

CONTRACTUALISM, EXCLUSION AND ‘MADNESS’ IN AUSTRALIA’S ‘OUTSOURCED WASTELANDS’

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I INTRODUCTION

Australia has an appalling history of mismanagement of welfare issues relating to people detained in its immigration centres. How is this possible in the ‘lucky country’ where Australians pride themselves on mateship and giving everyone ‘a fair go’? Theories of contemporary contractualism¹ offer one possible explanation.

Most concepts of the state² assume statehood involves certain functions. This article deals with the way that different facets of the state - especially its market, fortress and security facets - have fused together to manage ‘wasted lives’³ in detention centres in Australia. This fusion of the state has converted ‘illegal outsiders’ (asylum seekers and refugees) into ‘rightless’ *homines sacri*.⁴ My intention is to use contemporary contractualism as the lens through which we can consider how the state has failed to discharge its obligations to detainees under its care. Contemporary contractualism is an ideology that legitimates exclusion by limiting its process to the purchase of outputs rather than the delivery of outcomes.⁵ This is a

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¹ I use the term ‘contemporary contractualism’ here to refer to transactions that can appear contractual in nature but that do not necessarily draw on the principles of contract law as traditionally understood. Governments engaging in this activity by subjugating to private organisations through complex contractual arrangements do not have the protection of privity of contract.

² I use the term ‘state’ to mean the political entity that is Australia.

³ I use the term ‘wasted lives’ as developed by Zygmunt Bauman to refer to the poor, the frail, the disabled who are unwanted and unneeded in modern states because they represent financial and security problems. See Zygmunt Bauman, *Wasted Lives: Modernity and its Outcasts* (2004).

⁴ The notion of *homines sacri*, as developed by Agamben, is used here to mean persons stripped of all human and citizenship rights. See Giorgio Agamben, trans. Frans Daniel Hellen-Roazen as *Homo Sacer: Sovereign Power and Bare Life* (1998).

⁵ For further discussion on the meaning of the term see the essays in Jonathan Boston, *The State Under Contract* (1995).

new way of outsourcing the state's business to profit-making organisations. It allows the state to be insulated from the political and economic consequences of its coercive practices. My focus is on the human consequences of outsourcing the state's immigration business to profit-making organisations.

There is no denying that indefinite immigration detention is a confronting human rights violation issue involving blatant exclusion. However, this article is concerned with the less obviously confronting issue of contemporary contractualism. It is less confronting because of its complexity and opacity. As a system of organising the state, contemporary contractualism has deprived citizens of their direct social contract relationship with the state. For non-citizens, the situation is compounded by the absence of redress available to them against the companies empowered to coerce, confine and oppress them. Contemporary contractualism, characterised by its complex layers of contracts and sub-contracts, governs the process in this new quasi-market of carceral services. As such it is an instrument for the creation of a Kafkaesque situation marked by a sense of impending danger in isolated and troubled detainees. In such situation, neither the citizen nor the detainee has any privity in any of these contracts. They are without locus standi to evoke rights. Immigration detention centres become places of exclusion or 'outsourced wastelands'.

To better understand contemporary contractualism and exclusion requires, in my view, the theorising of the nature of modernity⁶. Such an approach is necessary because exclusion, the construction of *homo sacer* status and the abrogation of human rights are all paradigm illustrations of modernity in motion. The concept of detention centres as wastelands feeds into the broader theoretical context of modernity and contemporary contractualism. In Australia, the running of detention centres is contracted out by the Commonwealth to private organisations (probably to the cheapest tenderer). These activities are repeatedly sub-contracted out. This process results in a multitude of relationships. As the originating principal, the Department of Immigration and Multicultural Affairs (DIMA)⁷ has not succeeded in appropriately regulating, monitoring or auditing the organisations to which it has delegated and deferred certain obligations. Some say the state has failed to meet its responsibilities.

My project is tentative and partial. It aspires to identify the usefulness of new rhetoric about social 'exclusion' or 'inclusion' at the policy development level as a means of combating exclusion and human rights abrogation. As a concept, social exclusion describes why certain groups of people are designated *homo sacer*. It also has the capacity to open up discourse. Social exclusion has a counterpart. One of

⁶ I use the term 'modernity' to refer to the last third of the twentieth century onwards. I prefer not to use epithets like 'high', 'post', 'late' or 'second' to characterise modernity as I see it as a fluid process and do not intend to discuss it in terms of any specific fundamental ruptures with the past like capitalism.

⁷ Until 2006 named the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).

the tasks taken on by this article is to unravel how definitions of social exclusion can be used positively. By deconstructing exclusion we can better understand the challenge of inclusion.

This article has three parts. Since contemporary contractualism is a feature of modernity, the first part describes the contours of modernity. The second part examines the social exclusion/inclusion discourse. My tentative conclusion is that a fluid interpretation of social exclusion could provide a pathway to acknowledgement and action in terms of re-directing policy, even immigration policy. The third part considers why detention centres are a paradigm of exclusion. Both deficiencies in the manner in which Detention Services Providers perform custodial and security functions on behalf of DIMA, and inadequacies of DIMA's overseeing role are considered. Findings in contemporary reports and case law expose the human consequences of contemporary contractualism. My thesis is that inhumane consequences for detainees in Australia's publicly owned, privately run immigration detention facilities are predictable and inevitable.

II MODERNITY, DENIAL AND EXCLUSION

An understanding of the elements of 'modernity' and 'denial' as concepts is necessary to appreciate the nature of detention centre exclusion. The modernising state engages in a constant process of re-invention and balancing of competing facets of its ethos. This is particularly so when it is called upon to deal with social issues. The state must find a balance between its fortress activities (like border control), its security activities (like implementing anti-terror laws and strategies) and its market activities that focus on economic considerations. In immigration detention centres we see convergence of the fortress, market and security facet of the state. Certain aspects of the activities of each facet have attracted criticism.

The state's fortress xenophobic activities, for instance, have been described as 'the reversal of the democratic idea of a state which is transparent and accountable'.⁸ By concealing its wrongs behind 'walls of secrecy, fortified by political censorship', the state places itself beyond the law.⁹ Such an imperative allows suspect 'aliens' to be denied due process protections. It also justifies their subjection to a range of coercive and repressive techniques dressed up by the state as 'security measures'. The fortress state makes overt the synergy between order-building, economic growth and the need to efficiently manage redundant or, more precisely, 'unwanted humans' as waste. Under the safety state, this process appeared humane.

The market activities of the state reveal a state overlaid by the coincidental outsourcing of public services to the private sector through the use of complex contractual arrangements. Subjects are calculated by reference to their revenue

⁸ Jude McCulloch, 'State of Emergency: Secrecy, Transparency and National Security in the Age of Terror' - paper presented at the 'Manufacturing Fear - Who's Afraid in the 'War on Terror?'' Public Forum (13 November 2004) available at <<http://www.civilrightsnetwork.org>>.

