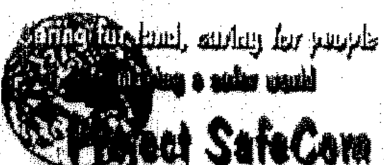
Great Lakes Rural Australians for Refugees

APPENDIX (B)

About Julian Burnside QC



Mr Julian Burnside completed his Bachelor of Economics and Bachelor of Laws at Monash University. He has worked as a barrister since 1976 and was appointed Queen's Counsel in 1989.

Well known for his work supporting asylum seekers, Julian serves as Patron for AfJRP and has acted as legal counsel for the Woomera escapees and for Liberty Victoria in relation to the Tampa asylum seekers.

Julian' acted as counsel for the MUA, Alan Bond, the Ok Tedi [indigenous community against BHP in their claim over river pollution in Papua New Guinea] and Rose Porteous. Julian also pursues an active interest in computers and the law. He has published several articles on the topic and chaired various committees on computer law. He was a founder of the Victorian Society for Computers and the Law where he served as president from 1980 to 1985.

Julian is a keen supporter of Australian music and art. His active involvement includes serving as Chair of 45 Downstairs Inc., Deputy Chair of Musica Viva Australia and as a member of the boards of the Mietta Foundation and the Victorian College of the Arts. His collection of contemporary paintings and sculptures is complemented by his own hobbies of photography and making sculpture using found objects.

Julian is also an active writer and has published several articles on language and etymology and famous court cases. In 1991, he published the children's book Matilda and the Dragon (Allen and Unwin).

Julian Burnside's website: http://www.julianburnside.com/

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Burnside versus Vanstone, Ruddock, Howard

SPEECH at the MELBOURNE ROTARY BREAKFAST

17 February 2004

JULIAN BURNSIDE QC

Published with permission April 2004

It was a full house when Julian Burnside QC, one of the most vigorous opponents of mandatory detention, went face to face against Immigration Minister Amanda Vanstone at a Rotary breakfast in held at the RACV Club in Melbourne this morning. It was an extraordinary debate as Burnside directly accused Vanstone of crimes against humanity but the Minister failed to respond. (From Crikey Dot Com, 19 February 2004)

ABOUT THIS BOOKLET

The idea for this booklet came from a friend of seasoned refugee advocate Freddie Steen, a Brisbane-based volunteer for the Romero Centre. On her request Julian Burnside QC readily gave his permission for the project. Freddie contacted me with the idea, and I guess that is in part because at Project SafeCom we've never shied away from working with and for others around the country in keeping with the notion that *the refugee movement* and its success is amplified because many people around Australia collaborate across the divide of distance as well as across organisational borders and limitations - an aspect Project SafeCom is now well known for: have a look at our media releases page to see some evidence of working successfully with many other groups, organisations and individuals.

I also strongly supported the idea for producing this particular booklet because the record of the Australian media in failing to take nótice of Burnside's serious criminal charges proposed to the Australian government, laid so directly at the feet of Immigration Minister Amanda Vanstone - who was in the audience in Melbourne on 17 Feb. 2004 - falls just slightly short of a national scandal. The fact that a senior editor of a major national newspaper has the brazenness to tell Burnside that his outline of how the Howard government qualifies, not under some foreign law, but under our own Australian laws, for charges of committing crimes against humanity *"is not interesting"* is unbelievable - but the often shallow and instant-gratification-ridden work of the media, and the lack of interest by the media in issues of corruption on government level, has formed a serious part of the problem facing the refugee movement from the days of the underreporting of the fact that Defence Minister Peter Reith - while in office - had lied during the children overboard incident.

In 2002 *Reportiers Sans Frontières* had Australia's Press Freedom listed as the 12th in its international country ranking. Just a year later, their report card showed Australia ranked as the 50th country in the world. Let it be known, that in denying Julian Burnside the coverage he so deserved with his crystal clear criminal charges speech, the media not only ignored a seasoned and highly credited lawyer, but also a Queens Council, and since March this year, a Living National Treasure.

You are free to give print copies of this book away, or sell them for fundraising for your own refugee group, but please consider that Project SafeCom has a full-time operations office since the Tampa days, and that from that time we have survived from donations and useful purchases through our website from many people around Australia. Please send us a donation for our ongoing work. See our website for details.

