

# “Between a Rock and a Hard Place”: Australia’s Mandatory Detention of Asylum Seekers

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## **Abstract**

*For fourteen years Australia has detained asylum seekers arriving unlawfully in its territory. It also intercepts asylum seekers arriving in the territorial waters, detaining them in third countries and preventing them from seeking refugee status in Australia (the “Pacific Solution”). This paper traces the development of the policy, its current implementation, the justification employed by the government for maintaining it, and its legality under international law. On examination of these issues, it is evident that the justification for the mandatory policy is flawed; that the costs of the policy – in terms of the physical and mental well-being of asylum seekers themselves, and the social and financial impact on the Australian community – are too great, and it puts Australia in breach of its obligations under international law. However, the government has not canvassed alternatives to the mandatory detention policy and has no intention of changing it. This leaves asylum seekers who enter Australian territory unlawfully literally and figuratively between a “rock and hard place.”*

## **Résumé**

*Depuis 14 ans l’Australie a eu pour politique de détenir les demandeurs d’asile qui arrivent illégalement sur son territoire. Il intercepte aussi les demandeurs d’asile qui pénètrent dans ses eaux territoriales, les détenant dans des pays tiers et les empêchant de revendiquer le statut de réfugié en Australie (la « solution du Pacifique », comme on l’appelle). Cet article retrace le développement de cette politique, la manière dont elle est présentement mise en œuvre,*

*les raisons évoquées par le gouvernement pour justifier son maintien, et sa légalité au regard du droit international. Lorsqu’on examine ces questions de près, il devient clair que la justification offerte pour cette politique obligatoire comporte des lacunes ; que les coûts de la politique – en terme du bien-être physique et mental des demandeurs d’asile, aussi bien qu’en terme de l’impact social et financier sur la société australienne – sont trop élevés, et qu’elle place l’Australie en position de violation de ses obligations vis-à-vis du droit international. Cependant, le gouvernement n’a pas exploré les alternatives possibles à la politique de détention obligatoire et n’a aucunement l’intention de la changer. Ainsi, les demandeurs d’asile qui entrent illégalement sur le territoire australien se retrouvent quasiment coincés.*

## **Introduction**

In Australia, freedom from arbitrary detention is a fundamental right derived from the common law.<sup>1</sup> Yet for fourteen years, Australia has enforced a policy that requires any person who arrives or remains in Australian territory unlawfully<sup>2</sup> to be detained until either any application for a visa is finalized<sup>3</sup> or they are removed from the country. Among those detained<sup>4</sup> are asylum seekers arriving unlawfully by boat and plane, and include many who have suffered torture and trauma, the elderly, the sick, pregnant women, and children.<sup>5</sup>

In recent months there have been press reports of detainees hunger striking, rioting, and committing acts

of self mutilation<sup>6</sup> from frustration at being detained for long periods in conditions that are increasingly recognized as sub-standard by the Australian community.<sup>7</sup> There has been strident criticism of the policy both nationally and internationally – from Australia's own Human Rights Commission, HREOC, and other human rights and international organizations – particularly concerning the detention of children.<sup>8</sup>

However, far from ameliorating the detention regime, the government has significantly strengthened it – making it almost impossible for asylum seekers to obtain information regarding their rights under Australian law so as to make Protection Visa applications,<sup>9</sup> to access legal advice, or to have their detention reviewed by the courts. Simultaneously, access to the detention centres by the media and members of the general public is strictly limited.<sup>10</sup>

Furthermore, the government has now implemented a policy of detaining vessels carrying asylum seekers<sup>11</sup> entering Australian territorial waters, arresting the asylum seekers, and deporting them to South Pacific nations (such as Nauru),<sup>12</sup> where they are detained pending processing (the so-called "Pacific Solution").<sup>13</sup> Since these places are outside Australia, persons detained there have no right to apply for refugee status under Australian law, no guarantee of proper processing, no access to advice, and no appeal rights against adverse decisions affecting them. These offshore detention centres are not easily accessible to the press nor are they subject to independent scrutiny by members of the Australian public.<sup>14</sup>

Currently, there is no other country which has such a strict policy of mandatory detention of all those who enter the country unlawfully regardless of their status or condition.

This paper shall examine the content of Australia's detention policy: how it developed, how it is currently implemented, its effects on asylum seekers, the justifications of government in support of the policy, and its legality. Finally, there is a discussion concerning the underlying rationale of the policy.

### ***Mandatory Detention – Its Rise and Rise***

The mandatory detention policy developed over twenty-five years in conjunction with Australia's policy towards onshore refugee applicants. Australia's migration laws are founded in the Australian Constitution, which empowers the Commonwealth Parliament to "make laws for the peace, order and good government of Australia" with respect to, *inter alia*, "immigration and emigration," "nationality and aliens," and "external affairs."<sup>15</sup> As interpreted by the High Court of Australia, this authorizes the Commonwealth Parliament to legislate regarding the treatment of "non-citizens," including their admission, stay, detention, and removal. Also relevant is the principle of common law that "aliens"<sup>16</sup> are not to be treated as "outlaws" and should not be detained without proper authority conferred by law.<sup>17</sup>

Australia's policy towards unauthorized arrivals immediately hardened when it became a country of first asylum in the mid-1970s. From initially tightening entry control and punishing those organizing the transport or unlawful entry of people into Australian territory, by the late 1980s the government began to direct its policy to penalizing asylum seekers themselves, both as a means of "deterrence" and for the protection of national security. Essentially, Australia does not want to be a country of first asylum but prefers to permit ingress to the country through an orderly system that it controls.<sup>18</sup> This blurring of policy imperatives between the need for national security on the one hand, and obligations owed under international law on the other, has seen the latter consistently subordinated to the former and has led to the current policy of mandatory detention of asylum seekers entering the country unlawfully.

Until the mid-1970s the arrival of asylum seekers was exceptionally rare in Australia. There was no formal system for assessing claims to refugee status at this time, the grant of an entry permit being solely at the discretion of the Minister under the then Section 6 of the Migration Act.<sup>19</sup> Resulting from the end of the Vietnam War and the enforced economic isolation of Communist countries in Southeast Asia, large numbers of people began to flee on boats to neighbouring countries. Australia suddenly found itself confronted by potential refugee applicants as a country of first asylum.<sup>20</sup> In response, Australia instituted a more regularized system for the processing of refugee claims,<sup>21</sup> although the grant of refugee status was still at the discretion of the Minister.<sup>22</sup> There was no "mandatory detention policy" as such for asylum seekers; applicants were held in processing centres until identification checks and final assessment of their claims. If granted refugee status, they would be given a temporary or a permanent entry permit. If refugee status was refused, they were removed.

After a further influx of ethnic Chinese being actively "forced" from Vietnam during the Sino-Vietnamese War in 1978–79, Australia instituted an organized migration scheme as part of an internationally agreed plan.<sup>23</sup> However, ongoing ethnic and economic problems in Vietnam and the Vietnamese invasion of Cambodia meant that the numbers fleeing quickly outstripped the numbers allocated. Some countries responded in the early 1980s by refusing entry to the "boat people."<sup>24</sup>

In response to the arrival of some two thousand people on boats in Australia in 1980, the government amended the Migration Act, formally providing a legal basis for the Minister's discretionary assessment of refu-

gee status according to the Refugees Convention and his power to grant an entry permit.<sup>25</sup> At the same time, the Immigration (Unauthorised Arrivals) Act 1980 (Cth) (hereinafter IUA Act)<sup>26</sup> vastly increased the powers of Commonwealth officials to board, search, and detain ships, and to arrest and detain masters, owners, agents, and charterers of vessels, etc., involved in the transportation of “unauthorized arrivals.”<sup>27</sup> The IUA Act also granted to Commonwealth officials the authority either to grant a person who arrived in Australia aboard a vessel (ship or airplane) without an entry permit issued pursuant to the Migration Act 1958 a permit to disembark the boat or airplane on whatever conditions the officer determined,<sup>28</sup> or to arrest such a person without warrant.<sup>29</sup> The law required that such a person, if arrested, be taken before a “prescribed authority”<sup>30</sup> within forty-eight hours of the initial arrest, or within a period of time as was reasonably practicable thereafter.<sup>31</sup> The prescribed authority could formally order in writing the continued detention of that person where satisfied that the arrest and subsequent detention of the individual were pursuant to the IUA Act.<sup>32</sup> A person the subject of such an order was kept in detention until they were either conveyed from Australia;<sup>33</sup> or until they were granted an entry permit under the Migration Act 1958,<sup>34</sup> or until the Immigration Minister made a declaration under s.10(2) of the IUA Act in respect of the person that the Migration Act 1958 applied to them, in which case they were to be taken to have entered Australia and hence obtained the classification of “prohibited immigrant,” enabling them to be deported from Australia.<sup>35</sup> The Migration Act authorized the removal of a detainee from Australia aboard the vessel on which they had arrived,<sup>36</sup> pursuant to which an authorized Commonwealth officer could place the person aboard the vessel and serve a direction on the Master or Captain of that vessel to remove the person from Australia. However, where the Minister had made a declaration under s.11(1) of the IUA Act, but the Minister was not satisfied that it would be practicable for the person to be removed from Australia in accordance with this direction, the Minister was required to order the release of the person.<sup>37</sup> If the Minister was satisfied that the “unauthorised arrival” in these circumstances was a refugee, the Minister could, via s.10(1) of the IUA Act, utilize his discretionary power under s.6A(1)(c) of the Migration Act 1958 to grant them an entry permit. Later, the Migration Amendment Act 1983 (Cth)<sup>38</sup> hardened penalties for forgery of documents and for orchestrating illegal entry to Australia, and facilitated the deportation of non-citizens from Australia if they made no claims to refugee status or their applications were rejected.<sup>39</sup>

After a lull in the number of asylum seekers arriving by boat in the mid 1980s, by 1988–89 the number again rose sharply, prompted by disturbances such as famine in Vietnam, the ending of the Cold War, and events in China.<sup>40</sup> ASEAN once

more called for an international conference to assist in resolving the issue. The resulting International Conference on Indo-Chinese Refugees<sup>41</sup> approved the Comprehensive Plan of Action (CPA).<sup>42</sup> This required Vietnam to prevent “illegal” departures in return for financial aid and set out a time frame for the repatriation of those asylum seekers from the camps in Southeast Asia who were not positively assessed by the UNHCR for asylum. But this action did not prevent increased numbers of boats arriving in Australian waters – in some cases caused, ironically, by the secondary flight of many fearing the imminent closure of the camps and their forced repatriation to their homelands.

It was from this time that the Australian government manifested increasing hostility towards unauthorized arrivals, implementing a policy of direct deterrence based on mandatory detention.

The Migration Legislation Amendment Act 1989 (Cth)<sup>43</sup> strengthened border control<sup>44</sup> and introduced a form of *mandatory* detention as positive law.<sup>45</sup> Section 14 of the Migration Act<sup>46</sup> prescribed that a non-citizen became an “illegal entrant”<sup>47</sup> on entry to Australia *unless* they held a valid entry permit, or their continued stay was authorized under the Migration Act, or they had departed at the expiry of their entry permit. The same status was bestowed by s.20 of the Migration Act on any person who had obtained entry to Australia fraudulently or from false or forged documents. Under s.92 [s.38] of the Migration Act a Commonwealth Officer had the power to arrest an illegal entrant and to detain them in custody until they made arrangements to leave Australia voluntarily, or to detain them for a reasonable period to enable consideration for the grant of an entry permit. However, such detention was not to exceed seven days. The Minister could authorize the release of an illegal entrant from detention on whatever conditions he deemed appropriate. However, where a deportation order had been issued under the Migration Act, s.93(2) [s.39(2)] empowered the Minister to order the continued detention of the illegal entrant until such time as they were in fact deported.

More important to the development of the mandatory detention policy of asylum seekers was section 88 [s.36] of the Migration Act. This was intended to deal with the small numbers of “prohibited entrants” such as stowaways found aboard seaborne vessels or those who would become “illegal entrants” should they be allowed to enter the country. Soon the section became the main basis on which asylum seekers arriving by boat were detained, since it was in force in 1989 when Australia faced an increasing number of such boats which were

intercepted in the territorial waters. Under its provisions asylum seekers were detained until they were either granted an entry permit to enter Australia or were removed "expeditiously" on the ships on which they came.<sup>48</sup> A person detained under this provision was deemed not to have entered Australia for the purposes of the Migration Act. Increasingly, unlawful arrivals were detained and were denied the procedural safeguards granted to non-citizens arriving lawfully and whose entry permits later expired but who claimed protection. Asylum seekers were hence being divided into two groups depending on their status on arrival.<sup>49</sup>

Those who became illegal entrants after expiry or cancellation of a valid entry permit had a twenty-eight day "period of grace" during which time they had to leave Australia or apply for a further entry permit.<sup>50</sup> If they were detained as a result of being an illegal entrant, but then made arrangements to leave voluntarily from Australia or applied for an entry permit (including refugee status), they could be released from detention on conditions decided by the Minister until they departed or until their application was finalized. If the application was refused or they made no application to remain in Australia, they would be deported following the expiry of any of the "period of grace" that remained if they made no arrangements to leave voluntarily within this time. If a person was detained following the expiry of the "period of grace," they could still apply for refugee status (provided they had not been removed from Australia in the interim) and again could be released on whatever conditions the Minister saw fit until the application was finalized.

By contrast, those prohibited entrants detained pursuant to s.88 were kept in detention until they were either granted an entry permit under s.47 [s.11ZD] of the Migration Act or they were removed. As a result of this system, some asylum seekers remained in detention for four years and more.<sup>51</sup>

The need for a legislative basis for the detention policy was forced on the government in 1992 by an appeal to the High Court: *Chu Kheng Lim v. MILGEO* (1992) 110 ALR 97.<sup>52</sup> The applicants sought injunctive and declaratory relief against both the Minister and the Commonwealth of Australia on the basis that they had exceeded their power by detaining the applicants under s.88, and that a duty was owed to the applicants under the Refugees Convention and/or the ICCPR.<sup>53</sup>

On 5 May 1992, two days before the case was scheduled for hearing, the government pushed through Parliament the Migration Amendment Act 1992 (Cth).<sup>54</sup> This legalized the applicants' detention retrospectively. Nevertheless, five of the judges observed in their decisions that were it not for the amendment, s.88 could not be relied upon to detain the applicants, especially since the Department's own evidence was that the boats on which the applicants arrived had in fact been

burned and *ipso facto* it was impossible for the detainees to be returned on them as s.88 stipulated.<sup>55</sup>

The Migration Amendment Act 1992 inserted into the principle Act Division 6 [Division 4B] which created a new classification of "designated persons."<sup>56</sup> Sections 179, 181, and 183 [s.54L, 54N and 54P] required the detention of a "designated person." Under these provisions, detention was limited to a period of 273 days.<sup>57</sup> However, section 181 [s.54P] provided that the detainee could obtain release by writing to the Minister and asking to be removed from Australia. Contingent with the power to detain "designated persons," s.183 [s.54R] purported to deny the courts the power to order the release of a designated person from custody until their visa applications were finalized.<sup>58</sup>

The Court in *Lim* rejected the claim by the applicants that the amendment was introduced to prevent their release and so operated as an usurpation of the judicial power. The majority of the Court held that it completely precluded the courts from reviewing the detention of designated persons, but only where this detention was not unlawful, i.e., where the detention of the person concerned was not in accordance with the Migration Act.<sup>59</sup> The Court considered that the power to be released lay ultimately in the hands of the detainee if they should so wish under s.183 [s.54P]. In upholding these provisions the Court noted that: "[T]he citizens of this country, at least in times of peace, enjoy a Constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth."<sup>60</sup>

Crucially for the detention legislation, the Court held that this privilege did *not* include "non-citizens" (i.e., aliens) and that their detention or expulsion was within the legislative competence of the Commonwealth. The Court accepted the government's contention that the detention of designated persons was not a punishment but was to protect the national interest.<sup>61</sup> This purpose was clearly stated in s.176 [s.54].<sup>62</sup> The Court focused on the use of the term "non-citizens" (i.e., "aliens") in the legislation, and in this regard the power was specifically granted to the Commonwealth by section 51(xix) of the Constitution.<sup>63</sup> This meant incidentally that the Commonwealth also had the power to detain non-citizens.<sup>64</sup> Despite the fact that the Court stated it would review detention of an individual to ensure it was according to law, it was immediately apparent that, given the broad definition of "designated persons," it would be difficult to envisage when detention would be unlawful.<sup>65</sup>

The Court's decision in *Lim* essentially gave the green light to the detention policy, permitting it to become

entrenched as a tool of control and deterrence by successive Australian governments.<sup>66</sup>

### **Current Detention Policy**

The Migration Reform Act 1992 (Cth) (“the Reform Act”)<sup>67</sup> introduced s.36(1) [s.26B] into the Migration Act and legislated for the first time the Convention definition of a refugee into domestic law.<sup>68</sup> More importantly, the reforms removed the legal distinction between “unauthorized arrivals” and “illegal entrants” that had operated until then, replacing these with the distinction between “non-citizens” who were “lawful” or “unlawful”<sup>69</sup> but mandating the detention of all of the latter.<sup>70</sup>

According to the Migration Act, Division 7, s.189 an officer must detain a person in the “migration zone”<sup>71</sup> if the officer knows or reasonably suspects that the person is an “unlawful non-citizen.” This extends to a person who is outside the migration zone and is seeking to enter it and would be an unlawful non-citizen if they did so.<sup>72</sup> Detention is also mandated for a person who is unable to supply proper documentation or tries to avoid showing proper documentation that they are a lawful non-citizen.<sup>73</sup> A person can only be released from detention under s.191 if they show evidence that they are an Australian citizen, or produce evidence of being a lawful non-citizen, or are granted a visa. A person whose visa has been cancelled or who does not produce evidence of being a lawful non-citizen will also be detained.<sup>74</sup>