⁹ Ibid.

potential or as economic loss generators. This is a swing away from the 'safety state' which was committed to honouring the social contract and duty bound to provide health services to those for whom it assumed responsibility. The state's competing commitments see it downsizing public services in order to generate savings which are used to supplement the cost of the war on terror and on foreigners.

The state's security facet legitimises the progressive fear of terrorism. Indefinite institutionalisation is the modern instrument of choice for dealing with humans as waste in the form of 'unneeded' or dangerous 'others'. Accordingly, it emerges alongside prisons¹⁰ as a dumping ground for asylum seekers or refugees, indeed any suspected unlawful non-citizen, mentally ill or not. Involuntary mental health care policy provides the state with the mechanism to deal with difficult to control, trouble-prone, non-producers. Indefinite detention is the fortress state's prime method of dealing with 'unidentifiable' aliens and suspect terrorists. Old protections once afforded to mentally ill citizens are disappearing behind the opaque walls of detention institutions where security trumps health care and control replaces due process.

The fortress facet of the state relies on fear and anxiety about security to justify inaction. The 'new' politics of indifference is used to articulate the cruel, inhumane and degrading experiences of people with serious mental illness in immigration detention centres. It allows the abrogation of rights to be rationalised and legitimised. Australia's response to the Bush Administration's denial of the wrongs committed at Guantánamo Bay is one glaring example. Humanity and due process are readily traded-off for security or market efficiency.

A Modern Wastelands and Wasted Lives

A number of interrelated theories about modernity provide a useful vocabulary and framework with which to contextualise this discussion. Ulrich Beck's work on the crisis of the state as a consequence of the modernisation of modernity explains the deterioration of the 'safety state'. The safety state was based on promises of security in the form of welfare provided by state institutions, science and technology. For Beck, the safety state is in crisis. State processes of 'reflexive modernisation, detraditionalization and individualization' characterize the state's transformation into a 'risk society'.¹¹ The crisis deepens with the emergence and interpretation of a widening penumbra of unavoidable risks and insecurities induced by the modernisation process itself.¹²

¹⁰ The Immigration Department reportedly confirmed that at least 14 detainees were held in state-prisons. See Natasha Robinson, 'Detainees Languish in Prisons', *The Australian* 1 June 2005, 1.

¹¹ Ulrich Beck, *Risk Society: Towards a New Modernity* (1991) trans M Ritter.

¹² David Goldblatt, *Social Theory and the Environment* (1996) 165.

One of the casualties of these processes has been the legitimacy and utility of state institutions in providing safety, welfare and security to the public. 'Organized irresponsibility'¹³ describes the state's never ending string of promised technical fixes for poverty, homelessness and inequality. The state's inability, intentional or otherwise, to determine the culpability of either individuals or organisations for new risks and dangers accounts for the social explosiveness of reactions to the hazards the state has failed to eradicate.¹⁴ Deepening distrust and the polarisation of the included versus the excluded are by-products of such failure.

Bauman's concept of liquid modernity locates the production of wasted lives as one consequence of the modernisation process.¹⁵ Modernity is a manifestation of the growth in redundant 'superfluous populations of outcasts'.¹⁶ The outcasts are human beings deprived of adequate means of survival because they are 'unneeded, of no use' in a world that is running out of places to put them. In the fortress state, they are described as financial problems (particularly in the case of the poor, the mentally or physically disabled who are jobless) and as security problems (particularly immigrants and asylum seekers) for the political agenda.

Stateless humans are denied citizenship rights, including the right to appropriate care and treatment. In a sense, 'excluded non-citizens' conform to Agamben's notion of the *homo sacer*.¹⁷ The term describes a form of 'bare' life devoid of citizenship rights. Since the concept of sovereignty is integral in the citizen, it creates a fundamental difference between the individual as citizen and non-citizen.

Australian law requires the detention of all suspected non-citizens who are or arrive in Australia without a valid visa.¹⁸ The law makes no distinction between adults and children. Unlawful or unauthorised immigrants by definition are devoid of sovereignty and the rights and guarantees of citizenship.¹⁹

The inclusion of such rights-less lives in the judicial order is solely in the form of their exclusion.²⁰ Detention camps are spaces of exception where humans are reduced to bare lives. Once inside the camps, the detained life is excluded from the polity as a distinctively human life and becomes an object of politics.²¹

¹³ Ulrich Beck, *Ecological Politics in an Age of Risk* (1995) trans Amos Oz.

¹⁴ Goldblatt, above n 12, 157.

¹⁵ Zygmunt Bauman, *Liquid Modernity* (2000).

¹⁶ Bauman, above n 3.

¹⁷ *Homo sacer* (sacred man) is a term of archaic Roman law. The man was 'sacred' in the sense of being accursed.

¹⁸ *Migration Act* (Cth) 1958, ss 14(1), 189.

¹⁹ Jean-Pierre Masse, 'Homo Sacer: Sovereign Power and Bare Life' (8 April 2005) book review of Giorgio Agamben's *Homo Sacer: Sovereign Power and Bare Life* (1998), at <<http://www.libertysecurity.org/article 164.html>>.

²⁰ Agamben, above n 4, 6-9.

²¹ Gary Sauer-Thompson, 'Agamben: The Camps in Political Life' (5 June 2005) book review of Giorgio Agamben *Homo Sacer: Sovereign Power and Bare Life* (1998) at <<http://www.sauer-thompson.com/archives/philosophy/003293.html>>.

Agamben suggests that the 'state of exception' is a paradigm of government. President Bush's 'order' in November 2001 authorised 'indefinite detention' of non-citizens suspected of involvement in terrorist activities. This exceptional 'order', Agamben states, 'radically erases an individual's legal status', producing a legally unidentifiable and unclassifiable being.²² Present-day immigration 'detainees' find themselves in an analogous predicament. They are stateless and rights-less. Neither prisoners nor persons accused, detainees have flexible identities. They live transient lives in temporary, inhumane conditions, warehoused in the archipelago of Australian immigration detention centres, perhaps indefinitely.²³ They are excepted by the sovereign from the protection of positive laws, including human rights.²⁴

Denial rationalises and legitimises the historical and contemporary indifference by the state to the injustices perpetrated upon detainees in dangerous immigration centres.²⁵ For Cohen, 'denial'²⁶ goes beyond an 'unconscious defense mechanism characterized by refusal to acknowledge painful realities, thoughts, or feelings'.²⁷ His model includes conscious processes for coping with personal senses of guilt in response to the suffering of others.²⁸ Cohen's 'agents of denial' give all actors a role in constructing, amplifying and reproducing the human suffering of exclusion. The victims are those against whom wrongs are committed, the perpetrators are those who personally victimise, discriminate against or exploit the excluded. Perpetrators can also include governments that introduce excluding policies.

Cohen's third category of agents is the 'passive bystanders'. They let the wrongs happen. They are individuals who either grow to accept as 'normal' actions that are initially repugnant, deny what they see, or avoid and minimize information about the suffering of others. Techniques of denial, like euphemisms, confuse and render their minds numb. Guilt or anxiety can then be blunted and repressed²⁹ allowing responsibility to be diffused and inaction rationalized.

