Submission to Senate Inquiry into the administration and operation of the Migration Act 1958

Introduction

This submission addresses the inquiry's terms of reference a), c), d) and e) as they relate to the treatment of refugees and asylum-seekers. In so doing, we address some of the underlying reasons for the problems with the operation of the Migration Act, regulations and guidelines by the Minister and the Department of Immigration and Multicultural Indigenous Affairs. We argue that in many, if not all cases, one of the underlying problems is the Act and Regulations themselves. There is insufficient guidance to the Minister and the Department concerning values that are basic to the Australian community and which are reflected in the international human rights treaties to which Australia is a party. Often, the Act and Regulations have been shaped – with significant input from the Minister – so as to give the Minister far too much discretion in the way that he or she operates the Act and to limit possibilities for judicial review. This has led to a number of successful communications to the United Nations human rights treaty bodies. Frequently, also, Australian policy has attempted to develop "legal black holes" – the detention of asylum-seekers pursuant to the Pacific Solution being, perhaps, the best example. In the case of the Pacific Solution, and even on Australian territory, there are attempts to contract out Australian responsibilities with respect to detained asylum-seekers. This leads to insufficient oversight of the conditions of detention. In recent times, there have been some welcome amendments to the Migration Act which seek to provide proper guidance to the Minister and the Department, and we recommend that these initiatives be extended.

We will begin with a discussion of the detention regime and the mistreatment of detainees (section 1). The outsourcing of management and service provision will also be examined (section 2). We will also examine the offshore detention of asylum-seekers in countries participating in the "Pacific Solution" – detention for which Australia retains responsibility as a matter of international law and which therefore should be addressed by this inquiry (section 3). Finally, we will discuss the complicated visa regime established by the Act and regulations and the problematic management by the Minister and Department of matters relating to visa applications. In particular, we address the question of how to deal with refugees whose temporary visas have come to an end but who still require Australia's protection (section 4).

1. Detention

In its latest report on Australia's system of mandatory detention, Amnesty International cites some sobering figures:

"As at 29 May 2005, Amnesty International estimates that at least 150 people have been detained for more than three years in immigration detention by the Australian Government. This figure includes those detained in Australia's immigration facilities on Nauru, of which there are 54 including 48 adults and six children. The total number of persons detained by Australia rises to at least 200 when those detained for more

than 18 months but less than three years are included. Australia's longest serving immigration detainee, a rejected Kashmiri asylum-seeker, Peter Qasim, has been in detention since September 1998. In the case of children, Australia's Human Rights and Equal Opportunity Commission reports that the average detention period for a child in immigration detention is one year, eight months and 11 days."[1]

It is well established that Australia's immigration detention system breaches fundamental human rights. Relevant international human rights provisions include those relating to:

- liberty, such as Article 9 of the International Covenant on Civil and Political Rights, Article 37(b) of the Convention on the Rights of the Child, and Article 31 of the 1951 Convention Relating to the Status of Refugees;
- the family and children, such as Articles 17, 23 and 24 of the International Covenant on Civil and Political Rights and Articles 9 and 10 of the Convention on the Rights of the Child;
- the right to the highest attainable standard of physical and mental health, such as Article 12 of the International Covenant on Economic, Social and Cultural Rights; and
- the prohibition on torture and other related forms of harm contained in Article 7 of the International Covenant on Civil and Political Rights and in the Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment.

1.1. Liberty.

The system has been found to systematically subject people to arbitrary detention and, furthermore, that those in detention do not have adequate recourse to challenge the detention in court.[2] The United Nations Human Rights Committee ("HRC") has held, and has continued to hold, that for a detention system to avoid a characterisation of arbitrariness, it "should not continue beyond the period for which a State party can provide appropriate justification."[3] Similarly, the HRC has said that Australia is required to "demonstrate that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions" [4] which would take into account the family's particular circumstances (such as those of the Bakhtiyari family) or other individual circumstances such as "the hardship of prolonged detention"[5] of children (such as that of the dependant child in Baban v Australia).

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[1] Amnesty International, *Australia: the impact of indefinite detention – the case to change Australia's mandatory detention regime* (30 June 2005), at p. 2 (online version), available at: http://web.amnesty.org/library/index/ENGASA120012005.

[2] A v Australia Communication No 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993. (9.3, 9.4); Baban v Australia Communication No 1014/2001 : Australia. 18/09/2003. CCPR/C/78/D/1014/2001; C v. Australia Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 20028.2.

[3] A v Australia.,9.4.

[4] Bakhtiyari v Autralia, 9.3.

[5] Baban v Australia,17.2.

There have been a number of recent developments that serve to alleviate the situation of some asylum-seekers. In particular, we point to

- the introduction of s 4AA of the Migration Act (discussed below);
- the introduction of section 195 A (non compellable discretion for Minister to issue a visa to unlawful non-citizen in immigration detention) and section 197 AB Migration Act (discretionary power to determine it is in the public interest that a non-citizen be detained somewhere other than a place of immigration detention); and
- and the Bridging R (Class WR) – subclass 070 Bridging (Removal Pending) visa.