Under the law, the period of detention is indeterminate. Section 196(1) prescribes that an unlawful non-citizen detained under s.189 must be kept in immigration detention until they are: removed from Australia under s.198 or s.199 (for instance, after requesting the Minister in writing to be removed or upon any outstanding visa applications being finalized and refused); or deported (under ss 200–6); or granted a visa. This is strengthened by s.196(3) which prohibits the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation or unless they are granted a visa). Likewise, an unlawful non-citizen who has not subsequently been immigration cleared must be detained and removed from Australia as soon as reasonably practicable where they have not applied for a substantive visa, or the visa applied for is not one that can be granted when the applicant is in the migration zone; or their application has been finally determined.<sup>75</sup> Removal also extends to the non-citizen dependents of detainees, including spouses.<sup>76</sup>

Between the passage of the Reform Act 1992 through Parliament and its coming into force on 1 September 1994, several recommendations were made to “ameliorate” the rigidity of the system.<sup>77</sup> The Minister was given the power to grant detainees a *bridging visa*, thus permitting them to be released pending a final decision on their Protection Visa application.<sup>78</sup> Migration Regulations 1994 (hereinafter 1994 Regulations),

regulation 2.20 lists the prescribed classes of unlawful non-citizens eligible for release. These include: people detained under the law as it was before 1 September 1994;<sup>79</sup> minors;<sup>80</sup> the spouse of an Australian citizen or permanent resident or eligible New Zealand citizen or a member of that person’s family unit;<sup>81</sup> elderly people, i.e., aged seventy-five years and over;<sup>82</sup> and people with special medical needs, as determined by a medical officer appointed by the Department.<sup>83</sup> A detainee who does not fit one of the prescribed classes may apply to the Minister to grant a bridging visa in their favour.<sup>84</sup> In reality, however, these bridging visas are rarely granted. HREOC reported in 1998 that only two children arriving as boat people or born in detention had been released out of a possible total of 581 since 1 September 1994.<sup>85</sup>

This system has undergone some modification in the eight years of its operation, the government seeking to make the detention regime as strict as possible. For instance, under s.209 detainees are held liable to the Commonwealth for the cost of their detention where any visa application is finalized and refused.<sup>86</sup> Under s.193,<sup>87</sup> there is no requirement for the Minister or any officer to provide a detained person with an application form for a visa; or to advise a person that they may apply for a visa; or to give them any opportunity to apply for a visa; or to allow a person access to advice (whether legal or otherwise) in connection with applications for visas, unless the detainee should specifically request it.<sup>88</sup>

The ramifications of this “cone of silence” built around asylum seekers in detention was almost instantly obvious. In 1993–94, 100 per cent of unauthorized arrivals by boat made refugee claims. In 1994–95 only 10.4 per cent did so. In 1996–97, 80 per cent of unauthorized boat entrants were removed without requesting legal assistance.<sup>89</sup> Later, as part of an even tighter restriction on information flowing to detainees, Migration Act s.193(3)<sup>90</sup> was amended to exclude HREOC and the Commonwealth Ombudsmen from initiating communication with applicants to inform them of their right to make complaints to those offices.<sup>91</sup>

In 1998 the Department absolved itself of responsibility for the day-to-day running of the detention centres by privatizing their management to a private company.<sup>92</sup> The deteriorating standards alleged inside the detention centres and the long periods during which some detainees found themselves incarcerated resulted in a large number of complaints to HREOC.<sup>93</sup> This led to an inquiry into the detention centres by HREOC, the result of which was handed down in 1999.<sup>94</sup> This report was highly critical of the management of the detention centres and also of the policy of mandatory detention, par-

ticularly for the vulnerable – the aged, sick, infirmed, victims of torture and trauma, children, etc.<sup>95</sup> In response the government improved the quality of the holding facilities, but acted on none of the suggested reforms, including a model for release of detainees on reporting conditions pending the finalization of their applications.<sup>96</sup>

Upon the arrival of a large increase in the number of boats in the second half of 1999, the government introduced the Migration Legislation Amendment Act (No1) 1999,<sup>97</sup> which further reduced the right of refugees to apply for judicial review of unfavourable decisions made on their Protection Visa claims.<sup>98</sup> In 2000 the government restricted asylum seekers in detention to applications for a Temporary Protection Visa,<sup>99</sup> unlike the permanent residency Protection Visas granted to those arriving in Australia lawfully and who make their applications while still lawful (and who are not taken into detention).<sup>100</sup> These Temporary Protection Visas are valid for three years, at the expiry of which they must reapply for a Protection Visa (and hence be reassessed against the Refugee Convention) or face removal from Australia.<sup>101</sup> A person granted a Temporary Protection Visa is not permitted to sponsor their partner, spouse, or children to Australia nor are they entitled to any form of social welfare.<sup>102</sup>

In 2001, following the MV *Tampa* and *Aceng* incidents,<sup>103</sup> which represented a graphic intervention to expel potential asylum seekers without entertaining claims to protection, the government greatly increased the powers of officials to detain and remove asylum seekers found on board boats or planes in Australian territory.<sup>104</sup> These are now arrested and detained and thence deported outside Australia to third countries under the “Pacific Solution.”<sup>105</sup> The government claimed these laws were designed to discourage “illegal people smuggling” into Australia and to assert control over entry to the migration zone.<sup>106</sup> People detained and removed from Australia under these laws are prohibited from applying for a Protection Visa.<sup>107</sup> This was achieved by excising certain places inside Australian territory (and properly part of the “migration zone”) from the “migration zone” for the purposes of making a Protection Visa application. A person who enters Australian territory and thence enters without authority an “excised offshore place” becomes now an “offshore entry person.” The law empowers the arrest and detention of an offshore entry person (or those who would become so should they enter an excised offshore place or would become an unlawful non-citizen if they should enter the migration zone),<sup>108</sup> sanctions their restraint and removal from Australian territory to a designated place outside Australia, and excludes the arrest, detention, and transportation of such a person from the meaning of “immigration detention” under the Migration Act.<sup>109</sup> These laws grant powers to restrain or detain asylum seekers on a ship or aircraft in Australian territory, or forcibly remove such per-

sons from a ship or aircraft,<sup>110</sup> as well as the power to search people so detained without warrant.<sup>111</sup>

Furthermore, the law prohibits judicial proceedings relating to offshore entry by an “offshore entry person,” their status as an “offshore entry person,”<sup>112</sup> the lawfulness of their detention, the lawfulness of their deportation from Australia, and the prohibition on their right to apply for a visa. The exception relates to proceedings brought within the original jurisdiction of the High Court under s.75 of the Constitution, which of course cannot be utilized once the individual concerned has been removed from Australian territory.<sup>113</sup>

This represents a dramatic extension of the detention regime. Currently, the law now requires the detention of all those who manage to arrive on the mainland of Australia as unlawful non-citizens or are refused immigration clearance, restricts their rights to apply for a Protection Visa, and inhibits their access to assistance or information regarding their legal rights. If prospective asylum seekers are intercepted in the territorial waters or in an excised offshore place, the law sanctions their arrest and expulsion to a third country where they are detained, prohibited from applying for refugee status under Australian law, and denied access to representation and advice. Those who arrive in the migration zone with valid visas are permitted to enter and are not detained so long as they apply for Protection Visa while their visas remain valid. If their visa should expire or be cancelled before lodging an application for a Protection Visa, then they too are liable to be detained as unlawful non-citizens. This entire system is now almost entirely outside of the supervision of the courts.<sup>114</sup>

### **Implementation of Detention Policy**

According to the government's information<sup>115</sup> between 1989 and November 2001, 13,489 people arrived unlawfully by boat while 109 children were born to these detainees. All were/are kept in detention until their visa applications or requests for protection are finalized and they were/are either released or removed from Australia.<sup>116</sup>

In 2000–2001, 4,141 people arrived without authority on fifty-four boats, compared with 4,175 on seventy-four boats in 1999–2000. Of these, the majority came from Iraq, Afghanistan, and Iran, and over 90 per cent were granted Protection Visas on review to the Refugee Review Tribunal. This compares with 1989–90 when there were 920 arrivals on forty-two boats.<sup>117</sup>

In 2000–2001, 1,508 people were refused entry at airports, compared with 1,695 in 1999–2000. In 1998–99, there were 3,032 unauthorized airport arrivals compared with 610 in 1991–92.<sup>118</sup> In recent years those

refused clearance at airports have arrived predominantly from Malaysia, South Korea, New Zealand, Thailand, Indonesia, the U.K., P.R.C, the United States, India, and Japan, while 628 came from other various countries.<sup>119</sup>

In 2000–2001, forty-two people arrived as “stowaways.” These are not normally permitted to disembark and are detained on board until the ship departs. If they apply for a Protection Visa they are removed from the ship and taken to detention.<sup>120</sup>

The majority of boats carrying asylum seekers entered Australian territory via Ashmore Reef, Christmas Island, and Cocos and Keeling Islands; i.e., they were intercepted there by the Royal Australian Navy.<sup>121</sup>

During 2000–2001, there were 7,993 unlawful non-citizens admitted to Australia’s immigration detention facilities.<sup>122</sup> This is slightly fewer than the 8,205 admitted in 1999–2000 but more than double the numbers of 3,574 in 1998–99 and 2,716 in 1997–98. DIMIA claims that this was due to the increase in numbers of unauthorized boats arriving in Australian territory at the time.<sup>123</sup> As at 1 November 2001, there were 2,736 people in IDCs on mainland Australia, the top five nationalities being Afghani, 27.3 per cent; Iraqi, 13.2 per cent; Iranian, 7.0 per cent; Chinese, 5.2 per cent; and Indonesian, 4.5 per cent.<sup>124</sup> As at 1 February 2002, there were 637 women and children detained in mainland IDCs; of these, 259 were adult women; 224, male children; and 141, female children. There were also thirteen unaccompanied minors in detention,<sup>125</sup> nine other children in detention but under the care of the South Australian Department of Human Services, and one child in foster care after having been granted a bridging visa.<sup>126</sup> The numbers detained in offshore detention centres, such as Christmas Island, Manus Island, and Nauru are difficult to ascertain, but they would number at least several hundred.<sup>127</sup>

The length of time of detention varies greatly, from several days to some reported cases of four or five years. The government claims that with improved processing systems, the length of time of detention is greatly decreased. Some 80 per cent of asylum seekers receive a primary decision on their asylum application within eighteen weeks and 10 per cent of cases are processed within seven weeks.<sup>128</sup> The average time spent by a person arriving unlawfully by boat until the time of their release or removal was 155 days.<sup>129</sup> If an asylum seeker “chooses” to pursue appeals for judicial review, or “obstructs or hinders” the processing of their claims, then the period of time passed in detention can be greatly prolonged.<sup>130</sup> In the year from 1 January 2001 to 31 December 2001, a total of 3,465 temporary Protection Visas were granted to detainees; 1,490 cases were refused at primary level and 1,381 persons applied for review of the refusals to the Refugee Review Tribunal. Of those cases that had been finalized, 495 were found by the Refugee

Review Tribunal to engage Australia’s protection obligations.<sup>131</sup>

DIMIA claims that its processes for assessing refugee claims are flexible and constantly reviewed for effectiveness. Detainees undergo health screening within twenty-four hours of their arrival at detention centres. If the detainee claims to be a refugee, they are interviewed to ascertain if, *prima facie*, they engage Australia’s protection obligations. The report of the interview is considered by a senior DIMIA staff member as to whether the applicant *prima facie* engages Australia’s protection obligations; whether the applicant may have effective protection in another country (i.e., is engaged in “forum shopping”); and whether they may meet “public interest criteria” (i.e., health and character checks). This stage may take several weeks. If the applicant satisfies all factors, they may then be granted a Temporary Protection Visa (TPV).<sup>132</sup> Those who are refused may apply for review of the decision to the RRT. Any unauthorized arrival who does not engage Australia’s protection obligations and/or does not apply for a visa is subject to removal from Australia under the provisions of the Migration Act as soon as practicable.<sup>133</sup>

According to the Department, “emphasis is placed on the sensitive treatment of the detention population which may include torture and trauma sufferers, family groups, children, the elderly, people with a fear of authority, and those who are seeking to engage Australia’s protection obligations under the Refugee Convention.”<sup>134</sup>

### **The Detention Centres**

There are three Immigration Detention Centres (IDCs) and three Immigration Reception and Processing Centres (IRPCs) maintained by DIMIA.<sup>135</sup> The IDCs are located in Melbourne (established in 1966), Sydney (established in 1976), and Perth (established in 1981), and are used to accommodate mainly “non-boat people.”<sup>136</sup> The IRPCs are located at Port Hedland (established in 1991) and Curtin (established September 1999) in Western Australia, and at Woomera in South Australia (established November 1999), and are used to detain mainly boat people.<sup>137</sup> There are also detention centres on Christmas Island, Manus Island, and Nauru.

The government has also established three centres as contingency holding centres. These are located at HMAS Coonawarra in Darwin, NT; the Australian Army facility in Singleton, NSW; and El Alamein in Port Augusta, SA. The government has announced plans for a new detention centre to be established in Brisbane, but has not formally announced a site for it.<sup>138</sup>

The detention centres are not run directly by the government. In 1999 these were tendered to the Australasian Correctional Services Pty Ltd (hereinafter ACS), which now manages the detention facilities on behalf of the DIMIA. DIMIA claims it maintains an official presence at each immigration detention facility, continually monitoring ACS's performance against Immigration Detention Standards (hereinafter IDS), which were developed by DIMIA in consultation with the Commonwealth Ombudsman's office.

The IDS specify the standard of facilities, services, and programs expected in detention centres, including the requirement to provide safe and secure detention. The IDS outline the quality of life expected in the centres and take into consideration "individual needs such as the gender, culture and age of the detainees."<sup>139</sup> The government claims a full range of services is provided at each detention facility, including medical and dental services; education programs for children and adults, including English-language instruction; cultural activities; sporting activities; and religious services.<sup>140</sup> Detainees are also assisted to prepare and lodge Protection Visa applications (if they request to make an application) through the Immigration Advice and Application Assistance Scheme (IAAAS) if they specifically request such assistance.<sup>141</sup>

The government claims that detention services "are subject to both administrative and judicial review, and are subject to full parliamentary scrutiny and accountability."<sup>142</sup> While the government is at pains to point out that the HREOC and the Commonwealth Ombudsman regularly visit detention centres to investigate complaints and conduct their own enquiries, this ignores the fact that both these offices have been critical of the detention centres and the detention policy in general, and they are precluded by legislation from making initial contact with detainees.<sup>143</sup>

In February 2001, the Minister established the Immigration Detention Advisory Group (IDAG), which was designed to provide advice on the adequacy of services, accommodation, and facilities at the centres.<sup>144</sup> Members of the IDAG have also been critical of the standard of the detention centres and of the detention policy following repeated riots and disturbances that occurred towards the end of 2001 and the first few months of 2002.

The cost of the mainland detention centres for 2000–2001 was around of \$104 million, a large proportion of which was paid under the contract for managing the detention centres. However, this figure does not include "departmental corporate costs, capital costs for the provision of detention facilities or costs for detainees located in State correctional facilities." The average daily cost of maintaining the mainland detention facilities is \$120 per day per detainee.<sup>145</sup> The cost of the "Pacific Solution" is not included in this figure, but it is believed to be in the vicinity of several hundred million Australian dollars.<sup>146</sup>

### ***The Effects of Detention***

Space does not permit a full canvassing of this complex issue, and the writer is not expert in mental or general health issues; however, the effects of Australia's detention policy on the asylum seekers themselves are slowly making their way into the public's attention.<sup>147</sup> Among the claimed effects of detention are the dehumanization and objectivization of asylum seekers.<sup>148</sup> The process of detention deprives people of their identities, not only within the detention centres themselves but also in the minds of the general public. The plethora of terms used to denote asylum seekers, including "detainee," "unlawful non-citizen," "illegal immigrant," "boat person," etc., removes those individuals from being seen or heard as people legitimately seeking Australia's protection.<sup>149</sup> This is caused, and in turn enables, politicians and others to characterize the asylum seekers as criminals – people who wilfully breach Australia's immigration laws, enter the borders illegally, steal jobs, and drain resources, as well as present a threat to the national security and public health. These characterizations feed the perception that asylum seekers are undeserving of compassion.

Heightening the isolation of asylum seekers is the denial of access to the detention centres by members of the press and the general public,<sup>150</sup> but also the interdiction on providing information and advice as to their legal rights, access to the courts, and denial of basic fairness in the processes used to assess their claims to protection. Likewise, the fact that a detention centre is, for all intents and purposes, a prison, combined with the length of time that a person can be detained, compounds the detrimental impact, both psychological and physical, on the detainees.<sup>151</sup>

The impact on the health of an individual detained in remote places for lengthy periods of time is manifestly obvious. This is aggravated by the rhetoric of politicians particularly who enforce negative stereotyping in the public mind. Detention disrupts family relationships, creates stress and tension between individuals, and can lead to destructive impulses which the detainees inflict on themselves.<sup>152</sup>

HREOC, despite saying it is pleased with the government's recent improvements to the physical conditions in which detainees are kept, has been severely critical of the policy of detention itself. In its opinion the situation is particularly acute for the infirm, infants, the elderly, pregnant women, etc., there is overcrowding reported in some centres, lack of recreational facilities, and inadequate sanitary conditions.<sup>153</sup>

### ***Justifications for Detention***

The Australian government claims there are compelling reasons for the mandatory detention of people who arrive in Australia without authorization. These include:<sup>154</sup>

- conduct of essential identity and health checks;
- assessment of character and security issues, ensuring that people do not enter the community until their claims to do so have been properly assessed by internationally agreed standards;
- providing asylum seekers access to appropriate services for the processing of refugee applications, and helping them through the culture shock of coming to a new country;
- ensuring their availability for removal from Australia and maintaining the integrity of the migration program when claims to remain are unsuccessful.