Jack H Smit
Project SafeCom Inc.
Narrogin, Western Australia

Vanstone vs Burnside as the accusations fly

From Crikey Dot Com, 19 February 2004

It was a full house when Julian Burnside QC, one of the most vigorous opponents of mandatory detention, went face to face against Immigration Minister Amanda Vanstone at a Rotary breakfast in held at the RACV Club in Melbourne this morning. It was an extraordinary debate as Burnside directly accused Vanstone of crimes against humanity but the Minister failed to respond.

Burnside's argument was that in 2002, along with more than 80 other nations, Australia acceded to the Rome statute by which the International Criminal Court was created. This permanent court has jurisdiction to try war crimes, crimes against humanity and crimes of genocide regardless of the nationality of the perpetrators and regardless of the place where the offences occurred.

Australia has introduced mirror legislation into the domestic law so, for the first time since Federation, Australia now recognises genocide and various war crimes. Burnside argued that Australia's system of mandatory, indefinite detention satisfies each of the elements of that crime and that The United Nations Working Group on Arbitrary Detention has found that the system violates Article 9 of the ICCPR.

With Vanstone listening intently just metres away, Burnside then said the following:

> *"If moral arguments have no purchase, it remains the fact that our government is engaged in a continuing crime against humanity when assessed against its own legislative standards. I accuse Mr Howard and Mr Ruddock of that crime."*
>
> *"I accuse Senator Vanstone of that crime. I expect that they will ignore this accusation, since the only person who can bring charges is the Attorney General of the Commonwealth."*

Amazingly, Vanstone then rose to her feet and spoke for a few minutes without once trying to rebut or defeat this rather extraordinary claim by Burnside.

The silence was deafening.

See http://www.safecom.org/burnside4.htm

Media silence abets Ruddock's atrocities

From Margo Kingston's Web Diary (Sydney Morning Herald) 21 October 2003

One of Australia's leading barristers, Julian Burnside QC, mounts a blistering attack on Australia's media, accusing it of refusing to report the government's escalating atrocities. He can't even get publicity for his argument that Ruddock - recently appointed Australia's first law officer without a murmur of protest from the mainstream media - could be charged under Australian law with crimes against humanity. Apparently, according to one editor, that's not 'interesting'.

See http://www.safecom.org/burnside3.htm

WEBSITE RESOURCES

Julian Burnside's website:
http://www.julianburnside.com/

Other speeches by Julian Burnside QC:

Australia's Treatment Of Asylum Seekers: The View From Outside: http://www.safecom.org/burnside1.htm

Refugees: Australia's moral failure:
http://www.safecom.org/burnside2.htm

Australia's crimes against humanity not 'interesting' to the media: http://www.safecom.org/burnside3.htm

JULIAN BURNSIDE's SPEECH

Tony Abbott said recently, in connection with the Prime Minister's revised attitude to parliamentarians' superannuation, that "It takes real guts to do the right thing in difficult political circumstances".

He acknowledged implicitly that there can be a difference between what is right and what is convenient, or politically expedient, or electorally popular. Perhaps he also recognised that there are standards of conduct, which transcend political manoeuvring.

In Australia, we pride ourselves for our human rights record. Here is a prominent Australian speaking in November 2000:

> "I want to talk about the centrality of human rights to our foreign policy objectives, and our decision to make effectiveness the guiding principle of our actions.
>
> The second reason for our distinctive approach to human rights has more to do with an Australian way of doing things. Our approach is pragmatic but it is also firmly rooted in an ideological commitment to liberal democratic ideals. I believe this blend of the practical and the idealistic very much reflects the character of Australia. A separate public forum could no doubt be dedicated to discussing what core Australian values are - or if they even exist - in the year 2000. Personally, I have no qualms in saying that one of our abiding values is that of a fair go for all.
>
> Australians care about human rights because they believe strongly in a fair go, they support the underdog and they take particular exception to abuses of power. They see justice and human dignity as the self-evident right of all people. They also prefer to cut through the rhetoric and do something useful."

A fair go for all is probably as close as we, in Australia, get to a shared core value.