Occasionally, denial is overcome and acknowledgement creeps into public consciousness. The Cornelia Rau and Vivian Alvarez cases are two such interruptions.

²² Giorgio Agamben, *State of Exception* (2005) 3.

²³ M Augé, *Non-places: Introduction to an Anthropology of Supermodernity* (1995) 78.

²⁴ Bauman, above n 3, 32. See also, for example, Human Rights and Equal Opportunity Commission (HREOC), *A Last Resort? A National Inquiry into Children in Immigration Detention* (2004) Canberra.

²⁵ Bauman, above n 3, 32.

²⁶ Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (2001).

²⁷ *American Heritage Dictionary of the English Language* (4th ed 2000) <http://bartelby.com/61> and 'denial'.

²⁸ Cohen, above n 26, 4. Also John Berger, *Ways of Seeing* (1977).

²⁹ Cohen, above n 26, 15c.

B *Chronicles of Injustice*

The experiences of Cornelia Rau³⁰ and Vivian Alvarez³¹ provide recent instances in which the state has been found to have breached its duty to safeguard the welfare of detainees in Australia's immigration system. Three 2005 reports chronicle the abhorrent treatment of these two women. These are the *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*³² (the Palmer Report), a bipartisan Senate Committee interim report into *The Removal, Search for and Discovery of Ms Vivian Solon*³³ (the Senate Committee report) and the Commonwealth Ombudsman report, *The Inquiry into the Circumstances of the Vivian Alvarez Matter*³⁴ (the Comrie report). The findings in the reports share similar conclusions to those that appeared in a litany of media reports and opinion pieces that exposed the unfolding scandal.³⁵ Together these documents expose Australia's immigration detention system as inept and cruel.

³⁰ Despite having chronic schizophrenia and being visibly unwell, Ms Rau was detained by DIMIA, first in a prison and then in an immigration detention centre, without appropriate psychiatric treatment, as a suspected unlawful non-citizen from March 2004 to February 2005. Much of her detention was spent in isolation units.

³¹ Ms Alvarez, an Australian citizen for 15 years, the former wife of a Queensland bank officer and mother of two boys growing up in Brisbane, was erroneously deported by DIMIA from Australia to the Philippines on 20 July 2001, and left to reside in a hospice for the infirm and dying. Despite her apparent infirmity and brain injury following a fall into a deep drain in a park in Lismore, New South Wales, Ms Alvarez was impetuously removed from Australia after only days of detention at an airport hotel. Ms Alvarez left behind her five-year-old son who had been placed in foster care by the Department of Family Services. Family Services failed to notify missing persons for some five months after Ms Alvarez had failed to pick up her son from child care. DIMIA officers first realised their error in July 2003 but it took almost two years for DIMIA to officially acknowledge the unlawful removal and search for Ms Alvarez so that she could be returned to Australia.

³² Commonwealth of Australia, (July 2005) <http://www.minister.immi.gov.au/media_releases/media05/palmer-report.pdf> 23 September 2005.

³³ Foreign Affairs, Defence and Trade Committee, 'The Removal, Search for and Discovery of Ms Vivian Solon', <http://www.aph.gov.au/senate/committee/fadt_ctte/asylum/report02/index.htm> *Interim Report* (September 2005).

³⁴ Commonwealth of Australia, (26 September 2005) <<http://www.ombudsman.gov.au>> 29 September 2005.

³⁵ See for instance: ABC Television, 'Cornelia Rau Chronology', *4 Corners*, 4 April 2005 <<http://www.abc.net.au/4corners/content/2005/s1335386.htm>> 5 April 2005; and ABC Television, 'Anna's Story', *4 Corners*, 4 April 2005 <<http://www.abc.net.au/4corners/content/2005/s1338239.htm>> 21 April 2005; Kate Geraghty, 'The Lies that Kept Vivian Alvarez Hidden for Years', *Sydney Morning Herald*, 20 August 2005 <<http://www.smh.com.au/news/national/the-lies-that-kept-vivian-alvarez-hidden-for-years/2005/08/19/1124435144969.html>> 21 August 2005; Simon Kearney, 'Deportee's Joy as Sister Ends her Lost Years', *The Australian*, 13 May 2005, 1 and 2; also ABC Television, Tom Iggulden, 'New Information on Woman's Wrongful Deportation', *Lateline*, 6 May 2005 <<http://www.abc.net.au/lateline/content/2005/s1362107.htm>> 8 May 2005.

A more detailed critique of the now DIMA's performance in the Rau and Alvarez cases can be followed elsewhere.³⁶ Suffice it to say here, that the reports are damning of the Department's lack of transparency and accountability for the wrongs committed against detainees.

The question is whether these recent cases and others demonstrate 'exceptional injustices' or are examples of the indiscriminate exercise of unchecked discretionary power and the 'tip' of the some much larger denial 'iceberg'.³⁷ People have different perspectives of whether these are exceptional cases of injustice. For the people concerned, there are no hierarchies of suffering.

Human Rights and Equal Opportunity Commission reports have chronicled the abhorrent practices in detention centres for years. A 2004 Human Rights and Equal Opportunity Commission report, *A Last Resort*, for example, investigated human rights breaches and the adverse consequences of prolonged incarceration of children in immigration detention centres.³⁸ Other contemporary reports and cases³⁹ also raise concerns about DIMA's performance practices and monitoring role in relation to custodial and security functions performed by Detention Services Providers. Some of these are discussed more fully later.

III 'SOCIAL EXCLUSION' A PATHWAY TO INCLUSIVENESS?

A The Idea of Social Exclusion

Social exclusion is a 'somewhat amorphous' term coined in France in the form 'l'exclusé' in the late 1970s.⁴⁰ Despite much analysis directed at exploring different interpretations of social exclusion since then, the term lacks a specific explicit meaning. One might even say that the term is an oxymoron because 'social' and 'exclusion' reflect a different reality. The term 'social exclusion' is a model or platform for inclusion not exclusion.

The term is given to vagueness because it can refer to extremely negative and pervasive social phenomena like poor social networks, lack of civic engagement, children deprived of school, high levels of alcohol or drug use, high crime rates, ill-

³⁶ Lynda Crowley-Cyr, 'Mental Illness and Indefinite Detention at the Minister's Pleasure' (2005) 9 *UWSLR* 53; Ian Freckleton, 'Madness, Migration and Misfortune: the Challenge of the Bleak Tale of Cornelia Rau' (2005) Editorial 12:1 *Psychiatry, Psychology and Law* 1.

³⁷ Michael Naughton, 'How Big is the "Iceberg"? – A Zemiological Approach to Quantifying Miscarriages of Justice' (Spring 2003) 81 *Radical Statistics* 5.

³⁸ Above n 24. The Inquiry found that Australia's immigration detention laws, as administered by the Commonwealth, and applied to unauthorised arrival children, create a detention system that fails to ensure that children are treated with humanity and respect, in contravention of article 37(c) of the Convention on the Rights of the Child.