Superficially, these sound reasonable, since they mix legitimate elements of public policy (such as the need to protect the national interest) with the obligation to protect people in need (the asylum seekers themselves). But uglier motivations belie the policy than these offered by DIMIA (and the Minister).

### ***Australia Does Not Detain Asylum Seekers***

Australia claims that it does *not* detain asylum seekers, based on the semantic argument that, until a person is granted refugee status under the Refugees Convention, they are *not* a refugee and therefore do not come under its provisions. If no claim is made for refugee status, then Australia's protection obligations are not invoked. Given the restrictions on information provided to "unlawful arrivals," the fact that a large proportion do not make claims, or fail to make adequate claims, should not be surprising. This in turn permits the government to claim that detainees are not "asylum seekers" but "unlawful arrivals" or "illegal immigrants":

Australia does not have a policy of detaining asylum seekers, but does detain unauthorised arrivals. Some of these people subsequently apply for asylum. It is worth noting that the majority of asylum seekers have entered Australia with a valid visa and are free in the community while they pursue their claims. Those who are found to be refugees are released from detention immediately, subject to health and character requirements.<sup>155</sup>

Further, the government alleges that: "mandatory detention is the result of unlawful entry, not the seeking of asylum. People being held in immigration detention have broken Australian law, either by seeking to enter Australia without authority, or having entered legally, failing to comply with their visa conditions."<sup>156</sup>

This rhetoric shifts the onus (or blame) for detention onto the asylum seekers themselves. Because they are characterized

as lawbreakers, public compassion for their plight is undermined.

### ***Australia Is Not a Country of First Asylum***

Due to Australia's geographical position and its relative "isolation," the government claims Australia is far from most refugee-producing countries, and therefore should not be a country of first asylum.<sup>157</sup> Resettlement in a third, more distant, and different country to which the asylum seeker has fled after leaving their home country is regarded as a last resort:<sup>158</sup> "As Australia has not been and clearly is not, in the majority of circumstances, a country of first flight/asylum, it has consistently over time sought to contribute to international responsibility sharing through its generous resettlement program."<sup>159</sup>

Australia subtracts the number of refugee visas granted onshore from the number it takes under its offshore humanitarian program. The argument runs that by accepting large numbers of unauthorized arrivals, Australia is compromised in its capacity to resettle refugees who may be forced to remain in refugee camps in third countries.<sup>160</sup> The number of unlawful asylum seekers requires countries to implement asylum processing schemes which are costly and time consuming. The government claims the system is complicated by "judicial interference" in administrative decision making regarding protection claims, which in turn adds to the costs, makes it more time consuming, and reduces the tolerance of receiving nations:

[J]ust to find the relatively few refugees among those who seek asylum, western countries are spending over ten times UNHCR's budget. When are we going to address an overly legalistic system that uses up our capacity to help prevent refugee situations at source? Are we going to wait until the already too few resettlement countries no longer have any capacity or willingness to resettle the most vulnerable refugees?<sup>161</sup>

### ***Public Interest/National Security***

Considerations based on the "national interest" involve several discrete issues.

*Domestic political interests.* The public perception (created and fed by the government) is that by detaining asylum seekers, the government is seen to be tough in protecting Australia's territorial integrity and in punishing those who would wilfully enter the country unlawfully<sup>162</sup> "...asylum systems are beset with identity, nationality and claims fraud of such dimensions that the community's willingness to support refugees is being eroded. That community support is essential if states are

to be able to continue humanitarian action and resettlement.<sup>163</sup>

By statements such as these, the government has done much through distorting the facts regarding asylum seekers to make the issue a political one.<sup>164</sup> This was evident before the federal general election held in November 2001, when asylum seeker policy, including mandatory detention, became the central policy debate between the various political parties.

*Public interest.* Detention is necessary to prevent the entry of people who may be unidentified and who may pose health or security risks to the Australian community.

All applicants for Temporary Protection Visas must also meet health requirements. This is important to ensure that communicable diseases are not left undetected. ...While many people who apply for asylum in Australia will meet the character requirements for Temporary Protection Visas, there are also in immigration detention former terrorists, former senior officers and military personnel of despotic regimes, people who are suspected of crimes against humanity and organisers of people smuggling rackets.<sup>165</sup>

The government states that many asylum seekers upon arrival have no forms of identification, having disposed of all their personal papers en route, and that "it is not uncommon for them to 'change identity' either during the journey or processing, in the hope that it may be easier to stay if they claim a different nationality."<sup>166</sup> The government requires some asylum seekers to obtain formal police clearances from countries of first asylum in which they have resided for at least twelve months, to confirm they are of good character. This may take several months and so lengthens the period in detention.

*National security and border control.* In order to protect Australia's borders and to maintain control of the entry of persons into the country, detention is seen as a necessary tool for ensuring these objectives.<sup>167</sup> In relation to this the government claims that detention: "...reflects Australia's sovereign right under international law to determine which non-citizens are admitted or permitted to remain and the conditions under which they may be removed."<sup>168</sup>

And again: "This practice is consistent with the fundamental legal principle, accepted in Australian and international law, that as a matter of national sovereignty, the State determines which non-citizens are either admitted or permitted to remain and the conditions under which they may be removed."<sup>169</sup>

### **Deterrence**

In the government's view the need for deterrence covers several aspects.

*Deters queue jumpers and forum shoppers.* Mandatory detention is claimed to deter those who may wish to enter Australia

illegally ("queue jump," "forum shop," etc.) and seeks to punish those who have already done so.<sup>170</sup>

*Deters people smuggling in circumvention of Australia's migration laws.* The government, concerned about the rise in illegal schemes involving people smugglers who circumvent national borders and entry requirements, has increased the penalties on those involved in people smuggling/trafficking,<sup>171</sup> but maintains mandatory detention for those who wish to use people smugglers. The government is using detention as a tool to deter and punish people smugglers as well as asylum seekers who should resort to them: "The Australian Government believes it is important to send a clear message that it will not tolerate the activities of people smugglers or the illegal entry of people in Australia."<sup>172</sup>

And again: "In recent times, people smugglers have attempted to control who enters Australia. These changes [to the law in November 2001] mean that Australia is once again able to control who enters our borders and who is allowed to stay here."<sup>173</sup>

The government's rhetoric in this regard also shifts the onus for people smuggling onto the asylum seekers themselves, often without cognizance of the issues that may drive or impel people to seek out people smugglers in order to enter the country unlawfully: "...people are forsaking opportunities for protection in neighbouring countries and are using people smugglers and the asylum system to seek access to western countries – and some are tragically dying in the attempt."<sup>174</sup>

In furthering its policy of deterrence, Australia's migration law now prevents those who arrive unlawfully in certain areas from being able to remain in Australia or apply for refugee status: "In the past people smugglers have sent boats to Ashmore, Cartier, Christmas, and Cocos Islands and the people have been brought to the mainland by the Australian government at great expense. The new laws mean that people who travel illegally to excised offshore places can no longer apply for any visa to Australia."<sup>175</sup>

*Deters people from attempting to extend their time in Australia.* Asylum seekers are exploiting appeals to the courts for administrative review of decisions refusing Protection Visas ("delaying tactics") to avoid removal from the country. This has been encouraged by "activist judges" who extend the scope of the Refugees Convention from that originally intended.<sup>176</sup> By insisting asylum seekers remain in detention, the government is "detering" abuse of the system and encouraging them to accept repatriation. The government claims that, instead of accepting the "decision of the umpire,"<sup>177</sup> asylum seekers choose to exploit the legal system at great cost to

the Australian community and thus lengthen the period they will spend in detention. To further deter legal appeals, the government has introduced a “privative clause” which attempts to remove from judicial review all decisions refusing Protection Visas except on the basis of jurisdictional error.<sup>178</sup> Since it is the judiciary’s role to ensure the legality of administrative decision making according to proper principles of law,<sup>179</sup> the policy of removing judicial supervision of administrative decisions regarding refugees, combined with the government’s rhetoric in this regard, represents an attack on the independence of the judiciary itself and severely undermines the rule of law.

### ***Asylum Seekers Are Responsible for Their Detention***

A common theme of government rhetoric justifying the detention regime is to shift the blame for detention onto the asylum seekers themselves. Asylum seekers are portrayed as: “choosing” to come to Australia illegally, rather than patiently and properly applying for visas to come to Australia lawfully; choosing to use illegal means, such as people smugglers, to achieve this end; choosing to pay large sums of money in order to gain illegal entry to the country; choosing to destroy documentation such as passports, etc., in order to commit a fraud against the authorities by bolstering their claims to refugee status;<sup>180</sup> and, once in Australia, by choosing to use every available means to prevent their removal from Australia by electing to commence lengthy and costly legal proceedings in the Federal Court.<sup>181</sup>

People who enter Australia illegally have chosen not to apply for a visa. There are Australian overseas missions in the countries through which unauthorised arrivals have travelled to reach Australia illegally and at which they could have lodged applications for consideration under Australia’s humanitarian programs. Instead, they have contacted international criminal organisations involved in people smuggling. They have the resources to pay for their passage and should not be confused with popular images of refugees who flee civil disruption or war, on foot and with few belongings.<sup>182</sup>

And again:

Not all who arrive in Australia as unauthorised arrivals seeking protection have genuine protection claims. Nor have they come to Australia illegally because they could not join a “queue”. Some persons have left protection already available to them in a safe third country and are effectively seeking a migration outcome. Some have been rejected under the Humanitarian Program and have been led to believe that if they come to Australia illegally they may achieve a more favourable outcome. Others simply do not want to wait while their applications overseas are assessed.<sup>183</sup>

Such statements are clearly designed to undermine support for asylum seekers within the wider Australian community and to bolster support for the mandatory detention policy.

### ***Detention Is Not Prolonged or Longer Than Necessary***

The government claims that, since mandatory detention is implemented for reasons of national security, border control, and public interest and to uphold the integrity of the migration system (even facilitating applications for Protection Visas through maintaining order in the system), the policy is not in conflict with any of Australia’s international obligations. Indeed, the government claims that applicants are not detained any longer than necessary.<sup>184</sup> Those that are found to be refugees are granted visas and released immediately, while those that are refused are removed from the country.<sup>185</sup> Where a prolonged stay in detention occurs, this is usually the fault of the asylum seeker themselves: “Once detained, the period of time it takes for applications to progress through the refugee determination process and, hence, the period of detention is minimised.”<sup>186</sup>

### ***The Legality of Detention***

The legality of the detention of asylum seekers is highly contentious. However, there are several instruments, agreements, decisions, and recommendations made under international law which suggest that Australia’s mandatory detention of asylum seekers breaches international law standards.<sup>187</sup>

The Universal Declaration of Human Rights (1948) (hereinafter UDHR)<sup>188</sup> at Article 9 states that “[n]o one shall be subjected to arbitrary arrest, detention or exile.” Article 10 states, “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Article 14(1) states that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” While these may not give rise to enforceable rights,<sup>189</sup> other conventions which reflect these standards, and to which Australia is a party, are pertinent particularly the International Convention on Civil and Political Rights (hereinafter ICCPR),<sup>190</sup> the Convention on the Rights of the Child (hereinafter CROC),<sup>191</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT).<sup>192</sup>

Article 31 of the Refugees Convention states that refugees should not be punished for entering the territory of

a signatory state unlawfully, where they come directly from a territory where their life or freedom was threatened in the sense of Article 1, provided they present themselves without delay to the authorities and show good cause for their illegal entry.<sup>193</sup> Australia argues that until it exercises its prerogative right to grant an asylum seeker the status of a refugee under the Refugees Convention, it is not in breach; detention is only necessary for the regularization of the status of the individual concerned, thus complying with Article 31(2). Once recognized as a refugee, a person is immediately released from detention.<sup>194</sup> Therefore, refugees are not detained or penalised *per se*.<sup>195</sup> Despite this Orwellian logic, Australia's mandatory detention of asylum seekers has been the subject of critical comment nationally and internationally.<sup>196</sup>

The Executive Commission of the UNHCR (ExComm) has examined the issue of detention of asylum seekers. In Conclusion No. 44 (XXXVII) – 1986: Detention of Refugees and Asylum Seekers, the ExComm expressed the opinion that “in view of the hardship which it involves, detention should normally be avoided.”<sup>197</sup> It stated that detention may be resorted to:

...only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.<sup>198</sup>

ExComm is thus clear that asylum seekers should be detained only as a last resort and only for exceptional reasons. If detention must be imposed, then it must be according to law and according to accepted standards of human rights law; and this includes access to representatives of the UNHCR.<sup>199</sup> In this respect, ExComm stresses that national legislation and/or administrative practice should make “the necessary distinction between the situation of refugees and asylum seekers, and that of other aliens.”<sup>200</sup>

The UNHCR in its Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999)<sup>201</sup> expanded upon what ExComm had stated. There, the UNHCR stated:<sup>202</sup> “The detention of asylum-seekers is, in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs.”

The UNHCR was of the view that this injunction against detaining asylum seekers is in conformity with Article 14 of the UDHR since the “right to seek asylum” expressed therein is considered a basic human right.

The UNHCR confirmed that “detention should only be resorted to in cases of necessity” and is only permissible for set exceptions.<sup>203</sup> However, even where an asylum seeker has used fraudulent documents or travelled with no documents at all, detention is only permissible when there is evident a manifest intention to mislead, or a refusal to co-operate with the authorities.<sup>204</sup> Asylum seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.<sup>205</sup> In such cases, detention should not be “automatic, or unduly prolonged.” These principles should be applied not only to those declared to be refugees, but also to “asylum-seekers pending determination of their status.” Given the nature of the circumstances surrounding asylum seekers, it is only to be expected that in attempting to exercise this right “asylum-seekers are often forced to arrive at, or enter, a territory illegally.”<sup>206</sup>

Indeed, the UNHCR interprets the requirements of Article 31(1) as covering situations where an asylum seeker has not come “directly” from their country, but has come from another country where “protection, safety and security could not be assured.” This implies that even where an asylum seeker has transited through a third country “for a short period of time without having applied for, or received, asylum there” they should not be penalized for having done so.<sup>207</sup> Each case must be judged on its merits.<sup>208</sup> Categorically the UNHCR holds the view that detention must not be used as a punitive or disciplinary measure for illegal entry or presence in the country.<sup>209</sup>

In a similar vein are the Principles enunciated by the UN Commission on Human Rights' Working Group on Arbitrary Detention (hereinafter “the Working Group”),<sup>210</sup> which was directed to examine the situation of immigrants and asylum seekers, “who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy.”<sup>211</sup> In December 1998 the Working Group set out criteria for determining whether or not custody is “arbitrary”<sup>212</sup> and shortly thereafter adopted Deliberation No. 5.<sup>213</sup> This advises, *inter alia*, that: asylum seekers in detention must have the possibility of contact with lawyers and access to phones, faxes, and electronic mail (Principle 2); they must be brought promptly before a judicial or other authority (Principle 3); the decision to detain an asylum seeker must be made by a duly empowered authority and must be made according to law (Principle 6); a maximum length of custody should be set by law and in no case must it be of unlimited length or excessive (Principle 7); and the UNHCR, the International Committee of

the Red Cross (ICRC) and, where appropriate, duly authorized non-governmental organizations must be allowed access to the places of custody (Principle 10).

In relation to Australia's mandatory detention policy, HREOC advised the Parliament in November 1997, in May 1998, and again in November 1999<sup>214</sup> that the law requiring detention of almost all unauthorized arrivals<sup>215</sup> contravenes international law. Specifically, HREOC stated:

Australia's policy of detention of asylum seekers is automatic and mandatory and applies to almost all unauthorised arrivals until their claim for protection is determined finally. It goes well beyond what ExComm Conclusion 44 deems 'necessary' for the purposes of compliance with the Refugee Convention, CROC and the ICCPR.<sup>216</sup>

### ***Infringes Right against Arbitrary Detention***

Perhaps the severest criticism of the legality of Australia's mandatory detention policy came from the UN Human Rights Committee in its decision in *A v. Australia* in 1997, when it was called upon to consider whether the policy infringed certain articles contained in the ICCPR which guarantee against arbitrary detention.<sup>217</sup> Article 9 of the ICCPR states, *inter alia*:

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....

4. 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.

Furthermore, Article 10 of the ICCPR states "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

The complaint concerned a Cambodian refugee who arrived in Australia on 13 December 1989, made a claim to refugee status, and was taken into detention on 21 December 1989. He remained there until his release in January 1994 when he was granted refugee status. The UN Human Rights Committee found that Australia was in breach of certain of its obligations under the ICCPR. In relation to this the UN Committee stated: "Freedom from arbitrary detention is a fundamental human right, and the use of detention is, in many instances, contrary to the norms and principles of international law."<sup>218</sup> More specifically, the Committee held:

... detention should not continue beyond the period for which the State can provide appropriate justification.... Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State Party has not advanced any grounds particular to the author's case, which would justify his continued detention .... The Committee therefore concludes that the author's detention ... was arbitrary within the meaning of Article 9, paragraph 1."

The Committee then advised that: "to avoid the taint of arbitrariness, detention must be a proportionate means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights."<sup>219</sup>

As the UNHCR observed:<sup>220</sup>

[f]or detention of asylum-seekers to be lawful and not arbitrary, it must comply not only with the applicable national law, but with Article 31 of the Convention and international law. It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.

HREOC similarly noted, "[m]andatory minimum terms of imprisonment do not allow the judiciary to apply proper sentencing principles."<sup>221</sup>

Detainees should thus have the right to appear before properly constituted courts to ensure that their detention is according to law and either to determine the period of detention or to order their release. The fact that Australia's detention policy is mandatory with no discretion not to apply it to an individual, irrespective of the circumstances, and given there is no recourse by a detained individual to judicial review of that detention, means *ipso facto* that it results in arbitrary detention.<sup>222</sup> This is the more so since no appropriate justification for applying the policy has been properly advanced by Australia.