In recent times, Australia has been criticised internationally for its treatment of asylum seekers. That criticism says, in effect, that our treatment of asylum seekers falls below what is acceptable by contemporary human rights norms. Australia has brushed off the criticism. But perhaps Tony Abbott's approach allows a reassessment: is Australia doing what is right, or just what is expedient?

I will make 3 principal points:

- What we are doing is needlessly cruel;
- What we are doing is largely pointless;
- What we are doing is fabulously expensive.

Refugees

Let me turn to the way we treat people who seek asylum in Australia. The Howard government has introduced two policies, which are an affront to decency. One a policy of deflection, and the other a policy of detention. We try to stop them from getting here, by taking them from the high seas and locking them up in Nauru, or on Manus Island. If they get here, we lock them up in the Australian desert.

Alexander Downer, in the speech I just referred to, went on to say this:

> "...human rights are central to the maintenance of a peaceful world and our nation's security..."
>
> "It follows that it is very much in Australia's interests for government to work out how best to deliver an effective human rights policy. It is also, of course, in the interests of the ordinary people of the world who just want to live their lives free from the fear of poverty, war and tyranny. But I want to emphasise the word effective because this is the litmus test for everything this government does in the human rights field..."

> dreams they had once entertained for some future human harmony. It is the task of the historian and the myth-maker to tell the story of how the world came to be as it is. It is the task of the prophet to tell the story of what might be. The historian presents the choice: history is a book of wisdom for those making that choice."

Australia has made a choice with terrible consequences. We have chosen a government, which shows contempt for human rights, whilst posturing as champions of decency and family values; a government of hypocrites whose dishonesty has made us relaxed and comfortable only by anaesthetising the national conscience. In her latest novel, The Prosperous Thief, Andrea Goldsmith says of Germany in the 1930s: "The Government was a meticulous launderer of the public memory". I live in hope that, at the next Federal election, the Australian public will recover its memory of the days of Chifley or Menzies, its memory of the days when the idea of a fair go meant something, the days when decent treatment of other human beings was more important than blind pursuit of self-interest. If that happens, even for a moment, the Howard government will lose office and we will have a chance to return to the values, which truly mark Australia as a great nation.

If the Universal Declaration of Human Rights were being debated now, Australia would oppose it. Howard would prefer to avoid interference from the international community, just as Mr Ruddock would prefer to avoid interference from the Courts.

We have fallen a long way. We have squandered the legacy of our past. Our Prime Minister, who regards himself as walking in the footsteps of Robert Menzies and calls himself a Christian, is in fact immoral, hypocritical, un-Christian and - as a proponent of mandatory detention - a criminal. He must take personal responsibility for the Pacific Solution, which is the most disgraceful and cynical enterprise ever undertaken by an Australian government.

Mr Ruddock clings to his membership of Amnesty International, in the face of sustained criticism from that organisation; he chants the Liberal mantra of family values whilst locking families of innocent people behind a 9000 volt "courtesy fence" at Baxter. He pretends to be a Christian, while the leaders of all the Christian churches in Australia condemn him for his policies. He is responsible for instructing counsel to argue that we do not have solitary confinement in detention centres, but if we do the Courts must not interfere; that we must send terrified people back to torture or death; that we can lock them up for the rest of their lives if need be.

For their hypocrisy, as much as for their cruelty, the Howard government deserve our contempt.

In the epilogue to his 6-volume History of Australia, Manning Clark wrote:

> "This generation has a chance to be wiser than previous generations. They can make their own history. With the end of the domination by the straiteners, the enlargers of life now have their chance. They have the chance to lavish on each other the love the previous generations had given to God, and to bestow on the here and now the hopes and

> "This audience will be well acquainted with my view that you do not measure a government's interest in human rights by the decibel reading of its public criticism of others. You measure it by what it actually does..."

These words ring false today.

The government's recent hard-line stance on the refugee issue is officially justified in the name of our sovereignty. To guard our sovereignty, the government calls boat people "illegals", and it locks them up.

It is the great lie on which government policy rests. People who come here informally are not illegal. They commit no offence by arriving without papers, without an invitation, seeking protection. They may be locked up for months or years, but our moral conscience is lulled to sleep because we are told they are "illegals".