³⁹ See for instance, Finn J's decision in *S v DIMIA* [2005] FCA 549 (5 May 2005).

⁴⁰ See the Australian Broadcasting Commission's (ABC) transcripts for a Background Briefing program broadcast on 7 February 1999 on Radio National website <<http://www.abc.net.au/rn/talks/bbing/stories/s18970.htm>>.

health, police harassment and so on. There is, however, consensus in the literature⁴¹ and in the social policy field that social exclusion is not about poverty or disadvantage *per se*. Indeed, Marsh impishly proposes that the term 'social exclusion' initially gained currency in European policy because 'its vagueness allowed anti-poverty efforts to progress without having to mention the 'p' word.'⁴²

That being said, some commentators like Jock Young have found that social exclusion has at least four core features that distinguish it from previous notions of poverty or marginalisation. These are as follows:⁴³

- Social exclusion has a multi-dimensional character. More than just an economic problem, it involves a complex web of interrelating and reinforcing dimensions of exclusion in what are considered the 'normal' areas of participation of full citizenship. Social exclusion is as much about political and spatial exclusion as it is about poor access to specific services such as information, health care, housing, policing, security, education and so on.⁴⁴
- Social exclusion is a social, collective phenomenon.
- Social exclusion is a 'global' *systemic* problem: 'global in its causes, local in its impact'.⁴⁵ For Young, social exclusion is an intrinsically dynamic concept and a symptom of the impact of the modernisation of modernity.
- Social exclusion carries with it an imperative to include everyone into the ranks of citizenship. In 'late-modernity', Young proposes that this is evidenced by the constant search for ways to generate opportunities for the socially excluded to be included.

Without any intention to adjudicate on the merits or limitations of Young's approach (other than to comment that his works in this area are an important and valuable contribution to the development of the discourse), social exclusion is presented as a function of the impact of fundamental changes in the 'exclusive world of the last third of the twentieth century' ('late-modernity'). It is a period when terms like 'poverty', 'deprivation', 'vulnerability' and now 'social exclusion' were, and continue to be, used to conceal pervasive instruments of social

⁴¹ For a recent review of the literature on the causes of social exclusion see Jonathan Bradshaw, Peter Kemp, Sally Baldwin and Abigail Rowe, *The Drivers of Social Exclusion: a Review of the Literature for the Social Exclusion Unit in the Breaking the Cycle Series* (September 2004) for the Office of the Deputy Prime Minister, London.

⁴² Alex Marsh, 'Social Exclusion and Housing: a Relationship in need of Elaboration' (Winter 2001) 76 *Radical Statistics* 5.

⁴³ Jock Young, *The Exclusive Society* (1999).

⁴⁴ J Percy-Smith, 'The Contours of Social Exclusion' in Percy-Smith (ed), *Policy Responses to Social Exclusion* (2000); also the Social Exclusion Unit's definition of social exclusion as 'multiple deprivation resulting from a lack of personal, social, political or financial opportunities' <<http://www.cabinet-office.gov.uk/seu/index.htm>>.

⁴⁵ D Byrne, *Social Exclusion* (1999).

oppression. It is a period, for example, when in Australia unauthorised arrivals, especially 'boat people' seeking asylum, were progressively being detained and excluded. Coined 'queue jumpers' by the then Immigration Minister, these desperate people were compulsory detained – at first without the presence of mandatory detention provisions⁴⁶ and then pursuant to an indefinite detention policy and broad legislative provisions.⁴⁷ Soon into the new millennium, the Howard Government introduced the 'Pacific Solution' to further exclude, temporally and physically, unauthorised arrivals into Australia.⁴⁸

The lack of uniformity in the use of the term social exclusion is partly a result of the different ideologies that underpin the various agendas of its users.⁴⁹ Its ambiguity makes it too difficult to measure. Since social exclusion is devoid of a shared agreed meaning, the term becomes meaningless. In this sense, ambiguity provides policy makers with means by which they can legitimately escape or deny their responsibilities. Those responsibilities include setting targets to address critical issues of inequality, poverty, social distress and persistent human suffering.⁵⁰

On the other hand, some decision makers adopt a broader interpretation of the term. In South Australia, for instance, 'social exclusion' is used by the Social Inclusion Unit as 'the cornerstone' that underpins South Australia's entire social policy agenda. The Unit was established in 2002 by the incoming Labour Government. It tasked itself with finding 'real solutions to the State's most serious social problems'.⁵¹ The Unit uses social exclusion as a 'different way of tackling pressing social issues' within specific timelines that 'must be achieved'.⁵² Like Britain's Social Exclusion Unit, introduced by the Blair Government in 1997, the South

⁴⁶ In 1989, the Hawke Labour Government detained an 'influx' of Cambodian 'boat people' who arrived in Australia without authorisation, even though there were no mandatory detention provisions in the *Migration Act* 1958 (Cth).

⁴⁷ In 1992, days prior to a court hearing challenging the legality of 'boat people' who had been detained since 1989, the *Migration Act* was amended to include mandatory detention provisions. The amendments effectively ensured that the courts could not interfere with the period of custody. See, for instance, statements by Gerry Hand, Minister for Immigration, in Commonwealth, Parliamentary Debates, House of Representatives, May 1992, 2370.

⁴⁸ In effect, the Pacific Solution meant that unauthorised arrivals could be intercepted and escorted out of Australian waters to have their asylum applications processed in offshore places like Nauru, leaving the asylum seeker with practically no access to the Australian legal system.

⁴⁹ Young, above n 43; Ruth Levitas, 'Defining and Measuring Social Exclusion: a Critical Overview of Current Proposals' (Summer 1999) 71 *Radical Statistics* at <<http://www.radstats.org.uk/no071/arcicle2.htm>>.

⁵⁰ Boyd Hunter, 'Social Exclusion, Social Capital, and Indigenous Australians: Measuring the Social Costs of Unemployment' (2000) No 204 Centre for Aboriginal Economic Policy Research.

⁵¹ 'Rann Announces Social Inclusion Initiative: a First Act as Premier', *Media Release* 14 October 2000, South Australia Labor Party, Adelaide; and also see (Australian Labor Party 2002) <www.sa.alp.or.au/policy/community/social_inclusion.html>.

⁵² See 'Labor's Social Inclusive Initiative' at <http://www.sa.alp.org.au/policy/community/social_inclusion.html>. Also for a critique of the Unit see Fletcher Farrington, 'Social Exclusion in South Australia, Analysing the South Australian Labor Party's Social Inclusion Initiative' (2001), <www.ssn.flinders.edu.au/geog/2001honours/paper> at 17 March 2005.

Australian Unit pinpoints social exclusion as the principal social ill against which domestic policy must now be directed.⁵³ Its goal is to define 'the route back to inclusion'. The Unit aims to do this by rebuilding a 'fairer and more secure' community in which everyone has the opportunity to 'share in the benefits'.⁵⁴

This last statement is, however, somewhat misleading. While, as a concept, 'social exclusion' would appear to offer certain advantages, these benefits are not shared by everyone living in the State. The wasted lives detained in South Australia's detention centres, like Baxter for instance, are detained by the Commonwealth, which means that they are excluded from the State's laudable ambitions.