The indeterminate length of the detention which an asylum seeker faces under Australia's policy (in that, in order to substantiate their claim to protection, it may take months or even years to be processed through the system) means that there is a lack of proportionality between the act that leads to detention and the detention itself.<sup>223</sup> This is also contrary to the UNHCR Guidelines, which state that detention must be "reasonable" and "proportionate to meet the standard set out by ICCPR article 9.1."

Indeed, detention for any purpose outside those stated in ExComm Conclusions, the UNHCR Guidelines, and the decision of the UN Human Rights Committee, and contrary to international human rights norms, is in breach of international law.<sup>224</sup> Asylum seekers should have access to procedures for determining refugee status or granting asylum that are quick and fair, and they should not be detained through application of a mandatory policy. The distinction should always be drawn between the position of refugees and asylum seekers, and that of other aliens.<sup>225</sup> In this regard, UNHCR guidelines state that the detention of asylum seekers for any other purpose, “for example, as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law.”<sup>226</sup>

Australia's policy does not make such distinctions, but rather selects all unlawful non-citizens who arrive in Australia unlawfully, *including* prospective asylum seekers, for punishment for the expressed purpose of deterrence. The same conclusions can be made regarding the detention of asylum seekers on boats within territorial waters pursuant to s245F(9) of the Migration Act, their expulsion from Australia to third countries, and their detention there in centres run by the Australian authorities.<sup>227</sup>

### ***Infringes Obligations Not to Discriminate***

Article 7 of the UDHR states, “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” This is reflected in the ICCPR, Article 26, which states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”[emphasis added].

Article 2 of the CROC makes similar guarantees in relation to children.

Australian policy clearly discriminates between those who claim asylum after arriving on valid visas and thence are immigration cleared, those who arrive in the migration zone without visas who are detained, and those who arrive in an “excised offshore place” and who are detained and expelled to third countries. This creates three classes of asylum seekers who are not treated equally by law or policy.<sup>228</sup> This includes the fact that asylum seekers who arrive in the migration zone

unlawfully are restricted to Temporary Protection Visas, are not granted travel permits, and are prohibited from sponsoring members of their immediate families,<sup>229</sup> while those removed from Australia under the “Pacific Solution” are prohibited from applying for refugee status under Australian law. HREOC is of the view that this differentiation in policy application is discriminatory on the basis of the status of the asylum seekers and therefore infringes the above mentioned human rights instruments.<sup>230</sup>

### ***Infringes Non-Refoulement Obligations***

The expulsion and detention of asylum seekers under the “Pacific Solution” puts Australia at risk of violating its duties not to expel or *refouler* refugees under Articles 32 and 33 of the Refugees Convention<sup>231</sup> and the *non-refoulement* provisions of the CAT Article 3,<sup>232</sup> the ICCPR Article 7, and the CROC Articles 3, 20, 22, 39, and 37. This is because there are no guarantees that detainees will have information concerning their right to claim protection, there is no guarantee that their claims will be properly assessed, and there is no appeal right against adverse decisions made on their status in these circumstances.<sup>233</sup> There is also no right for these individuals to apply for refugee status under Australian law, as this can only be applied for in the Australian migration zone. This means individuals detained in third countries under the “Pacific Solution” are at risk of being *refouled* to their countries in contravention of the above-mentioned conventions.

For those detained in mainland IDCs, the fact that there is no onus to provide information to detainees on their legal rights unless the detainee should specifically request it, may well lead to the *refoulement* of an individual who may not have been aware that they had the right in Australian law to claim protection under the *Refugees Convention*, again contrary to the above mentioned conventions.

### ***Denies Right of Asylum Seekers to Apply for Refugee Status***

Closely linked with the above, the restrictions on providing information to prospective asylum seekers in mainland IDCs as to their rights to claim asylum effectively inhibit the individual's right to claim asylum and to have their cases assessed against international standards.<sup>234</sup> Worse, the fact that an individual can only claim refugee status within the Australian migration zone means that removal of asylum seekers pursuant to the “Pacific Solution” prevents them from seeking to apply for refugee status or from having Australia's protection obligations to them under the Refugees Convention invoked. This

infringes Article 14 of the UDHR; Article 31 of the Refugees Convention; provisions of the CROC; and the ICCPR.<sup>235</sup>

### ***Rights of the Child***

There are various articles contained in the CROC which guarantee that a child will not suffer discrimination, will be treated equally before the law, will not be detained arbitrarily, and will not be subject to torture or trauma, etc.<sup>236</sup> According to the UNHCR Guidelines,<sup>237</sup> Australia is obliged to ensure an appropriate environment for children who are detained. If children who are asylum seekers are detained they must not be held under “prison-like” conditions. All efforts must be made to have them released from detention and placed in other accommodation.<sup>238</sup> Australia fails this, especially considering there are some 365 children in mainland IDCs as well as some fifteen children who are unaccompanied minors – even more so given that under the Migration (Guardianship of Children) Act 1946 (Cth) the Minister is the Guardian charged with their welfare.<sup>239</sup>

The government has rejected criticism of its policy of detaining children. The Department stated: “The Australian Government is aware of its responsibilities under the UN-CROC and does its utmost to ensure that children are treated in accordance with the provisions of the Convention.”<sup>240</sup> Recently the government has commenced trial of a scheme under a Memorandum of Understanding with the South Australian Department of Human Services to provide alternative care to certain unaccompanied minors. Currently there are nine children placed under this alternative care mechanism.<sup>241</sup>

There have been several accusations of sexual abuse of children in the detention centres. DIMIA claims that it responded quickly on being notified of these allegations, alerting the police and ensuring the children received counselling. However, this begs the question of why children are kept in a situation where they are at risk in the first place. Detention centres after all are prisons, and the activities of the inmates cannot be monitored all the time. The fact that children are detained at all is clearly in breach of the CROC.<sup>242</sup>

### ***Infringes Obligations Not to Inflict Torture or Cruel or Unusual Punishment***

Article 7 of the ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment....” Article 16 of the CAT states:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution

for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.”

Article 37 of the CROC states:

States Parties shall ensure that; (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age...”

Given the evidence that the Australian mandatory detention policy inflicts mental and physical detriment on asylum seekers, is of undefined duration, and is inflicted arbitrarily, it could be concluded that Australia is in breach of the above conventions. It is arguable that mandatory detention results in the infliction of (at the very least) cruel and unusual punishment, if not, in some circumstances, torture.

### ***Alternatives to Detention***

The scope of alternative schemes to the mandatory detention policy is too complex for canvassing in this paper; suffice to note that several alternatives to detention have been proposed.<sup>243</sup> HREOC in the “Submission to the Senate Legal and Constitutional References Committee inquiry into Australia’s refugee and humanitarian program” recommended, *inter alia*:<sup>244</sup>

1. Australia should replace the current system of mandatory universal detention of unauthorized arrivals with the alternative set of community release based on reporting conditions.
2. All immigration detainees should be permitted to apply for release on the ground that their detention is unnecessary and/or disproportionate and should provide for judicial review of all unsuccessful applications.
3. Australia’s commitments under international law require the retention of the right of appeal and judicial review for protection visa applicants.
4. Australia must present the opportunity to all asylum seekers to receive protection where their claims fall within other international conventions such as the ICCPR, CAT, etc.

The government has not acted upon these suggestions and has even rejected the principles that HREOC formulated to govern the current detention system. In the government’s response to the findings on a complaint lodged with the HREOC, the Department stated that it rejected the Commission’s Detention Centre Guidelines

in preference for its own principles to assess standards inside the detention centres:

Immigration detention management and services are governed by the Immigration Detention Standards (IDS) developed by DIMA, in consultation with the Commonwealth Ombudsman's Office. DIMA advised the former Human Rights Commissioner, Mr Siodoti, in November 1999 that the IDS, which form part of DIMA's contractual agreement with ACM, meet Australia's international obligations in relation to core human rights principles.<sup>245</sup>

### Observations

The justification employed by the Australian government for detaining asylum seekers focuses on the need for national security and public health, and on the deterrent effect that it is supposed to have in protecting the borders.<sup>246</sup> This strategy clearly singles out unlawful asylum seekers for treatment different from that applied to asylum seekers who arrive on valid visas. Since the difference in treatment is detention, limited rights, and even expulsion under its so-called "Pacific Solution,"<sup>247</sup> it is impossible not to conclude those arriving unlawfully in Australian territory are being punished for so doing.

This is a matter of concern since it breaches Australia's responsibilities under the ICCPR, the CROC, and the Refugees Convention against discrimination and punishment of asylum seekers, and infringes the rule against arbitrary detention. The detention of children is clearly contrary to international human rights norms. The semantic argument used by Australia, that asylum seekers are not refugees until granted that status and hence no specific duties are owed to them, merely obfuscates the real issue – that is, whether Australia has a duty to assess claims to asylum from those who arrive on its shores in a just manner, regardless of whether their arrival was lawful; or whether Australia can avoid its obligation to assess claims for protection by using detention and expulsion as tools to prevent applications for asylum being made in the first place.

Australia has consistently maintained a policy of executive control of the country's migration intake, preferring only those applicants processed from other countries, and deterring those who may seek asylum directly in Australia. On face value this may seem sensible enough. But essentially it involves a blurring of the issues of control of borders and national security with obligations owed to asylum seekers. In the contest between the two competing interests, international human rights obligations have consistently played second fiddle.<sup>248</sup> To justify its policy, the official rhetoric over some twenty-five years has been to dehumanize and delegitimize asylum seekers. This undermines support in the public mind for a humanitarian response, which in turn demands a strong response from government to be seen to be doing something about it, irrespective of the individual circumstances which

may have impelled the asylum seeker in the first place. The Minister justifies the mandatory detention regime as punishing and deterring what are referred to as "queue jumpers," "forum shoppers," and "lawbreakers,"<sup>249</sup> maintaining that Australia should not be a country of first asylum as this is "unfair" to refugees waiting in camps.<sup>250</sup> The emphasis on "fairness" or concern for the refugees<sup>251</sup> (as opposed to those arriving unlawfully by boat) forms a large part of the official rhetoric towards onshore asylum seekers.

What the government fails to understand is that there is no competition or tension between the two policy objectives. Indeed, it is possible to maintain border control and security without sacrificing the rights of human beings in the process.<sup>252</sup> Regardless of whether asylum seekers are admitted and processed or not, the government maintains effective control of the borders and national security. No matter how an individual arrives in Australia, the *government* determines whether that person may remain in Australia and on what conditions. Whether such people are detained is not strictly relevant. The central issue regarding the problem of asylum seekers is one of fairness and expeditious processing of claims – rather than whether or not detention policy is efficacious in maintaining border control. Clearly it is not – since the asylum seekers keep coming and have consistently done so for the past fourteen years.<sup>253</sup>

National security became particularly important following the sad events of 11 September 2001. However, the government rhetoric in this regard was particularly base, since it cast aspersions on all people arriving from Middle Eastern countries and of Arab backgrounds as posing considerable risk to the Australian community.<sup>254</sup> Much residual sympathy for asylum seekers at this point quickly evaporated as the detention policy and border control became the central policy debate in the lead-up to the federal general election in November 2001.<sup>255</sup>

Despite the government's claims that its policy maintains strong borders, it is futile to hope that the borders of any country can be made impermeable to those who may be fleeing hardship and distress. If someone is driven by desperation to attempt to come to Australia, they will do so no matter how severe the detention regime nor how tight the government attempts to make the frontiers.

Even if detention were considered necessary for the purposes of confirming the identity of arrivals and for public health reasons, these issues do not justify mandatory detention for an extended period as the government maintains. Most identification checks and all necessary health checks should only require a few weeks to carry

out, and if a proper system, say, of mandatory reporting were instituted, there would be no necessity to keep the vast majority of people currently held in IDCs. This would be at far less social and economic cost to the Australian community than is now the case.

Most asylum seekers pass through another country before arriving in Australia where, it is alleged, if they were genuine refugees, they would have sought asylum. This puts unlawful asylum seekers in a “pincer movement”: either they remain in third countries and await processing to come to Australia (which, for the reasons discussed below, may never happen) or they would accept asylum in that country to which they have fled. In any event there would be no need for them to come to Australia unlawfully.

This is a simplistic argument which conveniently overlooks several important facts, not least of which is that it is only possible to claim refugee status when *in the territory of a signatory state*. The government’s assertion that there is an orderly queue for “refugee status” outside Australia is complete fiction: the definition of a refugee under Article 1A(2) of the Refugees Convention is not the criterion of *any* offshore class of visa that Australia offers. Under international law, while there may not yet exist an agreed “right to seek asylum,” those countries which are signatory to the Refugees Convention have assumed a duty not to *refouler* or expel any person who comes within the ambit of the definition of a refugee as found in Article 1A(2). In the view of some, this is in order to deter signatory states from adopting practices that may deter prospective refugees from entering their territory to claim protection.<sup>256</sup> It would hence make a mockery of the Convention if signatory states (like Australia) were to adopt policies which would prevent or deter a prospective refugee from entering their territory to claim their protection. If at best Australia’s policy is not a breach of its obligations under the Refugees Convention, it is definitely not in compliance with its spirit.

Given Australia’s geographical location it is virtually impossible to arrive directly without first passing through a third country. Many of the countries that lie on the route to Australia (such as Indonesia and Thailand) are not signatories to the Refugees Convention, and not all Australian embassies have Immigration Department offices capable of processing such claims. Indeed, many of the countries that have refugee exoduses or are the first port of call for asylum seekers have no Australian representation at all.<sup>257</sup> This necessitates that prospective applicants send their applications through the post to the Australian immigration office that has responsibility for such applications.<sup>258</sup> Applications must be made in English and must have accompanying documentation, including identity documents and other forms of proof substantiating the applicant’s claims. This poses difficulties for those people who

do not have education or status or other forms of access to information; indeed, it becomes impossible for the bulk of asylum seekers.

Furthermore, most applicants who are in refugee camps are not aware they can make applications for protection in Australia. Even if they manage to make an application they can wait years to be processed, and frequently the only correspondence they may receive from the Department will be a rejection of their claims. There are no appeal rights from decisions to refuse a visa applied for offshore, no right of putting a case in person, nor any obligation on immigration officers to inform applicants about evidential problems with their claims. Finally, but importantly, applications received at Australian posts are not processed in a “first in, first served” basis. Applications are processed until the officer is satisfied the applicant meets the requirements for the grant of the visa or not. Those that are approved may not be granted a visa if the quota for the financial year has already been reached; in this case, they could be held over for years before final decision.

For the above reasons, the criticism and punishment of asylum seekers for resorting to people traffickers is easy to refute. Desperation will force people to try any means to alleviate their condition. This makes them easy prey to people smugglers who exploit them to the point that their lives can be threatened. However, the Australian government prefers to punish the asylum seekers with detention or expulsion.

The government would do better to address the issues as to why so many people should risk their lives and savings to attempt to come to Australia in a perilous sea voyage; they may in fact find that all the answers would be legitimate as to why a person should do so. Persecution (for Refugees Convention or some other reason), repression, discrimination, and poverty are sadly too common a state of affairs for a large proportion of the population of this planet. The desire to find solace in other countries (and the need to use any means at one’s disposal to do so) means that industrialized nations will continue to have problems with asylum seekers until these root causes are addressed.

However, one may ask why, if the policy of detaining refugees were so successful in achieving its ends, do boatloads of asylum seekers keep arriving?<sup>259</sup> Why do successive Australian governments see the need to slowly remove detention from the purview of the courts and forbid media and other access to the detention centres? As part of this, the government shifts the onus onto the system’s critics to propose alternatives to the detention regime, despite the fact that an alternative scheme has

never been trialled nor publicly canvassed and that the government shows no inclination to do so. In truth, the number of onshore asylum seekers arriving unlawfully every year in Australia is relatively insignificant compared with most other industrialized nations, yet the passion that it evokes and the severity of the government response are wholly out of proportion.<sup>260</sup>

Due to economic pressures within, and a Machiavellian twisting of policy and public opinion, Australia has become a place where asylum seekers are increasingly demonized and where, far from being seen as people deserving of compassion, they are viewed as objects deserving of punishment. It seems that compassion comes at too high a price, but that AUD\$1 billion to detain asylum seekers and to support the “Pacific solution” is not too costly. Quick and proper processing of refugee claims would offer those who are genuinely fleeing persecution the chance to normalize their lives more quickly without the infliction of further trauma which currently occurs when a person may be incarcerated in a detention centre for an indeterminate period. Other countries which receive far larger numbers of asylum seekers than Australia manage to do so without detention and with far less fuss. It is perhaps more a reflection on the dark side of human nature and a level of immaturity in the Australian political processes than a reflection of policy which is proper and truly beneficial to the Australian community as a whole.

There are no plans for the Australian government to ameliorate the system of mandatory detention, let alone to abolish it.<sup>261</sup> The policy still enjoys bipartisan support in Parliament, and without a seismic ground-shift in public opinion, this is not likely to change in the near future; although cracks in its support are starting to appear.

### **Conclusion**

Detention centres tend to be placed in remote parts of Australia, in fact, anywhere that is not easily accessible to the bulk of Australian citizens, their representatives, the advocates representing the asylum seekers, and members of the press. By way of justification, the government claims that detention is necessary for security and public health risks that detainees pose to the Australian community. Detention is a mandatory regime under which there is no right to access legal advice, to make visa applications, or to have information about visas (even that asylum seekers may be eligible to apply for visas).<sup>262</sup>

The result of this policy is that the asylum seekers themselves remain largely faceless and voiceless – something which obviously works to the advantage of the government, which wishes to exploit the issue of asylum seekers for domestic political purposes. It does not take one long to find negative representations of asylum seekers in the mass media, usually

fed by politicians, even emanating from the Immigration Minister or the Prime Minister's office.<sup>263</sup>

The mandatory detention policy has taken a heavy toll: personal (for the mental health and well-being of asylum seekers themselves),<sup>264</sup> social, economic, and legal. It has caused severe schisms within Australian society and made many think seriously about the state of Australian democracy, in that the governing political party can unscrupulously manipulate public opinion for the sake of votes and sacrifice the basic rights of human beings in the process. It has also brought Australia's international reputation into disrepute. It can only be concluded that such a cost, compared with what the policy of mandatory detention is supposed to achieve, is too much.