The fact is that to come to Australia without authority and seek asylum is not an offence against Australian law. There is no provision of the law, which says it is an offence to arrive in Australia without permission. Much less is it an offence to arrive in Australia without permission and seek asylum. To the contrary, Article 14 of the Universal Declaration, entered into force on 10 December 1948, guarantees to every human being the right to seek asylum in any territory they can reach. Those who come here trying to exercise that right are locked up in desert camps or, more recently, in remote desert islands.

Indefinite detention

The Universal Declaration of Human Rights is the most widely accepted international convention in human history. Most countries in the world are parties to it. Article 14 of the universal declaration of human rights provides that every person has a right to seek asylum in any territory to which they can gain access. Despite that

universally accepted norm, when a person arrives in Australia without prior permission and seeks asylum, we lock them up. This is so notwithstanding that they have not committed any offence by arriving in Australia without prior permission.

The *Migration Act* provides for the detention of such people until they are either given a visa or removed from Australia. In practice, this means that human beings - men, women and children, innocent of any crime - are locked up for months, and in many cases years.

They are held in conditions of shocking harshness. The United Nations Human Rights Commission has described conditions in Australia's detention centres as "offensive to human dignity". The United Nations Working Group on Arbitrary Detention has described Australia's detention centres as "worse than prisons" and observed "alarming levels of self-harm". Furthermore, they have found that the detention of asylum seekers in Australia contravenes Article 9 of the International Covenant on Civil and Political Rights, which forbids arbitrary detention.

The Delegate of the United Nations Human Rights Commissioner who visited Woomera in 2002 described it as "a great human tragedy". Human Rights Watch and Amnesty International have repeatedly criticised Australia's policy of mandatory detention and the conditions in which people are held in detention.

In short, every responsible human rights organisation in the world has condemned Australia's treatment of asylum seekers. Only the Australian government and the Australian public are untroubled by our treatment of innocent, traumatised people who seek our help. Mr Ruddock and Mr Howard have made it clear that the mandatory detention system and the iniquitous Pacific Solution are designed to "send a message". This decodes as: we treat innocent people harshly to deter others. The punishment of innocent people to shape the behaviour of others is impossible to justify. It is the

accusation, since the only person who can bring charges is the Attorney General of the Commonwealth.

The cost

Is it possible to do any worse by these people? As a matter of fact, the government has a way to add salt to the wound. After the damage that is inflicted on these people, when they are released from detention, they get a bill for the cost of being held. I have in my Chambers one example of this in which the man is told the conditions of his release are that he must not work and he must make immediate arrangements to pay the sum of $214,000 for his stay in Port Hedland and Woomera. The going rate is about $120-$140 per day per person. We do it presumably to make them feel even more hopeless than we have managed to make them feel in their months or years of detention.

The cost of the Pacific Solution is much greater. Over the last two years the Pacific solution has prevented about 1500 asylum seekers from getting to Australia. It has cost us about $1000 million. We could have bought each of them a house in Adelaide or Brisbane for what it has cost us to dump them on Nauru, and we would have created a lot of goodwill by doing so. We would have created local jobs by doing so. Instead, by doing what we have done, we have simply destroyed their hope and their lives.

Choices

It is interesting to reflect that if Australia were geographically eligible for membership of the European Union, we would be disqualified on human rights grounds. We would be disqualified at the threshold because our treatment of Asylum seekers breaches the standards imposed by the European Union. Not a very proud record for a country, which looks for Europe, and Britain particularly, for our cultural origins and norms. We simply fail their test of what is decent treatment of human beings.

significance in the present context. It is as follows:

> **"268.12** Crime against humanity - imprisonment or other severe deprivation of physical liberty
>
> (1) A person (the perpetrator) commits an offence if:
> (a) the perpetrator imprisons one or more persons or otherwise severely deprives one or more persons of physical liberty; and
> (b) the perpetrator's conduct violates article 9, 14 or 15 of the Covenant; and
> (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.
>
> Penalty: Imprisonment for 17 years.

(The Covenant referred to is the International Covenant on Civil and Political Rights, the ICCPR.)

The elements of these offences are relatively simple:

- The perpetrator imprisons one or more persons;
- That conduct violates Article 9 of the ICCPR;
- The conduct is committed knowingly as part of a systematic attack directed against a civilian population.