C Towards a Fluid Interpretation

The more pivotal or 'proper' question about social exclusion, as Levitas says, is not so much what does the term mean (no-one appears to really know), but 'what is meant by it' and 'by whom'?⁵⁵ Whether reference is made to social 'inclusion' or 'exclusion' is not important. What is important is to progress beyond mere semantics to establish agreed shared meanings that will allow development of meaningful responses to social problems.

A model that allows for the deconstruction of 'denial' of extreme human suffering and injustices through the construction of 'acknowledgement' is critical.⁵⁶ Acknowledgement emphasises inclusion and participation of the marginalised in expressing their experiences, defining their needs and having a say in the decision making process. The object is to develop ways to respond to consequences of exclusion that flow from their position of disadvantage. In the mental health field, for example, the inclusiveness of subjective data has produced important benefits for people with mental illness who are living in the community.⁵⁷

⁵³ For a definition of 'social exclusion' by the British Unit see Prime Minister Tony Blair (8 December 1997, Column 409 UK House of Commons Hansard), also Social Exclusion Unit, *Social Exclusion Unit: Purpose, Work Priorities and Working Methods* (1997) and Australian Labor Party (2002) <http://www.sa.alp.or.au/policy/community/social_inclusion.html>.

⁵⁴ South Australian Labor Party's *Platform for Government*, introduction, <<http://www.sa.alp.org.au/policy/platform/intro.html>>.

⁵⁵ Ruth Levitas, 'The Idea of Social Exclusion' (paper presented at the Social Inclusion Research Conference, Ottawa, March 2003), <<http://www.ccsd.ca/events/inclusion/papers/index.htm>> visited March 2005.

⁵⁶ Cohen, above n 26.

⁵⁷ Project 300 is a Queensland initiative that involved the active participation of former long-term residents of three large tertiary mental health facilities in choosing the accommodation in which they were to be relocated in the community. The study reaffirmed the persistent problem of inaccurate forecasting of support services needed to meet the future housing needs of people with serious mental illness and found that all participants appreciated the opportunity of being involved in selecting their accommodation and when questioned at 6 months and later at 18 months, 94% were 'satisfied' with the accommodation provided which they describe as 'home'. See Queensland University of Technology in collaboration with University of Queensland, 'Evaluation of Project 300', *Progress Report No 5 (Housing for Clients: June – Dec 1999)* February 2000, 9.

The adoption of an inclusive approach takes the focus off exceptional cases, allowing more *routine* denials of injustice to be included in an analysis of social phenomena. Such a fluid approach to the idea of social inclusion in policy development might allow the experiences of detainees, as a consequence of their exclusion, to be taken into consideration in the development of policy changes. Detainees experience a complex, multi-dimensional web of linked and mutually reinforcing problems. These include inappropriate health care services, a lack of family or community support, poor access to information and to an interpreter for those who do not speak English, poor access to legal and security services, and so on. Such deficiencies act to escalate their marginalization and exclusion.

By acknowledging the experiences of detainees as a species of social exclusion, then indefinite detention can be discussed within the scope of disadvantage generally. This takes us beyond the search for ‘causes’ of a ‘discrete problem’ or ‘phenomenon’ that blames governments, individual failings or a combination of these⁵⁸ at the structural or individual level.⁵⁹ The Centro de Estudos para a Intervenção Social advocates viewing social problems through the social exclusion lens because that allows non-monetary experiences of the excluded to be considered in the development of responses and pathways out of exclusion.⁶⁰ Such an approach allows for an analysis of, for instance, consequences of discrimination, trauma and dispossession,⁶¹ or the skills and support required to engage in effective processes of response to social problems.⁶²

Though the path towards inclusiveness and reduced inequality is not well defined by terms like social exclusion, such ideas are undoubtedly movement in the right direction. As the Australian Housing and Urban Research Institute (AHURI) point out, ‘social exclusion’ is a means of stressing interconnectedness of deprivation with other problems. Governments can then develop ‘multi-agency’ and ‘joined-up policy’⁶³ approaches aimed at the sources of social problems.⁶⁴ The AHURI

⁵⁸ J Neale, ‘Homelessness and Theory Reconsidered’ (1997) 12, (1) *Housing Studies*, 47-61; S Fitzpatrick, P A Kemp and S Klinker, *Single Homelessness: an Overview of Research in Britain* (2000). Studies have found that macro-level factors like unemployment and the affordability of housing have been the most important drivers of the overall level of homelessness. See, for instance, P A Kem, E Lynch and D Mackay, *Structural Trends and Homelessness: a Quantitative Analysis* (2001).

⁵⁹ Catherine Robinson for the Australian Housing and Urban Research Institute, ‘Understanding Iterative Homelessness: the Case of People with Mental Disorders’ (July 2003) 12.

⁶⁰ Centro de Estudos para a Intervenção Social, ‘Non-Monetary Indicators of Social Exclusion, Final Report (1996) 4-6, <<http://europa.eu.int/comm/eurostat/research/supcom.95/02/result/result02.pdf>>. CESIS was contracted in 1995 by Eurostat (the Statistical Office of the European Communities) to research the identification of ‘Non-monetary indicators of poverty and social exclusion’.

⁶¹ Anne Coleman, ‘Sister, it happens to me every day: an exploration of, and responses to, Indigenous women in Brisbane’s inner-city public spaces’ (Queensland Government and Brisbane City Council, 2000), <<http://www.datsip.qld.gov.au/pdf/sister.pdf>>.

⁶² Jeanne Moore, ‘Health and Home for Homeless People in Transition’ (2000) 15 *Reviews on Environmental Health* 135.

⁶³ The term ‘joined-up policies for joined-up problems’ was developed by the Social Exclusion Unit based in the Cabinet Office of the UK Prime Minister in 1997.

considers the term to be most useful if used to 'present a set of ideas about social phenomena and the processes leading to disadvantage'.⁶⁵

The remainder of this paper considers how contemporary contractualism compounds exclusion. Contractualism is an instrument for the alleged enhancement of the efficiency of public management. My argument concludes that it is instead efficient for waste management and profit-making out of the suffering of others.

IV EXCLUSION AS A CONSEQUENCE OF CONTEMPORARY CONTRACTUALISM

For-profit private health service providers have long attracted criticism in Australia and abroad.⁶⁶ Agency theory, or more correctly certain aspects of agency theory,⁶⁷ helps to explain how, in the 'contracting (out)' state,⁶⁸ legally binding performance agreements for short-term outputs are stressed as superior to the more traditional bureaucratic structures designed to produce longer-term outcomes based on social justice, equity and fairness.⁶⁹

This form of principal-agent contract is a product of the New Public Management process.⁷⁰ It occurs when one party (the principal) uses a contract to allocate rights and responsibilities to another party (the agent) to carry out a duty for which the principal would otherwise be responsible.⁷¹ In the case of immigration detention service provision in Australia, DIMA is the principal and Global Solutions Limited (Australia) Pty Ltd (GSL) is the agent. GSL is duty bound to provide a comprehensive range of day-to-day 'detention services' like security, education and recreational services. Such services are understood in this model as outputs. They also include specific services like the provision of mental health services for detainees.