Openness and accountability are keystones of democracy – but it would seem that in Australia the government has implemented legislation that effectively deprives detained asylum seekers of normal democratic safeguards.<sup>265</sup> To make matters worse, some detainees can find themselves detained for periods amounting to years, which, under tyrannical regimes, would be considered at the least as “severe or unusual punishment” and at worst as “torture” – even the more so when one considers that under Australian law, even those accused of the most heinous crimes still obtain the right to apply for bail pending the outcome of a trial.<sup>266</sup>

Men, women, and children peering out through barbed-wire fences, detained in camps in remote places, far from the eyes of the public who know little, if anything, about the issues involved, how these camps are run, and in what standard the inmates are kept: one might be forgiven for thinking that such an image is drawn from camps dating to another era. This, however, is the image of detention centres currently run by the Australian government to house asylum seekers. This is not an image that bodes well for a country that claims moral leadership on global issues.

Sadly, until elected politicians cease to exploit human rights as a tool of political expediency and there is an informed, intelligent debate within the wider Australian community concerning detention policy, asylum seekers will continue to remain, literally and figuratively, “between a rock and a hard place” if they should attempt to seek asylum on Australia's shores.

### **Notes**

1. *Infra* note 17. All Australian legislation can be obtained online: Australasian Legal Information Institute Homepage fs2 <<http://www.austlii.edu.au/>> (date accessed: 24 February 2002). The “Immigration Department” has

undergone various name changes reflecting its role according to evolving government policy. It has been known as “DILGEA” (Department of Immigration, Local Government and Ethnic Affairs); “DIEA” (Department of Immigration and Ethnic Affairs); “DIMA” (Department of Immigration and Multicultural Affairs) and most recently “DIMIA” (Department of Immigration, Multicultural and Indigenous Affairs). The same applies to the title of the Minister for Immigration, whose various acronyms have included “MILGEA”, “MIEA,” and “MIMA,” and who is now referred to by the acronym “MIMIA” (Minister for Immigration, Multicultural and Indigenous Affairs). In this paper I shall refer to the former as “DIMIA” and the latter as the “Immigration Minister” or the “Minister.” Since no Immigration Minister has been female, I refer to the person holding that office with the third person pronoun “he” and its declensions.

2. I.e., without a valid visa, and more often than not without identity papers and passports. The Migration Act 1958 (Cth) (No.62 of 1958) (hereinafter *Migration Act*), s.13(1) defines a “lawful non-citizen” as “a non citizen in the migration zone who holds a visa that is in effect”; s.14 defines “unlawful non-citizen” as a person who is present within the “migration zone” unlawfully, i.e., without a valid visa: *infra* note 47 and 69. See Department of Immigration, Multicultural and Indigenous Affairs, *Unauthorised Arrivals and Detention – Information Paper* (Canberra: DIMIA, 15 October 2001) at 3; online: DIMIA Homepage <[http://www.immi.gov.au/illegals/uad/uad\\_paper.pdf](http://www.immi.gov.au/illegals/uad/uad_paper.pdf)> (date accessed: 20 February 2002): “In broad terms, there are four kinds of unlawful non-citizens: persons whose visas have expired, persons whose visas have been cancelled, persons who have entered Australia illegally (unauthorised arrivals) and persons whose visas have ceased by operation of migration law.”
3. Most often “refugee status,” which is a criterion for Protection Visas: *infra* note 9.
4. The mandatory detention policy covers all “unlawful non-citizens” including those who have arrived unlawfully. All are commonly referred to as “detainees.” For the purposes of this paper “asylum seekers” shall be used to denote more specifically those who arrive by boat or plane without lawful permission, are denied entry, and may or may not have actually applied for a Protection Visa.
5. Given the length of time that some spend in detention, many of the children can spend their early childhood or some of their formative years in detention, although never willingly having committed an offence against any law of the Commonwealth: M. Einfeld, “Is There a Role for Compassion in Refugee Policy?” (2000) 23(3) *University of New South Wales Law Journal* [hereinafter *UNSW L.J.*] 303–14 at 308. For the numbers of women and children in mainland detention centres, *infra* note 126. Under the *Immigration (Guardianship of Children) Act 1946* (Cth), s. 6 the Immigration Minister is the guardian of all non-citizen children who do not arrive in the company of a relative over the age of twenty-one.
6. Human Rights and Equal Opportunity Commission [hereinafter HREOC], *Those Who’ve Come across the Sea: Detention of Unauthorised Arrivals* (Canberra: AGPS 1998) at 101: “[h]unger strikes are not a new phenomenon among asylum seekers detained in Australian immigration detention centres. They certainly occurred in the early 1980s. In response to a hunger strike in 1992 by three Cambodian women at Villawood, the then Minister for Immigration promulgated a regulation allowing the Department to direct physicians to force-feed asylum seekers whose lives are at risk because of their refusal to eat. The provision has been amended from its original form and is now contained in [*Migration Regulations 1994*] regulation 5.35.” According to the press information page, Immigration Minister, Philip Ruddock MP, “Detention Update”, as at 28 January 2002 there were 287 individuals on hunger strike in mainland Australia’s IDCs (including five minors); forty-one individuals had “stitched” their lips together in protest, and of these nine were also participants in the hunger strike. Online: Immigration Minister, Philip Ruddock MP Homepage <<http://www.minister.immi.gov.au/detention/update.htm>> (date accessed: 24 March 2002).
7. “Refugees Desperate” *The Age* (27 January 2002); “Policy on Refugees Repugnant – We Are All Immigrants” *The Age* (26 January 2002); “Never Confuse the Law with Justice” *The Sydney Morning Herald* (30 January 2002); “Refugee Hunger Protest Grows” *The Sunday Age* (16 January 2002).
8. In July 2000, the UN Human Rights Committee stated: “The Committee considers that the mandatory detention under the Migration Act of ‘unlawful non-citizens’, including asylum seekers, raises questions of compliance with article 9, paragraph 1, of the Covenant, which provides that no person shall be subjected to arbitrary detention. The Committee is concerned at the State party’s policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organizations to the detainees in order to inform them of this right.” Online: UNHCHR Homepage <<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/e1015b8a76fec400c125694900433654?Opendocument>> (date accessed: 25 September 2001); HREOC, *Preliminary Report on the Detention of Boat People* (November 1997). HREOC, *supra* note 6; HREOC, *Submission to the Senate Legal and Constitutional References Committee inquiry into Australia’s refugee and humanitarian program* (November 2000)(*infra* note 85); Human Rights Watch, *No Safe Refuge: The Impact of the September 11 Attacks on Refugees, Asylum Seekers and Migrants in the Afghanistan Region and Worldwide*, Human Rights Watch Backgrounder (18 October 2001); U.S. Department of State, *Country Reports on Human Rights Practices – 2001: Australia*, released by the Bureau of Democracy, Human Rights, and Labor, 4 March 2002; online: U.S. State Department Homepage <<http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8249.htm>> (date accessed: 24 March 2002).

9. *Migration Act*, s.36(1) states that a criterion of a Protection Visa is that the applicant “meets the definition of a refugee as found in the United Nations *Convention relating to the Status of Refugees of 28th July 1951* and the *Protocol Relating to the Status of Refugees, 31 January 1967*”. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR, January 1992) [“UNHCR Handbook”], online: UNHCR Homepage <<http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=publ>> (date accessed: 21 February 2002). The *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137, Australian Treaty Series (A.T.S.) 1954, No. 5 (entered into force for generally and for Australia 22 April 1954). The *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267, A.T.S. 1973 No. 37 (entered into force generally 4 October 1967, entered into force for Australia 13 December 1973). Both the *Refugees Convention* and the *Optional Protocol* are referred hereinafter as the “*Refugees Convention*.” The *Migration Regulations 1994* (Cth) (hereinafter “*1994 Regulations*”) contain the other criteria for the grant of a Protection Visa, among which is that “the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the *Refugees Convention*” [1994 *Regulations*, Schedule 2, Part 866, clause 866.221; and Schedule 2, Part 785, clause 785.221].
10. The government claims that journalists and photographers from many media organizations have participated in tours to Immigration Detention Centres (hereinafter IDCs) arranged by the Department. There have been numerous tours of IDCs since 1992. In recent years the media visited Port Hedland in June 1999 and February 2000; Woomera in November 1999 and in January, March, and December 2001; Maribyrnong in March 2001; and Curtin in June 2001. Of course, these “tours” are arranged by the Department and are highly orchestrated and controlled; the government claims this is for security reasons and the need to protect the identity and privacy of asylum seekers: *infra* note 92. The government further claims that visits to the centre by external bodies average more than one a week and that this demonstrates “that the immigration detention program is among the most closely scrutinised of government programs.” On 26 January 2002, during riots and unrest at the Woomera Detention Centre, the media were forcibly removed from outside the perimeter fencing; however, the government stated that DIMIA had no knowledge of the directive to move the media and that it was not a DIMIA directive. This of course begs the question, if DIMIA did not know of the directive what other events concerning the IDCs is the government not aware of? The government claims that IDCs are monitored or scrutinized, that they are subject to both administrative and judicial review, and that they are subject to full parliamentary scrutiny and accountability, even claiming that immigration detention is among the most closely scrutinized government programs. A number of government and non-government agencies make regular visits to detention facilities, such as the HREOC, the Commonwealth Ombudsman, the Australian Parliament’s Joint Standing Committee on Migration, other members of Parliament, and the Immigration Detention Advisory Group. Press information page of the website of the Immigration Minister, Philip Ruddock MP, “January 2002 Rebuttals to False Information Relating to Immigration Detention”; on-line: Immigration Minister, Philip Ruddock MP Homepage <<http://www.minister.immi.gov.au/detention/update.htm>> (date accessed: 24 March 2002).
11. “Boat people” is the term commonly used to denote those arriving unlawfully by boat in Australian territory.
12. These countries usually accept this burden after being granted millions of dollars in extra aid assistance. This *should* be added to the true financial cost of the policy; see “Costello Forced to Find \$400m as Refugee Costs Spiral” *Australian Financial Review*, (14 February 2002) and “Budget Faces \$1.8bn Hit from Refugees and Terror” *Australian Financial Review* (30 January 2002).
13. The name the government devised for its program of expelling asylum seekers.
14. *Infra* note 127.
15. *Commonwealth of Australia Constitution Act*, 63 & 64 Victoria c12, s.51(xix), (xxvii), (xxix).
16. The most notable exception being aliens classified as “hostile” or as “enemy aliens” in time of war.
17. *Chu Kheng Lim v. MILGEA* (1992) 110 ALR 97 at 107 (hereinafter “*Lim v. MILGEA* (1992)”).
18. These concerns have arisen partly from historical factors and partly from political expediency. Australia’s relative geographic remoteness, its large size (being an island continent) and relatively small population have fostered the belief that Australia is remote but also vulnerable. This has led to a certain amount of underlying paranoia in the Australian psyche (which is easily manipulated) about feared invasions from the heavily populated areas of Asia to the north and a fear of losing control of the migration system. This fear concerning the geographic placement of Australia was manifested in the “White Australia policy” in force until 1973 under which only white Europeans were permitted to migrate to the country. Arrival by boat of (what seems to the Australian mind) large numbers of asylum seekers from Asia tends to awaken these deeply held fears, an irony considering that the only invasion of Australia to have taken place in the last forty millennia was that of white Europeans. Australia’s policy of preferring repatriation of asylum seekers is expressed in the following article: P. Ruddock, “Refugee Claims and Australian Migration Law: A Ministerial Perspective” (2000) 23(3) UNSW L.J 1–12 at 3–4.
19. This empowered the Minister to grant an applicant a visa according to his discretion. The practice arose that his press releases would indicate on what basis he would exercise this discretion to do so. This system remained in place until December 1989.
20. Between 1976 and 1978, fifty-five boats arrived in Australia carrying 2,087 people. By 3 July 1979 Australia had accepted over 6,000 refugees from Laos, Cambodia, and Vietnam. In order to manage the crisis, Australia signed bilateral agreements with several Southeast Asian countries such as Hong Kong, Malaysia, and Indonesia in which it

- agreed to receive refugees processed in camps in those countries, in return for which those governments would restrict the passage of asylum seekers through their territory to Australia. See A. Schloenhardt, "Australia and the Boat-People: 25 Years of Unauthorised Arrivals" (2000) 23(3) UNSW L.J. 33–55 at 34–35.
21. Between 1977 and 1989 the process of determining whether a person had the status of a refugee was a matter which lay within the discretion of the executive: see D. H. N. Johnson, "Refugees, Departees, and Illegal Migrants" (1980) 9 Sydney Law Review [hereinafter Syd. L.R.] 11 at 47; I. Shearer, "Extradition and Asylum" in J. Ryan, ed., *International Law in Australia*, 2<sup>nd</sup> ed. (Sydney: Lawbook Co., 1984) at 206. Until 1980 with the introduction into the Migration Act of s.6A(1)(c) (*infra*, note 25), it appears that there was no Commonwealth legislative or regulatory provision which referred to any mechanism for deciding whether a person had the "status of refugee," what obligations were owed to a person who was determined to have such a status, nor expressly or impliedly conferred upon any Minister or other person the function of making a determination that a person had that status for the purposes of Australian law. By administrative arrangements, responsibility for refugees had been allotted to the Immigration Minister who established an interdepartmental committee to advise him on the question whether a particular person was a refugee within the meaning of the Refugees Convention. If the recommendation was positive, the Minister would utilize the provisions of the Migration Act under which he had discretionary power to grant a visa. The functions of the Minister and the interdepartmental committee in determining refugee status had no statutory foundation but were carried on as a prerogative of the executive until 1989.
  22. Schloenhardt, *supra* note 20 at 35–36.
  23. The Association of South East Asian Nations [hereinafter ASEAN] called for UN intervention. The Meeting on Refugees and Displaced Persons in South East Asia was called by the UN Secretary General and held in Geneva in July 1979.
  24. UNHCR, Report UN Doc A/AC.96/751 (1990) 2. Malaysia even turned boats out to sea: Schloenhardt, *supra* note 20 at 35–36.
  25. Introduced into the *Migration Act* by the *Migration Amendment Act (No 2)(1980)* (Cth) (No.175 of 1980). Following amendment, *Migration Act*, s.6A(1)(c) read: "(1) an entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say – ... (c) he is the holder of a temporary permit which is in force and the Minister has determined by instrument in writing that he has the status of a refugee within the meaning of the *Convention relating to the Status of Refugees* that was done at Geneva on 28 July 1951 or of the *Protocol relating to the Status of Refugees* that was done at New York on 31 January 1967." A person who has entered Australia, but did not hold a valid entry permit (either because it was refused on arrival, or it was cancelled or expired subsequent to that person's entry to Australia), was defined by s.6 (1) of the Migration Act, as a "prohibited immigrant."
  26. No.112 of 1980.
  27. IUA Act, ss.13, 17, 20, 23 and 26.
  28. IUA Act, s.9(4).
  29. IUA Act, s.12 (1); the "relevant passenger" was defined in s.9.
  30. IUA Act s.14 determined a prescribed authority to be a Magistrate *et al.* appointed as such under the legislation of the respective States of the Federation and pursuant to an agreement for this purpose by the Governor General.
  31. IUA Act, s.12(2).
  32. IUA Act, s.12(3).
  33. IUA Act, s.12(3)(a).
  34. IUA Act, s.12(3)(b). The entry permit could be issued to the person under the IUA Act, s.10(1), in which case the person was deemed to have entered Australia on the day the entry permit was granted.
  35. IUA Act, s.12(3)(c).
  36. IUA Act, s.11(1).
  37. IUA Act, s.12(5).
  38. No.112 of 1983.
  39. *Migration Act*, s.15 – now substituted.
  40. Some countries, such as Singapore, Thailand, and Brunei, refused to admit the boat people: V. Muntarhorn, *The Status of Refugees in Asia* (Oxford: Clarendon Press, 1992) at 97, 127 & 129; A. Helton, "The Comprehensive Plan of Action for Indo Chinese Refugees" (1990) 8 New York Law School Journal of Human Rights 111 at 111–13.
  41. Held in Geneva on 13–14 June 1989; Helton, *supra* note 40 at 111–13.
  42. UN Doc A/44/523 (22 Sept 1989).
  43. No.59 of 1989.
  44. Under the 1989 changes, the power of the Minister to grant refugee status was retained. The *Migration Act*, s.6A(1) was amended and renumbered – the various grounds for granting a visa were transformed from a discretionary system exercised by the Minister to one governed by the *Migration Regulations 1989*. Among the classes of visa were certain classes of refugee visa. However, the grant of refugee status (a contingent criterion [*inter alia*] for being granted a Refugee Visa and/or Entry Permit) remained at the discretion of the Minister. After amendments to the *Migration Act* (effected by the *Migration Amendment Act (no 2) 1988* (Cth), the *Migration Amendment Act 1989* (Cth), and the *Migration Legislation Amendment Act 1989* (Cth), the provisions of the *Migration Act*, s.6A became s.47 and read as follows: "s.47 (1) A permanent entry permit shall not be granted to a non-citizen after entry into Australia unless at least one of the following paragraphs applies to the non-citizen: ... (d) he or she is the holder of a valid temporary permit and the Minister has determined in writing that the non-citizen has the status of a refugee within the meaning of: (i) the *Convention relating to the Status of Refugees* that was done at Geneva on 28 July 1951; or (ii) the *Protocol relating to the Status of Refugees* that was done at New York on 31 January 1967;..."
  45. J. Crawford, "Australian Immigration Law and Refugees: The 1989 Amendments" (1990) International Journal of Refugee Law [hereinafter IJRL] 626 at 626–27.