Australia's system of mandatory, indefinite detention appears to satisfy each of the elements of that crime. We imprison asylum seekers. The United Nations Working Group on Arbitrary Detention has found that the system violates Article 9 of the ICCPR.

This conduct is intentional, and is part of a systematic attack directed against those who arrive in Australia without papers and seek asylum.

If moral arguments have no purchase, it remains the fact that our government is engaged in a continuing crime against humanity when assessed against its own legislative standards.

I accuse Mr Howard and Mr Ruddock of that crime. I accuse Senator Vanstone of that crime. I expect that they will ignore this

philosophy of hostage-takers.

Minister's website

The Minister's website says that "Immigration detention is not imprisonment". People can leave immigration detention by leaving Australia". This is partly misleading, partly a lie.

It is misleading because it obscures what is really being said: you can avoid this form of imprisonment by abandoning your claim to protection; you can get freedom here by returning to persecution in Iraq or Afghanistan. Not such an attractive option. Sophie's choice.

Lock them up for ever

In many cases it is simply false. Mr al Masri was a Palestinian from the Gaza Strip. He arrived in Australia in June 2001 and was placed in Woomera Detention Centre. He applied for a protection visa, claiming to be a refugee. He was refused a protection visa and asked to be returned to the Gaza Strip. Although Mr al Masri was able to produce a passport, officers of the Department of Immigration were unable to return him, because they could not get permission for his entry to the Gaza Strip.

The Palestinians, it seems, thought he was an Israeli spy. Israel, for its part, did not want him. Five months passed and Mr al Masri remained locked up in Woomera. Mr al Masri applied to the court for an order releasing him from detention. Not surprisingly, the government resisted that application.

Here, I need to say something about the constitutional basis for mandatory detention under the Migration Act. The Australian Constitution entrenches the separation of powers. The three powers of governments - legislative, executive and judicial - are vested in the three different arms of government. The powers of one arm of government may not be exercised by another arm of

government.

Accordingly, the Parliament, established under Chapter I cannot exercise the powers of the executive government which is established under Chapter II. Courts established under Chapter III of the Constitution may not pass laws Punishment is central to the judicial power. Accordingly, only a Chapter III court can inflict punishment on a person. Locking a person up is generally regarded as punishment.

However, the High Court has acknowledged that there are circumstances where detention is necessary for the discharge of an executive function. In those limited circumstances detention imposed directly and without the intervention of a Chapter III court will be constitutionally valid. This holds good only as long as the detention goes no further than can reasonably be seen as necessary to the executive purpose which it supports.

The Migration Act requires that all unlawful non-citizens should be detained and should be held in detention until granted a visa or removed from the country. Mr al Masri's case presented a conundrum: he had been refused a visa but he could not be removed. The question then was: should he remain in detention. For the sake of accuracy, it is worth quoting a portion of the Judgment in al Masri's case:

> "Theoretically at least, detention might continue for the rest of a person's life and the Solicitor-General did not shrink from that possibility, whilst contending that in the real world such a thing would not happen."

Put simply, the Solicitor-General, on behalf of the Minister for Immigration, had submitted to the court that, if it came to the point, Mr al Masri could be locked up for the rest of his life, although he is innocent of any offence.

would wish that your conduct became the universal rule for the conduct of others. And one of the outworkings of that is that you cannot use a human being as an instrument to the achievement of another objective. What mandatory detention does is to instrumentalise innocent human beings.

Kant is brilliant but almost unreadable. The Christian Bible said it much more simply. It said you should do unto others, as you would wish they would do unto you. It's what our mothers teach us when we're small: How would the world be if everyone behaved like that? That's Kant simplified for children. It seems to me plainly right.

I cannot think of any worthwhile moral framework which makes it right to punish innocent people in order to influence the conduct of others.

Mandatory detention is a crime against humanity

In 2002, along with more than 80 other nations, Australia acceded to the Rome statute by which the International Criminal Court was created. The court is the first permanent court ever established with jurisdiction to try war crimes, crimes against humanity and crimes of genocide regardless of the nationality of the perpetrators and regardless of the place where the offences occurred.