⁶⁴ Kathy Arthurson and Keith Jacobs, 'A Critique of the Concept of Social Exclusion and its Utility for Australian Social Housing Policy' for Australian Housing and Urban Research Institute (paper presented at the UK Housing Studies Association Conference, Bristol, September 2003).

⁶⁵ Ibid.

⁶⁶ For an informative discussion on key problems with outsourced detention services in the US see Paul von Zielbauer 'Private Health Care in Jails Can be a Death Sentence', *New York Times*, 28 February 2005, at <<http://www.nytimes.com/2005/02/27/nyregion/27jail.html>>. Despite criticism from judges and sheriffs, lawsuits from inmates' families and whistleblowers, condemnation from federal, state and local authorities and millions of dollars in fines and settlements, Prison Health Services continues to win lucrative jail contracts across America.

⁶⁷ The key work in this field is M Jensen and W Mecklin, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305.

⁶⁸ Paul Havemann, 'Modernity, Commodification and Social Citizenship' (1997) 1 *Yearbook of New Zealand Jurisprudence* 17.

⁶⁹ Glyn Davis and Margaret Gardner, 'Who Signs the Contract? Applying Agency Theory to Politicians' in Jonathon Boston (ed), *The State Under Contract* (1995).

⁷⁰ David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1992).

⁷¹ John Alford and Deidre O'Neill, *The Contract State* (1995) 15.

Typically, principal-agent contracts will involve the delegation of some control, management and decision-making power to the agent. Such contracts are typically characterised by each party attempting to maximise his or her self-interest. Also, agents have information advantages over principals because they know how well they can perform their duties.⁷² It is precisely because of the presence of conflicting interests and information asymmetry that principals must devise contracts that can ensure agents meet their obligations. In the absence of such contracts, there are no real incentives to motivate an agent to act in a way that benefits the principal.

Where the outcome of the contract is the only source of information available to the principal about the agent's performance, then the principal may seek to reduce the information asymmetry and the risk of opportunistic behaviour by 'actively' monitoring. Although monitoring yields additional information on the agent's performance, it involves additional costs. Hence, the relative efficiency of any principal-agent contract typically relies upon a mixture of incentives, monitoring and risk-sharing.⁷³

Where there are multiple sub-agents acting, ultimately, for one principal, and the output is unobservable, efficiency becomes more difficult to achieve. Additional monitoring of all the agents by the principal is necessary but is not always achievable.⁷⁴ In such cases, risks of inefficiency increase and those whose lives are ultimately put at risk by an inefficient immigration detention system are the detainees. In the immigration detention field, principal-agent arrangements between the state and private Detention Service Providers create serious problems, especially for detainees.

A Problems with Agents Meeting their Obligations

Under its contractual relationship with DIMA, GSL must meet specified Immigration Detention Standards in the performance of its contracts. However, GSL has long been the subject of serious allegations of detainee abuse and violations in breach of its contractual obligations. For instance, in 2000 GSL (formerly Australian Correctional Management Pty Ltd (ACM)) was publicly named in allegations of negligence, misconduct and mismanagement of detainee complaints. The organisation was accused of negligence after it failed to report claims of child sexual abuse in Woomera Detention Centre in South Australia.⁷⁵ This raised questions about legal proceedings against DIMA. Yet, despite such

⁷² Jonathan Boston, 'Inherently Governmental Functions and the Limits to Contracting Out' in Boston (ed), above n 69, 100-1c.

⁷³ Bronwyn Howell, *Health Sector Failures in New Zealand: Act of God, Act of Man or Inadequacies in Contract Design* (2001) 7-8.

⁷⁴ Ibid.

⁷⁵ Matthew Spencer, 'Penalty "Forced Cover-up"', *The Australian* 22 November 2000, 1; also Elisabeth Wynhausen, 'At the Mercy of Private Guards' in the Inquirer section of *The Weekend Australian* 11-12 June 2005, 22.

allegations, contractual arrangements with the company were renewed in 2002 under its more expansive name 'Global Solutions Ltd'.

GSL's competence to care for detainees was again questioned in 2004 in a report that investigated the transfer of five detainees from Maribyrnong Detention Centre to Baxter Immigration Detention Facility. The Hamburger Report (so named after the investigating officer)⁷⁶ found that GSL officers who planned and executed the transfer lacked appropriate training. Hence, the officers failed to act in accordance with good practice. This was found to be the case despite the presence of a generally sound, DIMIA approved, Operational Procedure to govern the conduct of detainee transfers and escorts.

Immigration Detention Standards and GSL's own *External Transport and Escort Services Generic Operational Procedure No 12.5 and 12.11* were violated. The outcomes for detainees included the following:

- Appropriate medical assessment and/or treatment was not provided to detainees who may have sustained injuries when GSL officers applied force prior to loading them into the escort van.
- Detainees were denied basic amenities including food and fluid, access to toilet facilities, personal privacy, rest and exercise, and an interpreter service for those who could not speak or understand English.
- Detainees were humiliated and treated in an inhumane, unsafe and undignified manner.⁷⁷

Complaints made by detainees were not properly investigated by GSL officers. This was a further breach of GSL's own procedural requirements. The company failed to prepare proper incident reports following the application of force and mechanical restraints. Incident reports that were prepared were found to be 'totally inadequate and conflicting in content'. This made it 'impossible' for GSL officers to defend their actions or 'to verify exactly what happened'.⁷⁸

Even the vehicle used in the transfer was found to be inappropriate. It had design faults (including inadequate air-conditioning) which made it 'totally unsuitable for the task' of transporting detainees.⁷⁹ This 'was compounded by the lack of

⁷⁶ Knowledge Consulting, *Findings and Recommendations from Report of Investigation on Behalf of DIMIA Concerning Allegations of Inappropriate Treatment of Five Detainees during Transfer from Maribyrnong Detention Centre to Baxter Immigration Detention Facility* (17 and 18 September 2004). The investigating officer was Keith Hamburger AM.

⁷⁷ Ibid 4.

⁷⁸ Ibid 9.

⁷⁹ Ibid 5.

professionalism and competence displayed by all GSL staff involved' in the transfer procedure.⁸⁰

DIMA's monitoring practices were also criticised. Its practice of placing DIMA officers with administrative or clerical backgrounds in positions that involve the monitoring of custodial and security functions performed by GSL was inappropriate.⁸¹ Had an appropriately experienced DIMA officer been monitoring the escort, serious deficiencies in the planning by GSL would have been exposed prior to the commencement of the transfer.⁸² This means that the inhumane treatment and 'unjust and adverse impacts' experienced by the detainees could have been averted.