46. These sections have been amended on several occasions by *Migration Amendment Act 1979* (Cth)(No.117 of 1979); *Migration Amendment Act 1983* (Cth)(No.112 of 1983); and *Migration Amendment Act 1987* (Cth)(No. 133 of 1987). They were repealed and substituted by the *Migration Amendment Act (1989)* (No. 59 of 1989) as s.6(1), (2), (3) and s.11A respectively. However, as part of the same amendment, the entire Act was renumbered, after which s.6(1), (2), (3) became s.14(1), (2) and (3), while s.11A became s.20. Hereafter, the sections of the *Migration Act* are referred to in their post December 1989 amendment numbering, the pre December 1989 amendment numbers, where applicable, being referred to in square brackets “[...]”. It should be noted that the entire Act was again substantially amended and renumbered by the *Migration Reform Act 1992* (Cth) (No. of 1992).
47. The terminology applied to those in Australia without valid authority has altered with various changes to the *Migration Act 1958*. Following passage of the *Migration Legislation Amendment Act (1989) (Cth)* (No.59 of 1989) on 19 December 1989, from then until 1 September 1994, persons arriving in Australia without visas or entry permits were referred to as “prohibited entrants”: *Migration Act*, s.54B and s. 88 [s.36]. Persons who entered Australia and whose entry permit expired after entry, or their entry permit was cancelled, became known as “illegal entrants”: *Migration Act*, s.14 [s.6(1)] and s.20 [11A] . This was a change from the term applied under the earlier form the *Migration Act*, s.6 which before 2 April 1984 described a person who arrived in Australia and was refused a valid entry permit, or whose entry permit was cancelled or expired after entry, as a “prohibited immigrant,” and after 2 April 1984 as a “prohibited non-citizen.” Following the passage of the *Migration Reform Act 1992* (Cth) (No.184 of 1992) and its coming into effect on 1 September 1994 the previous terminology was abandoned. The classification now differentiates simply between “unlawful non citizens” and “lawful non citizens” under the *Migration Act*, s.13 and s.14; *supra* note 2 and *infra* note 69.
48. *Migration Act*, s.88 read: “(1) A person who is on board a vessel (not being an aircraft) at the time of the arrival of the vessel at a port, whether or not that port is the first port of call of the vessel in Australia, being a stowaway or a person whom an authorized officer reasonably believes to be seeking to enter Australia in circumstances in which the person would become an illegal entrant, (in this section the “prohibited entrant”) may – (a) if an authorized officer so directs; or (b) if the master of the vessel so requests and an authorized officer approves, be kept in such custody as an authorized officer directs at such place as the authorized officer directs until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs. (2) Where a person ... who has travelled to a port in Australia on board a vessel (not being an aircraft), whether or not that port is the first port of call of the vessel in Australia, has, after the arrival of the vessel at its first port of call in Australia, sought and been refused an entry permit, the person may, if an authorized officer so directs, be kept in such custody as an authorized officer directs at such place as the authorized officer directs until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs.” The section was amended and renumbered from s.36 to become s.88 following passage of the *Migration Legislation Amendment Act (1989)* (Cth) (No.59 of 1989). Following the *Migration Reform Act 1992* (Cth) (No.184 of 1992), s.88 was substantially amended and renumbered to become s.250. The requirement of s.88 that a “prohibited entrant” “be returned on the boats” on which they had entered Australian territory was to be crucial in the High Court consideration of the validity of the *Migration Act*, s. 88 as empowering the mandatory detention of asylum seekers: *Lim v. MILGEA* (1992) 110 ALR 97: *supra* note 17; *infra* note 52.
49. *Migration Act*, s.92 and s.93.
50. *Migration Act*, s.13 [s.5]. The “period of grace” ran from the time the last entry permit held by the person expired, but stopped when any valid application for a visa was made, and only started running when that application was finalized: *Migration Act*, s.13(2).
51. UN Doc. CCPR/C/59/D/1993 (1993); reproduced in “UN Human Rights Committee. Communication No 560/1993 *A v. Australia*” (1997) 9 IJRL at 506–27. In response to the UN Committee’s finding that Australia was in breach of some of its obligations under the International Convention on Civil and Political Rights [hereinafter ICCPR]; *infra* note 190) Australia made a veiled threat to withdraw from the optional protocol which permitted appeals to be taken to the UN Human Rights Committee; see Australia, “Response of the Australian Government to the Views of the Human Rights Committee in Communication No 560/1993 (*A v Australia*),” (1997) 9 IJRL at 674–78.
52. This case involved a group of Cambodian asylum seekers who had arrived in Australia on two separate boats on 27 November 1989 and 31 March 1990. Upon arrival they were detained under the *Migration Act*, s.88. Between 3 and 6 April 1992 the applicants’ claims to refugee status were refused by the Minister. Applications were then made to the Federal Court under s.15 of the *Administrative Decisions (Judicial Review) Act 1997* (Cth) [hereinafter ADJR Act] on the basis that the detentions were without legal authority. The Minister conceded the case before it came to hearing, vacating the decisions and remitting them to the Department for reassessment, but keeping the applicants in detention in the meantime. For a complete discussion of the case see M. Crock, “Climbing Jacobs Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia” (1993) 15 Syd L.R. at 338.
53. In the end, it was not necessary for the Court to consider this second question.
54. No. 24 of 1992. It received the royal assent the following day. See Crock, *supra* note 52 at 340.
55. *Lim v. MILGEA* (1992) 110 ALR 97; at 109 per Brennan, Deane and Dawson JJ; at 127 per Toohey J; and at 143 per McHugh J. After examining the legislation in force before

- 7 May 1992, five judges held that the detention of the asylum seekers was or was probably unlawful.
56. *Migration Act*, s.177 [s.54K] defined a “designated person” as a “non-citizen who a) had been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992 [later amended and extended to 1 September 1994]; and b) has not presented a visa; and c) is in Australia; and d) has not been granted an entry permit; and e) is a person to whom the Department has given a designation by: i) determining and recording which boat he or she was on; ii) giving him or her an identifier that is not the same identifier as an identifier given to another non-citizen who was on the boat; and includes a non-citizen born in Australia whose mother is a designated person.” See Crock, *supra* note 52 at 340.
  57. Excluding certain days such as those spent waiting for visa processing, attending hearings, etc.
  58. *HREOC*, *supra* note 6 at 23–24.
  59. *Lim v MILGEA* (1992) 110 ALR 97 at 120–21.
  60. *Ibid.* at 115 per Brennan Deane and Dawson JJ.
  61. *Ibid.* at 114–15.
  62. That the Parliament had decided it is in the national interest for “designated persons” to be kept in detention until they leave Australia or be granted a visa.
  63. *Lim v. MILGEA* (1992) 110 ALR 97 at 100 per Mason CJ; at 113 per Brennan, Deane and Dawson JJ; at 128 per Toohey J; at 135 per Gaudron; at 143–44 per McHugh J.
  64. *Ibid.* at 100 per Mason CJ; at 117–18 per Brennan Deane and Dawson JJ; at 128 per Toohey J; at 135 per Gaudron; at 143–44 per McHugh J.
  65. *Senator Nick Bolkus & Joanna McRae v. Tang Jia Xin* (1993) 47 FCR 176; (1993) 118 ALR 603 where the Full Court of the Federal Court upheld the decision of the judge at first instance to order the release of the detainee because the period of detention had exceeded the maximum number of days permitted by the Migration Act.
  66. This case, and the attempts by the government to legislate itself out of the difficulty of having illegally detained people, shows how far the government was prepared to go to maintain its detention policy, even to the extent of legalizing it retrospectively and attempting to remove all judicial intervention or oversight of the detention regime.
  67. No.184 of 1992. It came into force on 1 September 1994. It repealed and substituted large parts of the Migration Act and renumbered it. Hereinafter, the section numbers cited are those post 1 September 1994, and the section numbers pre 1 September 1994 (where applicable) as introduced by the *Reform Act 1992* are cited in square brackets “[..]”.
  68. The prescription was changed from “temporary” visa to a non-defined temporal phrase “visas” by the *Migration Legislation Amendment Act 1994* (Cth) s 9.
  69. *Migration Act*, s. 14 reads: “An unlawful non citizen is: (1) A non citizen in the migration zone who is not a lawful non citizen is an unlawful non citizen. (2) To avoid doubt, a non citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non citizen.” For “migration zone,” *infra*, note 71.
  70. *Supra* notes 2 and 69. See M. Crock, “A Legal Perspective on the Evolution of Mandatory Detention” in M Crock ed., *Protection or Punishment: The Detention of Asylum Seekers in Australia* (Sydney: Federation Press, 1993) Chapter 5 *passim*; Joint Standing Committee on Migration [hereinafter JSCM], *Asylum, Border Control and Detention* (Canberra: AGPS 1994) at 49ff.
  71. The “migration zone” is defined by *Migration Act*, s.5(1) to include land above or below the low watermark and sea within the limits of a port in a state or territory but does not include the sea within a state or territory or the “territorial sea” of Australia. The migration zone includes Christmas Island and Ashmore Reef (*Migration Act*, s.7). The “migration zone” is a creation of Australian domestic law, not international law.
  72. *Migration Act*, s.189(2).
  73. *Migration Act*, s.190.
  74. *Migration Act*, s.192.
  75. *Migration Act*, s.196(5).
  76. *Migration Act*, s.199.
  77. JSCM, *supra* note 70 at 49ff. The need to ameliorate the system was also supported by the severe criticisms of the law by numerous bodies, a view later vindicated by the UN Human Rights Committee in 1997 in a case brought before it by one of the plaintiffs in *Lim v. MILGEA* (1992): *A v. Australia* 30 April 1997, UN Doc. CCPR/C/59/D/560/1993: *supra* note 51.
  78. *Migration Act*, s.73.
  79. *1994 Regulations*, reg. 2.20(2) and (3).
  80. *1994 Regulations*, reg. 2.20(5) and reg. 2.20(7): if the state or territory child welfare authority has certified that release from detention is in the child’s best interests and also that the Immigration Minister is satisfied that arrangements have been made for the child’s care and welfare, these arrangements are in the child’s best interests and release would not prejudice the rights and interests of the child’s parents or guardian.
  81. *1994 Regulations*, reg. 2.20(4).
  82. *1994 Regulations*, reg. 2.20(8).
  83. Based either on health or on previous experience of torture or trauma; the test is whether the person can be properly cared for in a detention environment: *1994 Regulations*, reg. 2.20(9).
  84. *Migration Act*, s.72(3). The power to make a determination is stipulated to be exercisable only by the Minister if: the person has made a valid application for a Protection Visa; the person has been in detention for more than six months since the visa application was made; the Minister has not yet made a primary decision (that is, the conclusion of the first stage of the formal refugee determination process) in relation to the visa application; and the Minister thinks release would be in the public interest: *The Migration Act*, s.72(2).

85. HREOC, "Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program" (November 2001) at 7; online: HREOC Homepage <[http://www.hreoc.gov.au/word/human\\_rights/asylum\\_seekers/h5\\_2\\_3.doc](http://www.hreoc.gov.au/word/human_rights/asylum_seekers/h5_2_3.doc)> (date accessed: 20 February 2002). The government claims that separating children from their parents is not in the best interests of the child, and since there is no power to release the parents, the children *ipso facto* should remain in detention. As at 1 February 2002, there is one child in foster care having been released on a bridging visa: Press information page, Immigration Minister, Philip Ruddock MP, "Women and Children in Detention"; online: Immigration Minister, Philip Ruddock MP Homepage <[http://www.minister.immi.gov.au/detention/women\\_&\\_children.htm](http://www.minister.immi.gov.au/detention/women_&_children.htm)> (date accessed: 24 March 2002).
86. Amended by *Migration Legislation Amendment Act 1994 (Cth)* (No. 60 of 1994).
87. *Migration Legislation Amendment Act 1994 (Cth)* (No.60 of 1994) repealed and substituted s.54ZA which thence became s.193.
88. *Migration Act*, s. 256 reads: "Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention."
89. S. Taylor, "Should Unauthorised Arrivals in Australia have free Access to Advice and Assistance" (2000) 6(1) *Australian Journal of Human Rights* [hereinafter *AJHR*] 34 at 43.
90. Effected by the passage of *Migration Legislation Amendment Act (No.1)(1999)*(No.89 of 1999).
91. S. Taylor, "Protecting Human Rights of Immigration Detainees in Australia: An Evaluation of Current Accountability Mechanisms" (2000) 22(1) *Syd. L.R.* 62; M. Phillips, "Impact of Being Detained On-Shore: The Plight of Asylum Seekers in Australia" (2000) 23(3) *UNSW L.J.* 288–302 at 290; DIMIA, *supra* note 2 at 8.
92. The Company is Australian Correctional Services Pty Ltd. The government claims that: "Detention centres are not open to unrestricted access by the public because of the need to protect potential refugees and the family and friends they have left behind. Indeed, many detainees seek anonymity." DIMIA, *supra* note 2 at 12.
93. Between 1990 and November 1999 there were fifty-eight complaints made to the Human Rights Commission: HREOC, *1998–1999 Review of Immigration Detention Centres* (Canberra 2000) at 2; online: HREOC Homepage <[http://www.hreoc.gov.au/word/human\\_rights/asylum\\_seekers/idc\\_review.doc](http://www.hreoc.gov.au/word/human_rights/asylum_seekers/idc_review.doc)> (date accessed: 22 February 2002).
94. HREOC, *supra* note 6 at 23–24.
95. *Ibid.* at 24.
96. HREOC, *supra* note 85 at 3–5.
97. *Migration Legislation Amendment Act 1999 (No. 1) (Cth)* (No. 89 of 1999).
98. Schloenhardt, *supra* note 20 at 52.
99. *1994 Regulations*, reg. 785.212 state that the applicant for a Temporary Protection Visa has entered the migration zone but has not been immigration cleared; *infra* note 101.
100. *1994 Regulations*, reg. 866.212 limits application for a Subclass 866 (Protection) Visa to those who have been immigration cleared. Reg. 866.228 prevents a person who has been granted a Subclass 785 (Temporary Protection) Visa from being granted a Subclass 860 (Protection) Visa unless they have held that temporary visa for a period of thirty months continuously. HREOC has stated its concern that these changes discriminate between asylum seekers, and is contrary to international Conventions, such as Article 26 of the ICCPR (*infra* note 190), and Article 2(1) of the *International Convention on the Rights of the Child* [hereinafter *CROC*] (*infra* note 191), and Articles 31–32 of the *Refugee Convention*: HREOC, *Briefing Paper: Human Rights and International Law implications of Migration Bills* (21 September 2001); online: HREOC Homepage <[http://www.hreoc.gov.au/human\\_rights/asylum\\_seekers/migration\\_bills.html](http://www.hreoc.gov.au/human_rights/asylum_seekers/migration_bills.html)> (date accessed: 20 February 2002).
101. *1994 Regulations*, reg. 785.511 permits the holder of the visa (when granted) to remain in, but not re-enter, Australia until the end of thirty-six months from the date of grant of the visa; or until the day on which an application by the holder for a permanent visa is finally determined, whichever is later. Importantly, Regulation 785.611 forbids the holder from being granted a substantive visa other than a Subclass 866 Protection Visa.
102. *1994 Regulations*, reg. 785.222 permits a member of the family unit as a person granted a Subclass 785 (Temporary Protection) Visa to apply for a Temporary Protection Visa; however, reg. 785.411 requires that family member must be in Australia at the time the decision is made to grant the visa.
103. On 26 August 2001 a boat which had stalled near Australian territory carrying 433 asylum seekers was spotted by Coastwatch. The next day, a Norwegian freighter, the *MV Tampa* responded to a call by the Australian Search and Rescue (AusSAR) to render assistance. After taking the asylum seekers on board, it is alleged that the captain of the *MV Tampa*, Arne Rinnan, turned towards Christmas Island after the passengers requested him to do so. Capt. Rinnan later stated that the Indonesian authorities denied him permission to enter Indonesian territory. The Australian authorities also denied the boat permission to enter Australian territory, ordering the *MV Tampa* to remain in the "contiguous zone." Since no assistance had been forthcoming within forty-eight hours, the captain ordered a distress signal to be sent and on 29 August 2001 he steered the ship into Australian territorial waters near Christmas Island. The ship was intercepted by forty-five SAS members. The government attempted to pass a Border Protection Bill through Parliament legalizing its ac-

tions, but this bill was rejected by the Senate. A stalemate ensued for several days during which the ship was anchored off Christmas Island. The Norwegian Ambassador to Australia visited the ship on 30 August 2001. On 31 August 2001 two applications were made to the Federal Court of Australia, the *Victorian Council for Civil Liberties Incorporated v. MIMA* [2001] FCA 1297 and *Ruddock v. Vidarlis* [2001] FCA 1329; (2001) 110 FCR 391; (2001) 183 ALR 1 [online: AusTLII Homepage <<http://www.austlii.edu.au/>>] (*infra* note 226), seeking restraining orders preventing the Commonwealth and the Minister from removing the asylum seekers from the territorial sea. On 3 September 2001 the asylum seekers were forcibly removed to the HMAS *Manoora* on which they were eventually transported to Nauru where the government had established a detention centre where the asylum seekers would be processed by the UNHCR. Before they arrived, the HMAS *Warramanga* intercepted on 7 September 2001 another vessel, later identified as the Indonesian fishing vessel, the *Aceng*, which was heading for Ashmore Reef. This boat was boarded by Australian authorities and the passengers were transferred to the HMAS *Manoora*, in which these people were also transhipped eventually to Nauru.