As part of the process of implementing the International Criminal Court regime, Australia has introduced into its own domestic law a series of offences, which mirror precisely the offences over which the International Criminal Court has jurisdiction. So, for the first time since Federation, the Commonwealth of Australia now recognises genocide as a crime and now recognises various war crimes.

The Australian Criminal Code also recognises various acts as constituting crimes against humanity. One of them is of particular

fabricated by Fatimeh and her witnesses in order to fortify her claim for asylum.

When the case came to be reviewed in Court, a subpoena to the Department produced documents, which showed not only that Hussein existed, but that he had been in the camp exactly when Fatimeh said he had, and that he left for Iran exactly when she said he had.

The tribunal member had not even bothered to ask the Department whether they had a record of Hussein. That casual indifference would very likely have led to Fatimeh's death. When the decision came on for review in court, the Department argued that the decision should not be overturned. It appeared not to trouble the RRT or the Department that, if Fatimeh were returned to Iran, she would almost certainly be stoned to death.

Mandatory detention is a moral wrong

I believe indefinite mandatory detention is wrong. Why is it wrong? The essentials of what we're doing are as follows: we take innocent human beings and we lock them up and treat them harshly and this is done to deter other people from following in their footsteps.

Infliction of harm on innocent human beings to influence the conduct of others is indistinguishable from what hostage takers do. It's the sort of thing that we would attack terrorists for doing; and yet we do it in the name of "border protection".

Why is it wrong to punish innocent people? Punishing guilty people, people who have been convicted - punishing them for the sake of deterrence - is perfectly orthodox. Why can't you punish innocent people to influence the conduct of others? Well I would rely on two sources, the complicated one is Kant's Categorical Imperative which says you should so conduct yourself that you

UN Working Group on Arbitrary Detention

The following is an extract from the report of the United Nations Working Group on Arbitrary Detention in June 2002. It is lengthy, but its contents should shock anyone who believes that we treat asylum seekers humanely:

> "36. Officials publicly reproached the delegation for its concern about this "so-called" syndrome. The delegation insists on its evaluation, corroborated by the report of the JSCFADT which states, "Inside the centres, the strongest memory some Committee members retained was the despair and depression of some of the detainees, their inability to understand why they were being kept in detention in isolated places, in harsh physical conditions with nothing to do" (JSCFADT report, para. 4.238). Recalling the words of one detainee, one of the subtitles of the report is "Immigration detention syndrome", a term similar to that for which the delegation was reproached (ibid., para. 7.13).
>
> 37. In the light of the many testimonies gathered, the delegation can state that the following behavioural anomalies existed: affective regression and infantilism; aggressivity against detainees (at Villawood, an increasing number of quarrels between women were noted); and, above all, acts of self-mutilation going as far as suicide.
>
> 38. The delegation also took note of equally alarming information concerning, for example, the case of Palestinian detainees (several suicide attempts); a Syrian man who had to be stitched up after trying to commit hara-kiri; an attempt to hang himself by a 12-year-old child who wanted to go home to his grandparents in Iran; a mother hospitalized for two months during which one of her two children tried to commit suicide and her sister and son-in-law went on hunger strike, he sewing his lips together. In a report submitted to HREOC in May 2002, "Two Australian national policies on self-injury and suicide", Dr. Michael Dudley, a psychiatrist, mentions specific and concording allegations, including as to the probable date of death, concerning five persons said to have committed suicide (annex I of the study).
>
> 39. These observations were generally corroborated by DIMIA statistics: "In the eight months between 1 March 2001 and 30 October2001 there were 264 incidents of self-harm reported (238 males

and 26 females). The rates of self-harm are appallingly high for people in the 26-35 age range: 116 people (105 men and 11 women). They were followed by those people entering their adulthood aged 20-25 years, of whom 103 had self-harmed (98 males and 5 females). Twenty-nine children and young people up to the age of 20 were recorded as having self-harmed." Following its interviews with detainees, the delegation was able to compile a list of the following acts of self-harm, some of which were witnessed personally:

(a) Corporal lacerations by jumping onto the razor wire (witnessed by the delegation) or by stealing sharp implements to lacerate arms or legs. The delegation was informed of the case of a detainee who cut the word "freedom" into his arm;

(b) Lips sewn together (two cases during the visit);

(c) Hitting of the head against walls or objects such as air conditioning units;

(d) Suicide or attempts by hanging, jumping off buildings or trees (the case of an Afghan whom the delegation met in Perth), taking an overdose of medicine, and poisoning by drinking shampoo, detergent, fly spray or other toxic liquids.

