The functions of the Commission are:
>
> …
>
> (f) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
>
> (i) where the Commission considers it appropriate to do so-to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
>
> (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement-to report to the Minister in relation to the inquiry.

Section 3 of the HREOC Act defines an "act" or "practice" as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth.

The Commission performs the functions referred to in s 11(1)(f) of the HREOC Act upon the Attorney-General's request, when a complaint is made in writing or when the Commission regards it desirable to do so (s 20(1) of the HREOC Act).

In addition, the Commission is obliged to perform all of its functions in accordance with the principles set out in s 10A of the HREOC Act, namely with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

The Commission attempts to resolve complaints under the provisions of the HREOC Act through the process of conciliation. Where conciliation is not successful or not appropriate and the Commission is of the opinion that an act or practice constitutes a breach of human rights, the Commission shall not furnish a report to the Attorney-General until it has given the respondent to the complaint an opportunity to make written and/or oral submissions in relation to the complaint (s 27 of the HREOC Act).

If, after the inquiry, the Commission finds a breach of human rights, it must serve a notice on the person doing the act or engaging in the practice setting out the findings and the reasons for those findings (s 29(2)(a) of the HREOC Act). The Commission may make recommendations for preventing a repetition of the act or practice, the payment of compensation or any other action or remedy to reduce the loss or damage suffered as a result of the breach of a person's human rights (ss 29(2)(b) and (c) of the HREOC Act).

If the Commission finds a breach of human rights and it furnishes a report on the matter to the Attorney-General, the Commission is to include in the report particulars of any recommendations made in the notice and details of any actions that the person is taking as a result of the findings and recommendations of the Commission (ss 29(2)(d) and (e) of the HREOC Act). The Attorney-General must table the report in both Houses of Federal Parliament within 15 sitting days in accordance with s 46 of the HREOC Act.

It should be noted that the Commission has a discretion to cease inquiry into an act or practice in certain circumstances (s 20(2) of the HREOC Act), including where the subject matter of the complaint has already been adequately dealt with by the Commission (s 20(2)(c)(v) of the HREOC Act).

1 The relevant Department has since been renamed twice and is currently named the Department of Immigration and Citizenship (DIAC). To avoid confusion, I have chosen to refer to the Department as DIMIA throughout this report. DIMIA was the applicable name of the Department at the time of the relevant allegations and at the time the complaint was made to the Commission.

2 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 3 January 1976).

3 A more detailed outline of the Commission's functions in relation to the investigation and conciliation of complaints of human rights breaches against the Commonwealth and its functions in relation to reporting on substantiated complaints that have not been resolved through the process of conciliation is contained in **Annexure A**.

4 HREOC Report No. 39 – *Report of a complaint by Mr Huong Nguyen and Mr Austin Okoye Against the Commonwealth of Australia and GSL (Australia) Pty Limited* (2008), [48]-[49]; HREOC Report No. 35 – *Report of an in inquiry into a complaint by Mr AV of a breach of his human rights whilst in immigration detention,* April 2006, Part 8.2.1; also see HREOC Report No. 21 – *Report of an inquiry into a complaint by six asylum seekers concerning their transfer from immigration detention centres to State prisons and their detention in those prisons* (2002), Part 4.2.

5 HREOC Report No. 39 – *Report of complaint by Mr Huong Nguyen and Mr Austin Okoye Against the Commonwealth of Australia and GSL (Australia) Pty Limited* (2008), [48]-[49]; HREOC Report No. 27 – *Report of an inquiry into a complaint by Ms KJ concerning events at Woomera Immigration Reception and Processing Centre between 29-30 March 2002* (2004), Part 12.

6 United Nations Human Rights Committee, General Comment No. 8 (1982), [1].

7 *Torres v Finland* Communication No. 291/1988 UN Doc CCPR/C/38/D/291/1988 and *A v Australia* Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993.

8 Communication No. 456/1991 UN Doc CCPR/C/51/D/456/1991.

9 Communication No. 833/1998 UN Doc CCPR/C/70/D/833/1998.

10 (2nd edition, 2004), [11.09].

11 Communication No. 265/1987 UN Doc CCPR/C/35/D/265/1987.

12 Ibid, [9.4].

13 HREOC Report No. 24 (2002).

14 Ibid Part **4.4.1.1**. See also HREOC Report No. 18 – Report of an inquiry into a complaint by Mr Duc Anh Ha of acts or practices inconsistent with or contrary to human rights arising from immigration detention (2001), [15.1].