104. HREOC, *supra* note 100: “The provisions of the Amendment Bills are of great concern to the Commission ... . It is the Commission’s view that the provisions of the Amendment Bills undermine Australia’s commitment to international human rights obligations.” These laws included the *Border Protection (Validation and Enforcement Powers) Act 2001* (No. 126 of 2001) [hereinafter *BP(VEP) Act*] which introduced into the *Migration Act* s.7A, which expressly re-enforces the right of the Commonwealth to exercise its executive power to “protect Australia’s borders, where necessary, by ejecting persons who have crossed those borders”; the *Migration Amendment (Excision from Migration Zone) Act 2001* (No. 127 of 2001) [hereinafter the *MA(EMZ) Act*]; the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (No. 128 of 2001) [hereinafter the *MA (EMZ) CP Act*]; the *Migration Legislation Amendment Act (No. 5) 2001* (No. 130 of 2001) which empowers officers under the *Migration Act* to obtain information from agencies, both private and public, about the travel to and from Australia of individuals without reaching the terms of the *Privacy Act 1988* (Cth); and the *Migration Legislation Amendment Act (No. 6) 2001* (No. 131 of 2001). In considering Australia’s actions against the *MV Tampa*, one should keep in mind the requirements of the UN Convention on the Law of the Sea, 10 October 1982, 1833 UNTS 1994 No 34 [Ratified by Australia 5 October 1994, entry into force for Australia 16 November 1994] Article 98, which requires signatory states to ensure that the master of a ship sailing under its flag render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance.
105. *Customs Act 1901* (Cth) s.185(3A), introduced by schedule 1, Item 3, *BP(VEP) Act 2001*; and the *Migration Act 1958*, s.245F(9), introduced by schedule 2, Item 8, *BP(VEP) Act 2001*. Furthermore, the *MA(EMZ)(CP) Act 2001* inserts into the *Migration Act* a new s.198A which empowers an officer of the Commonwealth to take an offshore entry person from Australia to a country declared under the provisions of the *Migration Act* at subsection 198A(3). Before removing a person to a third country, the Minister must declare in writing that a country specified provides access for persons seeking asylum to effective procedures for assessing their protection needs; provides protection for person seeking asylum pending determination of their refugee status; provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and meets relevant human rights standards in providing that protection.

106. Even though present in Australian territory, in order to make a valid application for a Protection Visa a person must be in Australia in the “Australian migration zone” 1994 *Regulations* at Schedule 1 – an area defined by legislation in the *Migration Act*, s.5(1): *supra* note 71. The *Migration Act*, s.36 stipulates that a criterion for a Protection Visa is that the applicant for the visa is a “non-citizen in Australia to whom Australia has protection obligations under the *Refugees Convention* as amended by the *Refugees Protocol*” [emphasis added]. The *Migration Act* does not define what “in Australia” signifies [“enter in Australia” is defined in s.5(1) as “enter the migration zone”]. The *Acts Interpretation Act 1901* (Cth), s. 17 states that “Australia” means “the Commonwealth of Australia and, when used in a geographical sense, includes the Territory of Christmas Island”. It also includes the “coastal sea of Australia” (s.15B(1)(b)) and this in itself includes the “territorial sea” (s.15B(4)). It would thus appear that Australia owes protection obligations to a refugee who has entered the territorial sea; i.e., a person is entitled to make a valid claim for refugee status under the *Refugees Convention* if they have entered the territorial sea of Australia, regardless of whether they are in the “migration zone” as defined by the *Migration Act*. But without being in the migration zone, it is not possible to apply for a Protection Visa. The *MA(EMZ) Act* (*supra* note 104), s.1 removed certain places from the migration zone by amending the *Migration Act*, s.5(1) so as to define an “excised offshore place” as including “the territory of Christmas island; the territory of Ashmore and Cartier Islands; the territory of Cocos (Keeling) Islands; any other external territory that is prescribed by the regulations for the purposes of the subsection; any island that forms part of a State or Territory and is prescribed for the purposes of the subsection; Australian sea installations; and Australian resource installations.” Asylum seekers in Australian territory may find themselves in the anomalous position that even though Australia may owe protection obligations to them under the *Refugees Convention*, there is no mechanism for them to have this status recognized by applying for a Protection Visa.

107. *MA (EMZ) Act 2001* schedule 1, Item 3, inserts into the *Migration Act*, s.5(1) the definition of “excised offshore place” and “offshore entry person”; HREOC, *supra* note 100. The *MA(EMZ) Act 2001* also inserts into the *Migration Act* a new s.46A which provides that an application for a visa (including a Protection Visa) by an “offshore entry person” (i.e., a person who has entered an “excised offshore place” after the excision time for that place) will not be valid if that person is “in Australia” and is “an unlawful non-citizen” (s.46A(1)); i.e., the person has entered Australia (its territorial waters) and has entered what would be (if it were not for the excision of that place) the “migration zone”. The *Migration Act*, s.46A(2) (introduced to the *Migration Act* by *MA(EMZ) Act 2001*, Schedule 1, Item 4) grants the Minister a discretionary power to allow an application made by a particular offshore entry person for a particular class of visa if he thinks it is in the public interest to do so.
108. *Migration Act*, s.189 introduced by *MA(EMZ)(CP) Act 2001*, Schedule 1, Item 4. Such people are not offshore entry persons.
109. *Migration Act*, s.198(4) introduced by *MA (EMZ)(CP) Act 2001* Schedule 1, Item 6.
110. *Customs Act 1901*, s.185(3AA) introduced by *BP(VEP) Act 2001*, Schedule 1, Item 3. Officers acting under this subsection are immune under s.185(3AB) from prosecution provided they act in good faith and use no more force than is authorized by the *Customs Act 1901*, s.185(3b).
111. *Customs Act 1901*, s.185AA introduced by *BP(VEP) Act 2001*, Schedule 1, Item 4.
112. “Ineligibility period” is defined to mean the period from the time of the offshore entry until the time when the person next ceases to be an unlawful non-citizen: *Migration Act*, s.494AA(4) introduced by *MA(EMZ)(CP) Act 2001*, Schedule 1, Item 7.
113. *Migration Act*, s.494AA introduced by *MA (EMZ)(CP) Act 2001*, Schedule 1, Item 7.
114. DIMIA, *Fact Sheet 74: Unauthorised Arrivals by Air and Sea*, Public Affairs Section DIMIA. Revised 8 November 2001; online DIMIA Homepage <<http://www.immi.gov.au/facts/74unauthorised.htm>> (date accessed: 20 February 2002).
115. *Ibid.*
116. *Ibid.*
117. Refugee Council of Australia [hereinafter RCOA], *The Size and Composition of the 2000–2001 Humanitarian Program: Views from the Community Sector* (February 2000) at 50; Immigration Minister, Philip Ruddock MP, *supra* note 18 at 3–4.
118. For analysis of the figures of unauthorized arrivals, refugee applicants, those approved, those rejected, etc., for the period between 1989 and 1999, see Schloenhardt, *supra* note 20 at 41–43.
119. DIMIA, *Fact Sheet 74*, *supra* note 114. This Fact Sheet contains a list of boats and a breakdown of the passengers between November 1989 and 22 August 2001.
120. *Ibid.*; *Migration Act*, s.250.
121. *Ibid.*
122. The difference in the figures between the numbers of people admitted to the IDCs and the actual numbers held in detention at any given time fluctuates according to various factors, such as how many are processed, released, or removed from Australia, the number of unlawful arrivals, etc.
123. DIMIA, *Fact Sheet 70: Border Control*, Public Affairs Section DIMIA. Revised 19 November 2001; online: DIMIA Homepage <<http://www.immi.gov.au/facts/doc/70border.doc>> (date accessed, 22 February 2002).
124. DIMIA *Fact Sheet 82: Immigration detention*, Public Affairs Section DIMIA. Revised 19 November 2001; online: DIMIA Homepage <<http://www.immi.gov.au/facts/doc/82detention.doc>>.
125. The Minister for Immigration is appointed as the guardian of unaccompanied minors who arrive in Australia unlawfully: *Immigration (Guardianship of Children Act 1946* (Cth) s.6.
126. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 85.
127. Despite carefully perusing the DIMIA Homepage <<http://www.immi.gov.au>> (date accessed: 20 February 2002 and 24 March 2002), I was unable to find any information regarding the exact figures of those detained offshore in Christmas Island, Manus Island, and Nauru.
128. Press information page, Immigration Minister, Philip Ruddock MP, “Frequently Asked Questions – Detention”; on-line: Immigration Minister, Philip Ruddock MP Homepage <<http://www.minister.immi.gov.au/faq/detention.htm>> (date accessed: 24 March 2002).
129. *Ibid.*
130. DIMIA, *supra* note 2: “Once detained, the period of time it takes for applications to progress through the refugee determination process and, hence, the period of detention is minimised.” And again: “The majority of people in immigration detention are only held for a short time. Significant measures have been introduced to improve the speed and effectiveness of the decision-making process.”
131. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
132. DIMIA, *Fact Sheet 70*, *supra* note 123; also DIMIA, *Fact Sheet 64: Temporary Protection Visas*, Public Affairs Section DIMIA, Canberra, 14 November 2001; on-line: DIMIA Homepage <<http://www.immi.gov.au/facts/doc/75processing.doc>> (date accessed: 22 February 2002).
133. DIMIA, *Fact Sheet 75: Processing Unlawful Boat Arrivals*. Public Affairs Section, DIMIA, Canberra, 14 November 2001; on-line DIMIA Homepage <<http://www.immi.gov.au/facts/doc/75processing.doc>>. (date accessed: 22 February 2002).
134. *Ibid.*
135. DIMIA, *Fact Sheet 82*, *supra* note 124; and DIMIA, *Fact Sheet 70*, *supra* note 123.
136. I.e., those who have arrived by air without valid documentation or have been refused entry clearance to Australia, or have been immigration cleared but have overstayed the validity period of their visas or their visas have been cancelled due to breach of conditions.
137. DIMIA *Fact Sheet 70*, *supra* note 123.

138. DIMIA, *Fact Sheet 82*, *supra* note 124.
139. *Ibid.*
140. *Ibid.*
141. Although the writer knows of two separate incidents in 2000 where lawyers were denied entry to the IDC by ACS to speak to detainee clients concerning Protection Visa applications unless the solicitor concerned divulged to the officer the content of what would be discussed between them and the detainee.
142. DIMIA, *Fact Sheet 82*, *supra* note 124. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
143. HREOC, *supra* note 8. *Migration Act*, s.193(2); see *supra* note 91.
144. *Ibid.*
145. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
146. *Supra* note 12.
147. *The Sydney Morning Herald* (4 May 2001) 6.
148. For an examination of the impact detention has on asylum seekers, Phillips, *supra* note 89. For more expert opinions, see A. Burnett and M. Peel, "Health Needs of Asylum Seekers and Refugees" (2001) 322 *British Medical Journal* at 544–47; D. Silove, Z. Steel and R. F. Mollica, "Detention of Asylum Seekers: Assault on Health, Human Rights, and Social Development" (2001) 357 *The Lancet* at 1436–37. The effects in terms of the effect of detention in the Australian context, see Joint Standing Committee on Foreign Affairs, Defence and Trade [hereinafter JSCFADT], *A Report on Visits to Immigration Detention Centres* (Canberra: AGP 18 June 2001) Chapter 7 *passim*; online: at <<http://www.aph.gov.au/house/committee/jfad t/IDCVisits/IDCindex.htm>> (date accessed, 24 March 2002).
149. R. Julian, "Invisible Subjects and the Victimized Self: Settlement Experiences of Refugee Women in Australia" in R. Lentin, ed., *Gender and Catastrophe* (London & New York: Zed Books, 1997) at 196–210; R. Zetter, "Labelling Refugees: Forming and Transforming a Bureaucratic Identity" (1991) *Journal of Refugee Studies* [hereinafter JRS] 4(1); Phillips, *supra* note 89 at 291.
150. *Supra* note 10.
151. JSCFADT, *supra* note 148, Chapter 7, at 7.21: Symptoms of psychological distress are common in asylum seekers and refugees, people may show symptoms of depression and anxiety, panic attacks or agoraphobia; poor sleep patterns are almost universal but may not be described spontaneously; hostile media reports have not nurtured good relationships with the community. At 7.24: Women are more likely than men to report poor health and depression. They may be lonely and isolated but often welcome the opportunity to belong to a support group. At 7.25: Children may have arrived alone and may be living with unfamiliar carers. They may have developmental difficulties, seeming to be mature beyond their years. While they may show problems such as anxiety and nightmares, few need psychiatric treatment.
152. Phillips, *supra* note 89 at 294–95. JSCFADT, *supra* note 148 at 7.21.
153. HREOC, *supra* note 6.
154. DIMIA, *supra* note 2 at 8.
155. *Ibid.*
156. *Ibid.*
157. Immigration Minister, Philip Ruddock MP, *supra* note 18 at 3.
158. DIMIA, *Fact Sheet 75*, *supra* note 133; DIMA, *supra* note 2 at 3.
159. DIMIA, *supra* note 2 at 3.
160. *Ibid.* at 5.
161. Minister for Immigration, P. Ruddock, "Australian statement to parties to the convention related to the status of refugees UNHCR Ministerial Council" (Geneva, 12 December 2001); online: DIMIA Homepage <[http://www.minister.immi.gov.au/transcripts/transcripts01/refugees\\_121201.htm](http://www.minister.immi.gov.au/transcripts/transcripts01/refugees_121201.htm)> (date accessed: 20 February 2002).
162. M. Kingston, "Politics and Public Opinion" in M. Crock, ed., *Protection or Punishment?: The Detention of Asylum Seekers in Australia* (Sydney: Federation Press, 1993) 9; also Phillips, *supra* note 80 at 290.
163. Immigration Minister, Philip Ruddock MP, *supra* note 161.
164. A. Clennell & C. Skehan, "I knew story was false but didn't tell PM, Reith admits" *The Sydney Morning Herald* (22 February 2002). This refers to the allegations made by the Minister for Immigration and the Prime Minister in the days before the federal election in November 2001 that asylum seekers had thrown their children into the ocean when intercepted by RAN vessels. It emerged from the Navy about two days before the election that the story was not true, and recently, the former Minister of Defence, Mr. Reith, admitted he knew for three days the story was untrue but did nothing to correct the story in the public mind.
165. DIMIA, *supra* note 2 at 3.
166. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
167. Immigration Minister, Philip Ruddock MP, *supra* note 18 at 5–6.
168. *Ibid.* 6.
169. DIMIA, *Fact Sheet 75*, *supra* note 133.
170. DIMIA, *Fact Sheet 70*, *supra* note 123; DIMIA, *Fact Sheet 82*, *supra* note 124.
171. Immigration Minister, Philip Ruddock MP, *supra* note 18 at 4–5.
172. DIMIA, *Fact Sheet 70*, *supra* note 123. Also *Fact Sheet 74*, *supra* note 114; *Fact Sheet 75*, *supra* note 133; and DIMIA, *Fact Sheet 73*, *People smuggling* and *Fact Sheet 71*, *New measures to strengthen border control* (Canberra: Public Affairs Section DIMIA, 28 September 2001); online: DIMIA Homepage <<http://www.immi.gov.au/facts/doc/71newmeasures.doc>>.
173. *Ibid.*
174. Immigration Minister, Philip Ruddock MP, *supra* note 161. The government, and Minister Ruddock himself, have accused those who are opposed to mandatory detention and deterrence strategies as "supporting people

- smuggling." M. Saunders, "Refugee Video Sparks Row" *The Weekend Australian* (17–18 June 2000).
175. DIMIA, *Fact Sheet 75*, *supra* note 133.
  176. DIMIA, *supra* note 2 at 3; also, Immigration Minister, Philip Ruddock MP, *supra* note 18 at 7.
  177. A phrase drawn from the game of cricket, which is renowned for its "fairness." "Not to abide by the umpire's decision" suggests that one is not playing in a sportsmanlike manner and is not "playing fair."
  178. DIMIA, *supra* note 2 at 6–7. *Migration Act*, Part 8, substituted by the *Migration Legislation Amendment (Judicial Review) Act 2001*, Schedule 1, Item 7.
  179. This does *not* mean "according to government policy" – since the government must also abide by the rule of law – although this distinction seems to be lost on the government itself.
  180. DIMIA, *supra* note 2 at 6: "Many unauthorised arrivals have disposed of their identity documents en route to Australia. Establishing the identity of these people can take considerable time but it is essential to determine whether Australia owes them a protection obligation." Legislation which commenced in October 2001 allows the Minister or other approved decision maker to draw adverse inferences about the veracity of the person's claimed identity, nationality or citizenship if that person refuses to provide identity documents without reasonable explanation: *Migration Act*, s.91V and s.91W as introduced by *Migration Legislation Amendment Act (No. 6) 2001 (No.131 of 2001)*, Schedule 1, Item 5.
  181. DIMIA, *supra* note 2 at 6–7. Immigration Minister, Philip Ruddock MP, *supra* note 18 at 8.
  182. DIMIA, *supra* note 2 at 6–7.
  183. *Ibid.*
  184. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
  185. DIMIA, *supra* note 2 at 6–7.
  186. *Ibid.*: "The majority of people in immigration detention are only held for a short time. Significant measures have been introduced to improve the speed and effectiveness of the decision-making process."
  187. For a comprehensive survey of the position regarding detention and penalization of asylum seekers see G. S. Goodwin Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection," a paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations October 2001; online: UNCHR Homepage: <Http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations > (date accessed: 24 March 2002).
  188. *Universal Declaration of Human Rights (UDHR)*, United Nations General Assembly Resolution 217A (III) (10 December 1948).
  189. According to Lauterpacht, at the time the UDHR was proclaimed there was a consensus among the member states of the UN that the Declaration did not impose upon them any duties or legal obligations with respect to its content: H. Lauterpacht, "The Universal Declaration of Human Rights," (1948) 25 *British Year Book of International Law* 354 at 373–74. Fifty years later, there is general consensus that the provisions of the UDHR have become part of general international law principles: I. Brownlie, *Principles of Public International Law*, 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 1985) at 570–71. In any event, contravention of the principles contained in the UDHR is, at the very least, morally reprehensible.
  190. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, A.T.S. 1980 No. 23 (entered into force generally [except Article 41] 23 March 1976. Entered into force for Australia [except Article 41] 13 November 1980. Article 41 came into force generally 28 March 1979 and for Australia 28 January 1993).
  191. *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, A.T.S. 1991 No.4 (entered into force generally 2 September 1990. Signed for Australia 22 August 1990. Instrument of ratification, with reservation to Article 37(c) regarding separate imprisonment, deposited for Australia 17 December 1990. Entered into force for Australia 16 January 1991).
  192. *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, A.T.S. 1989 No.21 (entered into force generally 26 June 1987 (including Articles 21 and 22). Signed for Australia 10 December 1985. Instrument of ratification deposited for Australia 8 August 1989. Entered into force for Australia 7 September 1989. Declaration of acceptance of Articles 21 and 22 deposited for Australia 28 January 1993 with effect from that date).
  193. *Refugees Convention*, Article 31.
  194. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
  195. This is a position that Australia has taken for some years. With respect to the UNHCR Executive Committee, *Conclusions No. 58 (XL) – 1989: The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which They had already found Protection*, the following "interpretative declaration or reservation" was made by the delegation of Australia, that "...Australia wishes it to be pointed out that its endorsement of the draft conclusions is subject to it being clearly understood that refugees and asylum seekers should not necessarily be afforded the same treatment". See *Report of the 40th Session of the Executive Committee: UN doc. A/AC.96/737*, part N, p.23.
  196. The Senate Legal and Constitutional References Committee, *Sanctuary Under Review: An Inquiry into Australia's refugee and humanitarian program* (Canberra: AGPS, June 2000) was not an inquiry into the detention system as some advocates had called for. The Committee was clear on this in the introductory comments: "the legitimacy or otherwise of the policy of detaining illegal arrivals...are not within the terms of reference of this inquiry." However, the report did make recommenda-