40. Following the exchange of views that the delegation had on this subject with the Immigration and Detention Advisory Group (IDAG) charged with advising the Minister, and in the light of the testimonies gathered and the reports submitted by NGOs, the delegation considers that the two following factors play a preponderant role:

(a) On the one hand, the wracking uncertainty, day after day, in which the detainees live concerning the length of their detention which, contrary to common-law prisoners, is without legal limit (see paragraphs 16 ff);

(b) On the other hand, the inadequate information provided on the status of the application at whatever stage, or the difficulty in obtaining information on the frequent problems encountered during the investigation of the application (see paragraphs 20 ff).

41. This absence of temporal reference points foments collective turmoil, each person trying to find out the status of everyone else's

Fatimeh

Fatimeh (not her real name) arrived in Australia from Iran in mid-1999. She converted to Christianity in early 2000, and began preaching against Islam. She was baptised in August 2000, after the Department of Immigration lifted its ban on baptism in detention. In late August, Hussein (not his real name) an Iranian man held in the same detention camp, left Australia voluntarily and returned to Iran. Hussein informed on Fatimeh. Her family in Iran contacted her to tell her she was in great danger if she returned to Iran. Preaching against Islam is a serious offence in Iran. If she returned she faced the prospect of being stoned to death.

I have seen an official videotape of two women being stoned to death. They are brought out wrapped from head to foot in some kind of shroud. They are placed in holes, which are about 3 feet deep. The dirt is shovelled in around them, so that their bodies are buried to waist level. They are then bombarded with medium sized stones from all sides. They cannot flinch in anticipation, because they cannot see. They flinch after each blow. Gradually blood begins to seep through the shroud; their bodies start to sag forward. Eventually they collapse completely, and their bloodied skulls are clearly visible through the torn material. They are dragged out of the holes and are carried away.

A central fact in Fatimeh's claim for asylum was that Hussein had returned to Iran and informed on her. Five witnesses gave evidence that Hussein had been in the camp at the relevant time, and that he had taken some of Fatimeh's writings with him when he returned to Iran. No witness contradicted that evidence. Fatimeh told the RRT Hussein's camp number and his boat number. She asked the RRT to check on Hussein to dispel any doubt about this part of her claim.

The RRT found, as a fact, that Hussein did not exist. The tribunal member found, as a fact, that Hussein's existence had been

were unauthorised arrivals, but 90 of them are genuine refugees who will eventually get protection visas. We lock up the 100. We torment them; we encrease the damage they have already suffered. This is said to protect our borders.

Of course it got worse after Tampa. And don't forget, Tampa was before September 11. It's very easy to telescope history, especially with the magnitude of the events of September 11. The judgement of Justice North at first instance in the federal court was given at 2.15 pm EST on September 11, 2001: nine hours before the planes hit the twin towers in New York. There was no suggestion that the Tampa standoff had anything to do with terrorism. To the contrary, we knew that the people on the deck of the Tampa, rescued from the sinking Palapa on 26 August, were fleeing the Taliban, a regime so terrible that, only weeks after September 11, we helped America march in and bomb them back to the Stone Age.

In the wake of Tampa we introduced the Pacific Solution. The Pacific Solution involves intercepting people before they manage to get to the mainland and taking them against their will to either Manus Island (to the north of Port Moresby) or to Nauru in the central Pacific. The detention of people in those places is indistinguishable from the detention of people in Guantanamo Bay but for this difference: the people being held in Guantanamo Bay are suspected of serious offences. Whether the suspicions are well founded is another matter, but they're suspected of involvement in serious offences. The people who are detained, equally isolated, equally denied access to legal help, equally abandoned by every country in the world, those people in Nauru and Manus Island are not suspected of any offence whatever, except it could be an offence to try to save your own life when fleeing Saddam Hussein or the Taliban.

case, which breeds jealousy and frustration; in the absence of sufficient information, the granting of visas is often compared to a lottery. "We are suspended in time", says one detainee; "We live in limbo", says a mother.