The report made twelve recommendations. The most relevant in terms of this discussion are as follows:

- GSL urgently review internal audit and compliance systems and procedures at each Detention Centre and Facility and report upon this review to DIMIA (recommendation 8).
- In light of GSL's non-compliance with Generic Operational Procedures, DIMIA conduct an intensive program of unannounced audits of all Detention Centres and Facilities of GSL's performance (recommendation 9).
- DIMIA and GSL, as a matter of urgency, review and enhance their respective detainee complaint handling procedures (recommendation 10).
- UADD give high priority to its current review of governance of the Detention Services Contract (recommendation 12).

B Problems with Monitoring Sub-contractors: the Mental Health Services Example

The problems of monitoring the provision of services in complex contractual arrangements such as those used in immigration detention are amplified with every layer of sub-contracts. The provision of mental health services in Australia's immigration detention centers provides a useful example of the consequences of these types of arrangement.

The link between long-term detention and the deterioration of the mental health of detainees is well documented in Australia's mental health and human rights literature, reports and case law.⁸³ Despite such warnings and documented criticisms

⁸⁰ Ibid 9.

⁸¹ Ibid 8.

⁸² Ibid.

⁸³ See Zachary Steel and Derrick Silove, 'The Mental Health Implications of Detaining Asylum Seekers' (2001) 175 *Medical Journal of Australia* 596; HREOC, 'A Last Resort?' above n 17; HREOC, 'Those who've come across the seas: The Report of the Commission's Inquiry into

of GSL's general service provision practices, DIMA continues to engage the company to provide health care services to detainees. Elaborate outsourcing arrangements are used to do so. Such arrangements are the subject of progressively intense criticism. This time the focus of criticism is on systemic defects in the manner in which mental health services are provided in Australia's immigration detention centres - in particular, the Baxter Detention Centre in South Australia.

As part of its services provision role at Baxter, GSL agreed to ensure that detainees receive proper preventative and remedial primary health care services. To do so, at least in 2004, GSL engaged two companies: Professional Support Services (PSS) which provided psychological care and International Medical Health Services (IHMS) which provided general medical services. Actual medical and psychiatric services were in turn sub-contracted out by IHMS to other private organisations. The contract between DIMA and GSL contemplates that DIMIA is to maintain its own staff onsite at Baxter. The DIMA staff perform monitoring and auditing functions so as to ensure GSL complies with its contractual obligations and standards. This is the process used by DIMA to ensure the needs of detainees are met. A string of cases and reports have now established that appropriate mental health services were not made available to detainees by GSL or its sub-agents.

In 2005, Finn J in *S v Secretary, DIMIA* delivered a damning decision that exposed the consequences of complex outsourcing arrangements. The Federal Court found that two vulnerable Baxter detainees, S and M, were not given appropriate mental health care services to meet their special needs. These men were hunger strikers who were suffering from severe depression and anxiety following a roof-top protest during their detention. The men were not effectively managed by medication at Baxter. Consequently, they were found to be at risk of self-harm (suicidal). Notwithstanding, both men were denied inpatient assessment and treatment at a mental health service.

Finn J found that GSL, as DIMIA's surrogate in this matter, had failed to audit the 'inadequate' and 'poorly functioning mental health care service' provided by its agents IHMS and PSS.⁸⁴ DIMIA's failure to properly monitor GSL's practices and procedures or to audit the company in order to ensure that it met its contractual obligations was also firmly criticised.

In finding that DIMIA had breached its duty of care to Baxter detainees, Finn J summed up the situation as follows:

the Detention of Unauthorised Arrivals' (1998); *S v Secretary Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549 (5 May 2005); Australian Psychological Society, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Administration and Operation of the Migration Act 1958* (26 August 2005) 2; Kevin O'Sullivan and Aamar Sultan, 'Psychological Disturbances in Asylum Seekers Held in Long Term Detention: a Participant Observer Account' (2001) 175 *Medical Journal of Australia* 593, 594.

⁸⁴ *S v Secretary Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549 (5 May 2005), [221] and [237].

... the Commonwealth had to ensure both that the mental health care services so provided were reasonably designed to meet the mental health care needs of Baxter's detainees and that the requisite level of mental health care was in fact being provided and with reasonable care and skill. To do this, one would have thought that it was imperative that the Commonwealth conduct regular and systematic performance audits of the providers of its psychiatric and psychological service providers, the more so as (a) the extended chain of contracting for service provision left the Commonwealth in no legal relationship with, and remote from, the service providers; and (b) service provision itself was fragmented between various, uncoordinated separate providers.⁸⁵

The state's duty to ensure, through its instrumentalities, that appropriate care is taken of those who are under its supervision and control is non-delegable.⁸⁶ Such a duty arises in negligence where one person undertakes the care, supervision or control of another 'in circumstances where the person affected might reasonably expect that due care will be exercised'.⁸⁷ Detainees, Finn J points out, are especially dependent because 'without freedom and without capacity to provide for their own needs, special or otherwise' they are vulnerable individuals.⁸⁸

Hence, such a duty must also take account of the very 'distinctive outsourcing arrangements that the Commonwealth has been prepared to accept for the provision of health care services'.⁸⁹ By failing to oversee, monitor or investigate the provision of psychiatric and psychological services that GSL was contracted to supply, DIMIA allowed Baxter detainees to be unlawfully denied appropriate mental health treatment and care.⁹⁰ Such system failures were held not only to have 'put the Commonwealth in continuing breach of its duty' to detainees, but also to have 'exacerbated the mental illnesses from which they suffered'.⁹¹

In spite of such findings, S and M had only requested an injunctive order for their release to a mental health service so that appropriate services could be accessed. By the time the court heard the matter, Baxter had already released the men into the care of South Australia's Mental Health Services. None-the-less, Finn J's eloquent decision clearly exposes the indifference of DIMIA/DIMA and the incompetence of those making decisions about the treatment of detainees warehoused in privately run immigration detention centres. Most probably the decision has been highly influential in wearing down resistance by the state in acknowledging its responsibility in terms of the wrongs committed against detainees.

⁸⁵ Ibid [220]-[221].

⁸⁶ *Kondis v State Transport Authority* (1984) 154 CLR 687; *S v Secretary, Department of Immigration Multicultural & Indigenous Affairs* [2005] FCA 549 (5 May 2005).

⁸⁷ Per Mason J in *Kondis v State Transport Authority* (1984) 54 CLR 679, 687; *Commonwealth v Introvigne* (1982) 150 CLR 258, 271.

⁸⁸ *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549 (5 May 2005), [210].

⁸⁹ Ibid [211].

⁹⁰ Ibid [163].

⁹¹ Ibid [214] and [257]-[262].

C Limits to 'Contracting Out'

It should come as no surprise that the types of breach by DIMA and its agents as exposed in contemporary immigration detention reports and cases keep re-occurring. Australia neither has an 'independent' body dedicated solely to monitoring its immigration detention facilities nor an external organisation that has power to compel DIMA to change its detention practices where warranted. Instead, DIMA sets its own standards (Immigration Detention Standards), policies and procedures and conducts its own monitoring of detention service provision. All measures used to assess the quality of detention services are set by DIMA, a state instrumentality.