15 *A v Australia* Communication No. 305/1988, CCPR/C/39/D/305/1988, [9.4]; *Spakmo v Norway* Communication No. 631/1995, CCPR/C/67/D/631/1995. See also Concluding Comments Regarding Switzerland (1996), CCPR/C/79/Add.70.

16 *Weeks v United Kingdom Series A,* No. 114, ECHR, 2 March 1987; *Thynne, Wilson and Gunnell v United Kingdom,* Series A, No. 190, ECHR, 25 October 1990; *Amuur v France,* Application No. 19776/1992, ECHR, 25 June 1996; *Aerts v Belgium,* Application No. 25357/1994, ECHR, 30 July 1998; *Erkalo v Netherlands* Application No. 23 807/94, ECHR, 23 September 1998. Cf *X v Switzerland* Application No. 7754/77, ECHR, 9 May 1977.

17 HREOC Report No. 24 – *Report of an inquiry into complaints by five asylum seekers concerning their detention in the separation and management block at the Port Headland Immigration Reception and Processing Centre* (2002), Part 4.4.1.1

18 Communication No. 305/1988 UN Doc CCPR/C/39/D/305/1988.

19 Ibid [5.8].

20 Communication No. 560/1993 UN Doc CCPR/C/59/D/560/1993.

21 Ibid [9.2].

22 Communication No. 631/1995 UN Doc CCPR/C/67/D/631/1995, [6.3].

23 UNHRC General Comment 21, [2].

24 *Cabal and Pasini v Australia* Communication No. 1020/2001 Un Doc CCPR/C/78/D/1020/2001, [7.2].

25 *Walker and Richards v Jamaica* Communication No. 529/1993 UN Doc CCPR/C/60/D/639/1995; *Kennedy v Trinidad and Tobago* Communication No. 845/1998 Un Doc CCPR/C/74/D/845/1998; *R.S. v Trinidad and Tobago* Communication No. 684/1996 UN Doc CCPR/C/74/D/684/1996.

26 [2007] NZSC 70.

27 Ibid [79].

28 Communication No. 74/1980 UN Doc CCPR/C/18/D/74/1980.

29 Communication No. 726/1996 UN Doc CCPR/C/76/D/726/1996.

30 Ibid. Mr Rivas Posada, with whom Messrs Bhagwati and Ando agreed, dissented in the case and found that mere obstruction of access to medical records per se did not breach Article 10(1).

31 See discussion the meaning of the word 'dignity' in a different context in *A, R (on the application of) v East Sussex County Council* [2003] EWHC 167, [86]-[89].

32 UNHRC General Comment 16, [4].

33 Communication No. 488/1992 UN Doc CCPR/C/50/D/488/1992.

34 Ibid [8.3]. Whilst this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.

35 (2nd ed, 2005).

36 M Nowak, UN Covenant on Civil and Political Rights CCPR Commentary (2nd ed, 2005) 380 [7].

37 UNHRC General Comment 16, [1].

38 *IP v Finland* Communication No. 450/1991 UN Doc CCPR/C/48/D/450/1991 – this involved a complaint about disclosure of personal information. Whilst the UNHRC ultimately held that the disclosure did not breach art 17(1) it did not suggest that a disclosure of personal information would not fall within the terms of this article.

39 (1938) 60 CLR 266, 362 per Dixon J.

40 (1992) 110 ALR 449, 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

41 Opened for signature 28 July 1954, 189 UNTS 150 (entered into force 22 April 1954).

42 The importance of taking all reasonable steps to remove illegal immigrants has been recognised by the Privy Council in *Tan Le Lim* [1984] 1 WLR 704. In that case the Privy Council held that the Hong Kong Director of Immigration's power to detain illegal immigrants is subject to the limitation that she must take all reasonable to ensure the removal of an illegal immigrant.

43 Section 3(3) of the HREOC Act provides that a reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.

44 HREOC Act s 29(2)(a).

45 HREOC Act s 29(2)(b).

46 HREOC Act s 29(2)(c).

47 HREOC Report No. 39 (2008), [313].

48 See *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, 239 (Lockhart J).

49 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).