42. Among other stress factors observed, the delegation notes in particular:

(a) The constant "eye" of the surveillance camera (detainees say, "We are totally robbed of privacy"; "We no longer have any control over our lives");

(b) The too-frequent practice of handcuffing, using disposable plastic flexi cuffs, of detainees for trips outside the centre, in particular for dental or medical treatment; the detainees say they feel like criminals;

(c) The frequent roll calls (four per day on average, including one at night by counting heads in the bedrooms and dormitories). On this point, the observations of the delegation were corroborated by the JSCFADT report which cites "a number of complaints about the waking of detainees during nightly checks of sleeping accommodations" (para. 6.87);

(d) Autistic reactions provoked by the difficulties encountered by some detainees in making their needs known because of language problems that are so diverse that it has been impossible for ACM to deal with them, despite its efforts. This problem is particularly acute for women who, in the absence of an adequate number of female interpreters, are reluctant to discuss their private problems;

(e) The routine calling for detainees over the public address system using their registration number composed of three letters and a number. According to an NGO that had provided toys for Christmas, the children were called up to receive their gifts using their registration numbers.

The delegation also observed that most of the detainees who came forward introduced themselves by their registration numbers. At bottom, this practice is felt to be a loss of the detainees' identity."

Solitary confinement

Officially, solitary confinement is not used in Australia's detention system. Officially, recalcitrant detainees are placed in the Management Unit. The truth is that the Management Unit at Baxter is solitary confinement bordering on total sensory deprivation. I have viewed a videotape of one of the Management Unit cells. It shows a cell about 3½ metres square, with a mattress on the floor. There is no other furniture; the walls are bare. A doorway, with no door, leads into a tiny bathroom. The cell has no view outside; it is never dark.

The occupant has nothing to read, no writing materials, no TV or radio; no company yet no privacy because a video camera observes and records everything, 24 hours a day. The detainee is kept in the cell 23 ½ hours a day. For half an hour a day he is allowed into a small exercise area where he can see the sky.

No court has found him guilty of any offence; no court has ordered that he be held this way. The government insists that no court has power to interfere in the manner of detention.

Border protection

'Protection' implies a threat. I do not need to be protected from something, which does not threaten me: I do not need to be protected from dinner with friends or a holiday at the beach. The language of border protection became standard when the Tampa rescued 433 asylum seekers in August 2001, and brought them into the waters off Christmas Island. They were mostly Afghans fleeing the Taleban. There is no need to remind people of the Taliban's malevolence. Women who dared appear in public unaccompanied by a male relative were taken into the Kabul sportsground an summarily shot. Women and girls fleeing the Taliban in early 2001 were the most obvious candidates for

refugee status. How could it be said that they were a threat to us. They needed our help.

We turned them away and sent them to Nauru at vast expense to the Australian taxpayer. By doing so, we did not in any sense protect our borders: we simply showed the world that, in Australia, electoral opportunism and selfishness trump humanitarian imperatives and decency.

The numbers

It's useful also to put this in context, given the rhetoric that surrounds it. Every year 4.7 million people visit Australia; short term visits for holidays or business. Every year 110,000 people migrate permanently to live in this country. Every year - until the time of Tampa at least - there were on average 1000 people who arrived without authority and sought asylum and of them approximately 900 in every thousand were found to have proper grounds for refugee status. The highest number of unauthorised arrivals in one year was just over 4000: most of them fleeing the Taliban or Saddam Hussein.

The ones we lock up are not the 55,000 who overstay their visas and simply remain in the country without permission. The ones we lock up are the 1000 or so each year who would come, of whom 900 turned out to be genuine refugees - already damaged and traumatised by the circumstances which bring them here. They're the ones we're locking up. Who can provide a rational justification for that approach to the problem?

Let us put these numbers in a more manageable context. If we divide all the numbers by 40, it looks like this: imagine the MCG filled with a capacity crowd: just on 120,000 people. That represents the number of people who arrive in Australia each year. Most of them will leave again. 1300 of them will stay on after the game: they are the visa overstayers. Just one hundred of them