Compliance with quality assurance procedures, also set by DIMA, only provides an indication of the quality of services provided by its agents, and little more. Without an independent monitoring or auditing process, the state cannot access information necessary for it to ascertain (on a generic level) the performance and service quality of agents and sub-agents selected to act on its behalf. Hence, the risk of deterioration of the physical and mental health of detainees remains unassessed.

Since detainees have no contractual rights with any of these actors, they have no ability to directly influence the content of immigration detention standards or the quality of the services they receive. They cannot specify requirements, provide incentives or share risks, even though they bear the costs of inadequate performance.⁹²

The then DIMIA's ongoing neglect to institute a system of independent review of services, of auditing and monitoring was heavily criticised in the Palmer and Comrie reports. The outcome of such failures, especially on the mental health of detainees, was highlighted by the Royal Australian and New Zealand College of Psychiatrists (RANZCP) in its submissions to the Senate Legal and Constitutional References Committee's 'Inquiry into the Administration and Operation of the Migration Act'. Apart from DIMIA's inadequate mental health staff, inappropriately trained supervisory staff, and inadequate capacity to review and monitor biological treatments, the RANZCP had the following to say about the mental health services provided in immigration detention centres:

The use of inappropriate behavioural management techniques, including solitary confinement is of great concern to the RANZCP. These techniques are not considered to be standard treatment of behavioural disturbance resulting from mental illness, and are not acceptable to international psychiatric bodies. Brief uses of low stimulus environments are only used as part of overall comprehensive treatment of mental illness. The use of antipsychotic medications for behavioural control is inappropriate. We are also concerned that the environment of the detention centre

⁹² Howell, above n 73, 24.

creates a culture which perceives disturbed behaviour as deliberately disruptive, rather than a symptom of illness.⁹³

In relation to the sub-contracting of detention services, the RANZCP submitted that a 'key factor in the deficient treatment of mental illness in detention centres' has been the separation of the mental healthcare of detainees from the mainstream mental health system without a 'formalised arrangement' between the two organisations.⁹⁴

DIMA's neglect to institute detailed regulations or a code of conduct specifically to guide those working on contract for DIMA and who are engaged in the long-term detention of people who have or may develop a mental illness exemplifies the insidious nature of unfettered discretion in detention centres.

The judiciary has recurrently levelled criticisms at DIMA for its failure to make detailed regulations for detention centres. The Full Federal Court in *Secretary, DIMIA v Mastipour*, for instance, considered that the failure to make regulations which purport to regulate the manner and conditions of immigration detention necessarily resulted in uncertainty as to what powers and obligations applied in detention centres.⁹⁵ Further, in *Behrooz v Secretary, DIMIA/Gleeson CJ* commented on the possible liability of those who manage or are employed in detention centres and who fail to comply with the duties imposed on them by law.⁹⁶

The government-appointed Palmer inquiry is now said to have over 200 cases of possible wrongful detention to investigate.⁹⁷ On 9 February 2006, Immigration Minister Amanda Vanstone revealed that another 'very tragic case' involving the wrongful detention of a person suffering mental illness was among the approximately 200 cases being investigated by the ombudsman.⁹⁸ On 1 March 2006, the Commonwealth Ombudsman's damning report was tabled in Federal Parliament, criticising the immigration system for the lengthy detention of two mentally ill men who could not be identified by incompetent officials.⁹⁹

⁹³ Royal Australian and New Zealand College of Psychiatrists, *Submission to the Senate Legal and Constitutional References Committee into the Administration and Operation of the Migration Act 1958* (29 July 2005) 3.

⁹⁴ *Ibid.*

⁹⁵ See, for instance, *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* (2004) 207 ALR 83 [2] and [8].

⁹⁶ (2004) 208 ALR 271 [21]. See also the reasons of the High Court in *Sanders v Snell* (1998) 196 CLR 329.

⁹⁷ Margot O'Neill, 'Immigration Official Gives Insight into Department', *ABC Lateline*, 13 June 2005, TV broadcast transcript at <<http://www.abc.net.au/lateline/content/2005/s1391140.htm>>.

⁹⁸ Michael Gordon, 'Vanstone Confesses to "Another Rau"', *The Age* (Melbourne), 9 February 2006, 1.

⁹⁹ Andra Jackson, 'Two More "Lost" in Detention System', *The Age* (Melbourne), 3 March 2006, 1.

V CONCLUSION

The modernisation process of the fortress/market/security state involves the constant erosion of the state as a bastion for Rule of Law governance. This is particularly evident in Australia, which has no bill of rights with which to benchmark international human rights standards against local practices. Australia's detainees are, as Agamben puts it, an 'object of pure de facto rule' that is removed from the law and from judicial oversight.¹⁰⁰

Contemporary contractualism is simply an ideology that legitimates inaction by limiting its process to the purchase of outputs rather than the delivery of outcomes. Relationship management units like DIMA evaluate performance of obligations as they appear on paper instead of evaluating outputs in terms of human impact that falls on those who have no privity of contract. In this way, it fails detainees who are in its care. Support for this proposition can be found in the 2005 Palmer, Comrie and Senate Committee Reports which focus on the then DIMIA's dysfunctional management and technical fixes rather than the effectiveness and efficiency of good public governance.

The usefulness of new rhetoric about social 'exclusion' or 'inclusion' at the policy development level may well be doomed at the implementation level. It is precisely because the term 'social exclusion' produces acute ambiguity, that it is vulnerable to strict interpretation. Accordingly, it risks becoming a euphemism for inaction under the banner of state-led 'social inclusion'. Yet, it can also be used ostensibly in policy discourse to allow development of strategies that overcome exclusion. Unless there is a change in culture and shift away from an actuarial cost-effective model used by the state to identify and respond to exclusion and injustice, little is likely to change. Quantitative data can only offer up a measure for the cost of managing the problem instead of addressing its wrongs. Qualitative data allows the subjective to enter the discussion and acknowledgement of human suffering to begin.

It is uncertain how the social transitions or transformations of modernity will impact upon the likelihood that marginalised actors like immigration detainees will become better equipped to escape the 'destinies' that flow from their position of disadvantage. Acknowledging and accepting the permanent need to assist 'redundant' or 'wasted lives' to survive is, however, only a part of the problem.¹⁰¹ Where will these persons be accommodated? 'Human waste' - especially those who are mentally ill, poor and without family or sponsors to assist them in assimilating into Australian life - are too easily excluded from the consumer game. They become non-players, superfluous and unwanted.¹⁰² Their rights as humans to appropriate mental health care both during their detention or while living in the community must be acknowledged and made available.

¹⁰⁰ Agamben, above n 22, 3-4.

¹⁰¹ Bauman, above n 3, 13.

¹⁰² Ibid, 14.

What remains to be seen is whether there is room in the DIMA machinery for a more humane and dignified approach.