50 *Hall v Sheiban* (1989) 20 FCR 217, 256; *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [156]; *Phillis v Mandic* [2005] FMCA 330, [23]; *Rankilor v Jerome Pty Ltd* [2006] FMCA 922, [41]; *Gilroy v Angelov* [2000] FCA 1775, [105]; *Re Susan Hall; Dianne Susan Oliver and Karyn Reid v A & A Sheiban Pty Ltd;* Dr Atallah Sheiban and Human Rights and Equal Opportunity Commission (1989) 20 FCR 217, [70].

51 *Phillis v Mandic* [2005] FMCA 2, [79]; *Hall v Sheiban* (1989) 20 FCR 217, 256.

52 (1989) 20 FCR 217, 256.

53 [1988] 2 All ER 118.

54 Ibid 122.

55 *Carr v Boree Aboriginal Corp* [2003] FMCA 408; *McMahon v Bowman* [2000] FMCA 3; *San v Dirluck Pty Ltd* (2005) 222 ALR 91; *Font v Paspaley v Pearls* [2002] FMCA 142; *Grulke v KC Canvas Pty Ltd* [2000] FCA 1415; *Cooke v Plauen Holdings* [2001] FMCA 91; *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31; *Escobar v Rainbow Printing Pty Ltd* (No 2) [2002] FMCA 122; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160; *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584; *Gardner v All Australia Netball Association* (2003) 197 ALR 28; *Ho v Regulator Australia Pty Ltd* [2004] FMCA 62; *Howe v Qantas Airways Ltd* (2004) 1888 FLR 1; *Dare v Hurley* [2005] FMCA 844; *Fenton v Hair & Beauty Gallery Pty Ltd* [2006] FMCA 3; *Rankilor v Jerome Pty Ltd* [2006] FMCA 922; *Wattle v Kirkland (No 2)* [2002] FMCA 135; *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81; *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109; *Beamish v Zheng* [2004] 60; *Hughes v Car Buyers Pty Ltd* (2004) 210 ALR 645; *Cross v Hughes & Anor* [2006] FMCA 976; *Hewett v Davies & Anor* [2006] FMCA 1678; *Haar v Maldon Nominees* (2000) 184 ALR 83; *Travers v New South Wales* (2001) 163 FLR 99; *McKenzie v Department of Urban Services and Canberra Hospital* (2001) 163 FLR 133; *Sheehan v Tin Can Bay Country Club* [2002] FMCA 95; *Randell v Consolidated Bearing Company (SA) Pty Ltd* [2002] FMCA 44; *Bassanelli v QBE Insurance* [2003] FMCA 412; *Clarke v Catholic Education Office* (2003) 202 ALR 340; *Power v Aboriginal Hostels Ltd* [2004] FMCA 452; *Hurst & Devlin v Education Queensland* [2005] FCA 405; *Drury v Andreco Hurll Refractory Services Pty Ltd* (No 4) [2005] FMCA 1226; *Vickers v The Ambulance Service of NSW* [2006] FMCA 1232.

56 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

Glossary

Commission – Human Rights and Equal Opportunity Commission

DIAC – Department of Immigration and Citizenship

DIMIA – Department of Immigration and Multicultural and Indigenous Affairs

DIMIA's initial letter to the Commission – letter from DIMIA to the Commission dated 5 July 2007

DIMIA's Response – letter from DIMIA to the Commission dated 27 September 2006, DIMIA's formal response to the first complaint

DIMIA's second response – letters from DIMIA to the Commission dated 14 February 2007 and 22 March 2007, DIMIA's response to the second complaint

DIMIA's third response – letter from DIMIA to the Commission dated 3 December 2007, DIMIA's response to the third complaint

GSL – GSL (Australia) Pty Ltd

HREOC Act – Human Rights and Equal Opportunity Act 1986 (Cth)

ICCPR – International Covenant on Civil and Political Rights

Invitation – written invitation issued by DIMIA to the MPS in relation to the interviews

MPS officials – the officials from the Chinese Ministry of Public Security who conducted the interviews

PRC – People's Republic of China

Refugee Convention – Convention relating to the Status of Refugees

RRT – Refugee Review Tribunal

Separation detention – the detention of some of the complainants in the Manning Building

UNHRC – United Nations Human Rights Committee

UNHCR – United Nations High Commission on Refugees

UNHCR Advisory Opinion – United Nations High Commission on Refugees Representation in Japan's Advisory Opinion on the rules of confidentiality regarding asylum information dated 31 March 2005

The US Country Report on the PRC – The United States Department of State says the following in its Country Report on Human Rights Practices in the PRC for 2004 (released on 28 February 2005)