- tions critical of the government's restriction of information flow to asylum seekers and recommended that more information be provided to onshore asylum seekers concerning the making of protection applications, in preparing their claims, in receiving legal advice, and in having legal aid for initial advice on judicial reviews. It also recommended that the entire system of protection determination be reviewed in order to see whether an entirely judicial system or determination would be preferable to the administrative system currently in place. See HREOC, *Report on the Human Rights Commissioner's Visit to Curtin IRPC in July 2000*; online HREOC Homepage <[http://www.hreoc.gov.au/human\\_rights/asylum\\_seekers/index.html](http://www.hreoc.gov.au/human_rights/asylum_seekers/index.html)> (date accessed: 22 February 2002); – reiterated view that detention transgresses Australia's human rights obligations citing: the continued refusal to advise new arrivals of their right to request legal assistance (HREOC *Immigration Detention Guidelines*, March 2000) [hereinafter HREOC Guidelines] section 2.1; online HREOC Homepage, <[http://www.hreoc.gov.au/human\\_rights/asylum/idc\\_guidelines](http://www.hreoc.gov.au/human_rights/asylum/idc_guidelines)> (date accessed: 21 February 2002); the alleged failure to provide legal assistance upon request to some individuals who have been "screened in" to the asylum application process (HREOC Guidelines section 4.4); the inappropriateness of the detention environment for children; the practice of referring to detainees predominantly by number rather than by their given or proper names; the inadequacy of clothing and bedding provided to detainees (HREOC Guidelines sections 9.1, 9.5 and 9.6); the inadequacy of phone lines and of access for lawyers and others needing to contact detainees (HREOC Guidelines sections 3.6 and 4.1); concerns about access to health services, with particular concerns expressed about the availability of dental and ophthalmology services (HREOC Guidelines Part 13). See *supra* note 8.
197. EXComm Conclusion No. 44 (XXXVII) – 1986: *Detention of Refugees and Asylum Seekers*, Report of the 37th Session: UN doc. A/AC.96/688, para. 128: Recommendation (d).
198. *Ibid.* at Recommendation (e). See also HREOC, *supra* note 85 at 4–5.
199. EXComm Conclusion No. 44 (XXXVII) – 1986, *supra* note 197, Recommendation (d). See also ExComm Conclusion No. 22 (XXXII) – 1981: *Protection of Asylum Seekers in Situations of Large-scale Influx*, Report of the 32nd Session: UN doc. A/AC.96/601, para. 57(2). UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (Geneva: February 1999); available online: UNHCR Homepage <<http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations>> (date accessed: 24 March 2002), Guideline 3: Exceptional Grounds of Detention.
200. EXComm Conclusion No. 44 (XXXVII) – 1986, *supra* note 197.
201. UNHCR, *supra* note 199.
202. *Ibid.* Guideline 1.
203. *Ibid.* Guideline 3: "(i) to verify identity; (ii) to determine the elements on which the claim for refugee status or asylum is based; (iii) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum; and (iv) to protect national security and public order."
204. *Ibid.* Guideline 3; also ExComm Conclusion No. 58 (XL) – 1989: *The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which They had already found Protection*; Report of the 40th Session of the Executive Committee: UN doc. A/AC.96/737, part N, p.23." at (h): "The problem of irregular movements is compounded by the use, by a growing number of refugees and asylum seekers, of fraudulent documentation and their practice of wilfully destroying or disposing of travel and/or other documents in order to mislead the authorities of their country of arrival. These practices complicate the personal identification of the person concerned and the determination of the country where he stayed prior to arrival, and the nature and duration of his stay in such a country. Practices of this kind are fraudulent and may weaken the case of the person concerned; (i) It is recognized that circumstances may compel a refugee or asylum seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered. Where no such compelling circumstances exist, the use of fraudulent documentation is unjustified; (j) The wilful destruction or disposal of travel or other documents by refugees and asylum seekers upon arrival in their country of destination, in order to mislead the national authorities as to their previous stay in another country where they have protection, is unacceptable. Appropriate arrangements should be made by States, either individually or in co-operation with other States, to deal with this growing phenomenon."
205. ExComm Conclusion No. 58 (XL) at (f): "Where refugees and asylum seekers nevertheless move in an irregular manner from a country where they have already found protection, they may be returned to that country if (i) they are protected there against *refoulement* and (ii) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them."
206. UNHCR, *supra* note 199 at Guideline 2.
207. ExComm Conclusions No. 15 (XXX) – 1979: *Refugees without an Asylum Country*, Report of the 30th Session: UN doc. A/AC.96/572, para. 72(2)] General Principles (h)(iv), and (k).
208. See also *Note on International Protection*, 15 August 1988: UN Doc. A/AC.96/713, paragraph 19. Also, HREOC, *supra* note 106 at 4–5.
209. UNHCR, *supra* note 199, Guideline 3 (4).
210. Established pursuant to Resolution 1991/42.
211. Commission on Human Rights, UN doc. E/CN.4/RES/1997/50, 15 April 1997. See also the Report of the Working Group: UN doc. E/CN.4/1998/44, 19 December 1997; E/CN.4/RES/1998/ 41, 17 April 1998.

212. Report of the Working Group, UN doc. E/CN.4/1999/63, 18 December 1999, paragraph 69 (fourteen guarantees).
213. Commission on Human Rights: United Nations Working Group on Arbitrary, *Detention Deliberation No. 5: Situation regarding immigrants and asylum seekers*, UN doc. E/CN.4/2000/4, 28 December 1999, Annex II relating to the situation of immigrants and asylum seekers and guarantees concerning persons held in custody. The Declaration was noted by the Commission on Human Rights in Resolutions 2001/40, 23 April 2001 and 2000/36, 20 April 2000.
214. HREOC, *supra* note 85 at 3.
215. *Migration Act* s.189 and s. 196.
216. HREOC, *supra* note 85 at 4.
217. UN Human Rights Committee, *A v Australia*, Communication No. 560/1993. Views of the Human Rights Committee, 30 April 1997: UN Doc. CCPR/C/59/D/560/1993. Reproduced in *UN Human Rights Committee*. Communication No 560/1993 *A v Australia* (1997) 9 IJRL at 506–27.
218. HREOC, *Report on Visit to Curtin*, *supra* note 196.
219. *A v. Australia*, *supra* notes 51 and 217. The Committee stated: “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.”
220. UNHCR, *supra* note 199, Guideline 5.
221. HREOC, *supra* note 85 at 4–5.
222. HREOC, *Report on Visit to Curtin*, *supra* note 196.
223. *Veen v. The Queen (No.2)* (1988) 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ at 472; HREOC, *Report on Visit to Curtin*, *supra* note 196.
224. *Torres v. Finland*, Communication No. 291/1988. View adopted 2 April 1990, Report of the Human Rights Committee, Vol II, Supplement No.40: UN Doc. A45/40, page 96; HREOC, *supra* note 85 at 8.
225. HREOC, *supra* note 85 at 4–5.
226. UNHCR, *supra* note 199, Guideline 3.
227. Note *Ruddock v. Vadarlis*, [2001] FCA 1329; (2001) 110 FCR 491; (2001) 183 ALR 1; online: AusTLII Homepage <<http://www.austlii.edu.au/>>. In response to the *MV Tampa* incident, applications were filed, Vadarlis claiming, *inter alia*, that the asylum seekers were being unlawfully detained by the government, and seeking writs of habeas corpus. The writs were granted; release was ordered to the mainland. On appeal by the Minister, a majority of the Full Court of the Federal Court of Australia held that actions of the Australian government did not amount to detention, such as to attract the remedy of habeas corpus. The majority of the Court, per French J, held that the actions of the government had been incidental to preventing the rescued from landing on Australian territory, “where they had no right to go,” (paragraph 193), while the asylum seekers’ inability to go elsewhere derived from circumstances “which did not come from any action on the part of the Commonwealth.” This was especially so since it was the captain of the *Tampa* who refused to sail from Australian waters while the asylum seekers were on board his boat (paragraph 202). Chief Justice Black dissented. His Honour concluded that actual detention and complete loss of freedom is not necessary to found the issue of the writ of habeas corpus (paragraph 69). Moreover, whether a detainee had a right to enter was not relevant; the real issue was whether there were reasonable means of egress open to the rescued people such that detention should not be held to exist (paragraph 79); “viewed as a practical, realistic matter, the rescued people were unable to leave the ship that rescued them...” (paragraph 80). However, the Court was not called upon to consider the operation of obligations that Australia may owe under international treaties such as the ICCPR or the Refugees Convention.
228. H. Esmaeili & B. Wells, “The ‘Temporary’ Refugees: Australia’s Legal Response to the Arrival of Iraqi and Afghan Boat-People” (2000) 23(3) UNSW L.J. 224–45 at 235–36.
229. Such as *Refugee Convention*, Articles 26, 28, 31, etc.
230. HREOC, *supra* note 100.
231. Australia has implemented certain provisions of the Refugees Convention into domestic law by reference via the *Migration Act*, s.36(1); see *MIMA v. Thiyagarajah* (1997) 151 ALR 685 at 697. Just what parts of the Convention are directly incorporated into domestic law is a matter of some discussion. While Australia is a signatory to the Convention and Protocol, it has not enacted every part of the Convention into domestic law, thereby giving rise to enforceable rights. It would appear that the central obligations are those contained in Articles 32 and 33 (against *non-refoulement* and expulsion of refugees) and the definition and exclusion clauses contained in Article 1 of the Convention. *MIMA v. Thiyagarajah* (1997) 151 ALR 685 at 697–98; see also *MIMA v. Ibrahim* [2000] HCA 55 per Gummow J paras 107–109–136 who referred to these duties as ones being owed to refugees. See also *MIMA v. Khawar* [2002] HCA 14 (11 April 2002) at paras. 45 and 46 per McHugh and Gummow JJ; online: AusTLII Homepage <<http://www.austlii.edu.au/>>. See Esmaeili & Wells, *supra* note 228 at 228–29.
232. CAT, Article 3: “1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”
233. HREOC, *supra* note 196. Also Human Rights Watch, *supra* note 8 at 12; Esmaeili & Wells, *supra* note 228 at 238–39.
234. Human Rights Watch, *supra* note 8 at 165.
235. HREOC, *supra* note 196.
236. CROC Articles 2, 3, 30, 22, 37, and 39.
237. UNHCR, *supra* note 199, Guideline 5.
238. HREOC, *supra* note 167.
239. *Supra* notes 5 and 126.
240. DIMIA, *Response to the Human Rights Commissioner’s July 2000 Review of Curtin IRPC* (15 December 2000); online: HREOC Homepage <<<http://www.hreoc.gov.au/>>>

- word/human\_rights/ asylum\_seekers/DIMA\_response.doc>> (date accessed: 21 February 2002).
241. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 85.
  242. HREOC, *supra* note 167.
  243. For a comprehensive and thoughtful analysis of these issues, see M. Crock, "A Sanctuary Under Review: Where to From Here for Australia's Refugee and Humanitarian Program?" (2000) 23(3) UNSW L.J. 246–87.
  244. HREOC, *supra* note 85 at 12; and also ROC, "Alternative Detention Model"; online: ROC Homepage <<http://www.refugee-council.org.au>> (date accessed: 22 February 2002).
  245. DIMIA, *supra* note 239.
  246. DIMIA, *Fact Sheet 70*, *supra* note 123.
  247. An uncomfortable use of words, since it so clearly resonates with another type of "solution" implemented by another regime in the middle of last century.
  248. HREOC, *supra* note 85 at 12: "The convergence of border control on the one hand and protection obligations under the Refugee Convention and Protocol on the other gives rise to policies of mandatory detention as a deterrent. The impact of this convergence is disproportionately felt by asylum seekers who arrive by boat and claim refugee status on-shore. Some may be illegal immigrants and some refugees. On the surface, however, they are often indistinguishable and are treated as such."
  249. Immigration Minister, Philip Ruddock MP, *supra* note 161; Phillips, *supra* note 89 at 289 and fn7.
  250. The notion of "queue jumping" or "forum shopping" is not entirely new in Australian domestic politics. In 1979, a Sydney newspaper, the *Daily Telegraph*, in its editorial of 8 January 1979, noting Australia's offer to take 10,500 "properly processed" refugees by June 1979 from camps in Malaysia then holding 500,000 people, commented: "it would be unfair to them if a substantial part of this quota was made up of refugees who have sailed directly here": Johnson, *supra* note 21 at 14.
  251. Implicitly differentiating between "deserving" and "undeserving" refugee applicants.
  252. Let's be clear, incarcerating anyone without recourse to the courts is a punishment.
  253. Since the government strengthened its mandatory policy by introducing expulsion of asylum seekers following the *Tampa* incident, it claims that these "policies of deterrence" are working, in that the number of boat arrivals has dropped. This conveniently ignores the fact that since the policy's introduction in November 2001, the monsoon season, which extends from November to February, is unsuitable and highly dangerous to open sea crossings. Indeed, the initial upsurge in unauthorized arrivals in August/September 2001 at the time following the *Tampa* incident was probably more indicative of people wishing to make the crossing to Australia before the commencement of the wet season than a measure of the success or failure of the government's policy. For negative characterizations of asylum seekers, see D. Corlett, "Politics, Symbolism and the Asylum Seeker Issue" (2000) 23(3) UNSW L.J. 13–28 at 19–20.
  254. It makes no sense that Al Qaeda or any terrorist group would spend time and money to train a potential terrorist merely to put them on a leaking boat in the Indian Ocean in the hope that they may arrive in Australia in order to end up in a detention centre, possibly for years on end. The sad irony is that all the suspects in the attacks in New York were by all reports well dressed, well educated young men with money, passports, and regular documentation – meaning that they had in fact been granted visas and immigration-cleared to enter the U.S. This is not the type of person usually found on a boat off the coast of Australia seeking asylum.
  255. The government even claimed to have found terrorists among purported asylum seekers, this not so much refers to those who may pose a genuine security risk to the Australian community, but are alleged to have been involved in terrorist or criminal actions overseas. While it may be desirable to detain such people in detention, this does not serve as justification to keep all asylum seekers in detention.
  256. Esmaeili & Wells, *supra* note 228 at 229.
  257. For example, at the Australian embassy in Nairobi, Kenya, there are two and half Australian staff members, with responsibility for processing applications from thirty-four countries in Africa. Only around half of Australian representative posts overseas have Migration Department offices. There are usually around 10,000 visa places reserved in the yearly migration quotas for the refugee, humanitarian, and special assistance categories. Only Principal and Senior Migration officers and other Australian Immigration Department officers can process such visas: S. Dunbar, "The Myth of the Off-Shore Refugee Queue: The Reality of Despair" (2000) 9(1) *Human Rights Defender* at 20–21.
  258. *Ibid.* at 20–21.
  259. *Supra* note 253.
  260. The government's response is that it is up to critics to state when the problem does become significant, pointing to the vast numbers of asylum seekers that beset other industrialized countries: Immigration Minister, Philip Ruddock MP, *supra* note 18 at 4.
  261. DIMIA, *supra* note 2 at 8: "There is currently no intention to end the policy of mandatory detention of unauthorised arrivals, which has bipartisan support in Parliament."
  262. N. Poynder, "The Incommunicado Detention of Boat People: A Recent Development in Australia's Refugee Policy" (1997) 3(2) *AJHR* 53 at 63.
  263. S. Pickering, "The hard press of asylum" (2000) 8 *Forced Migration Review* 32; R. McGregor, "Minister Warns of Boatpeople Flood" *The Australian* (16 November 1999) 1.

264. Esmaeili & Wells, *supra* note 228 at 237–38; RCOA, *supra* note 117 at 59.

265. Einfeld, *supra* note 5 at 308.

266. *Ibid.* at 308.

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