However, the core of the system of mandatory detention remains. Only with respect to children has the parliament included a very clear direction that detention should be a last resort (s 4AA), while other powers, such as s 195A, remain at the discretion of the Minister. Unfortunately, use of Ministerial discretion is problematic, as confirmed by the Senate Select Committee inquiry on Ministerial Discretion in Migration Matters. Thus, there is the risk that many individuals will continue to be arbitrarily detained in contravention of Article 9 of the International Covenant on Civil and Political Rights. This leaves open the possibility of the violation of other rights, such as the violation on the prohibition on torture and other related forms of treatment, which Australia has been found to have violated in C v. Australia by failing to release an asylum-seeker who developed a psychiatric disorder as a result of his detention.

Recommendation 1: The best way to ensure that the Minister and the Department do not act in such a way is to undertake an overhaul of the system as set out in the Migration Act and to ensure that Australia's international obligations are enshrined in legislative form. We advocate a system in which the legislation clearly states that immigration detention is only permitted in any individual case for valid reasons specific to that individual – for example, that the individual is a threat to the security of Australia – and that periodic judicial review of detention be required under the Act in order to ensure that a person is justly detained for such reasons. Given the recent moves to soften the system of mandatory detention so that it permits more scope for exception, it is clear that nothing prevents Australia from returning to a system in which detention is the exception rather than the norm.

1.2. Health and the prohibition on torture and other related forms of maltreatment

C v. Australia involved an asylum-seeker who was eventually granted refugee status, and then faced deportation on the basis of criminal charges. He developed a psychiatric disorder while in detention, and the UN Human Rights Committee noted that "[t]he medical evidence was unanimous in concluding that his severe psychiatric illness was brought about by his prolonged incarceration."[6] The Committee went on to say that: "the Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the

[6] C v. Australia, 3.1, and 8.4.

author's continued detention and his sanity. ***Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention)***."[7] The Committee found that "continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant."[8]

HREOC has also found that the Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from detention with their parents amounted to cruel, inhuman and degrading treatment of those children. This amounted to a breach under article 37(a) of the Convention on the Rights of the Child.[9]

Increasingly, a number of professional medical bodies have come out and criticized the detention system because of its impact on the mental health of detainees. These are summarised in Amnesty International's latest report:

"There is mounting evidence that detainees, particularly those who are kept in prolonged or indefinite detention, are at high risk of experiencing chronic depression, incidents of self-harm or attempted suicide. Studies published in the *Australian and New Zealand Journal of Public Health* (December 2004) confirm earlier clinical consensus that high levels of psychopathology of detainees is attributable to the experience of detention. Amnesty International notes the Australian Human Rights and Equal Opportunity Commissioner Dr Sev Ozdowski's position that detention itself is a primary cause of mental illness, and as such a sufferer cannot be treated whilst that person remains in detention.

This position has been confirmed by the Royal Australian and New Zealand College of Psychiatrists, in their response to an announcement by the Minister for Immigration that extra medical staff would be provided within the Baxter detention centre. The College stated that the changes were: 'grossly inadequate in terms of the needs of this [detainee] population' and that immigration detention 'is not suitable for the treatment of the mentally ill, that there should be immediate release of those with mental illness and mental disorder into appropriate psychiatric facilities. Detention centres don't operate as hospitals and in no way can be said to be therapeutic'.

The Federal Court on 5 May 2005 effectively found that the Commonwealth had breached its duty to take reasonable care of two detainees (referred to as 'M' and 'S') held in mandatory detention at Baxter.(109) Amnesty International has questioned the appropriateness of placing mentally ill detainees who are experiencing psychological distress in isolation in the Baxter Management Support Unit." [10]

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[7] C v. Australia, 8.4. [emphasis added]
[8] C v Australia, 8.4.
[9] HREOC, *A Last Resort?,* Major finding 2.
[10] Amnesty International, *Australia: the impact of indefinite detention – the case to change Australia's mandatory detention regime*, note 1 *supra*, at pp 15 - 16.

Recommendation 2: The best way of ensuring that the actions of the Minister and the Department do not result in the ill-health of asylum-seekers, with all the problems that entails for integration into and contribution to the community if they are subsequently granted refugee status, is to abolish the policy of mandatory detention. See recommendation 1, above. Release into appropriate psychiatric institutions, as recommended by the Royal Australian and New Zealand College of Psychiatrists, for those asylum-seekers whom it is necessary to sequester from the Australian community (for example, because they pose a security threat) should be required under the legislation. As with Australian citizens, any asylum-seeker or refugee in the community who requires psychiatric treatment should receive it. It would be appropriate in this regard for parliament to consider the proper legislative implementation of the International Covenant on Economic, Social and Cultural Rights, including Article 12 concerning the right to health.

1. 3. Families and Children.

In *A Last Resort*, HREOC found that DIMIA has failed to actively pursue resolutions to problems in the best interests of families.[11] It is not surprising that child welfare agencies and medical practitioners hold the view that many families simply cannot be properly cared for in a detention environment. DIMIA has in the past acknowledged restraints on their ability to help a family suffering from psychological and psychiatric illnesses when those illnesses were reported by an external medical officer.[12] The Federal government's decision to release all children from detention by 29 July 2005 is a welcome move.[13] This decision goes some way toward meeting the UNHRC's requirement that Australia find less intrusive means achieving compliance with its immigration system.

The inter-relationship between the regime of mandatory detention and the visa regime, particularly the policy of granting temporary protection visas to unlawful arrivals has resulted in the separation of family members. One family member – often the husband and father, may arrive before the rest of the family. When the rest of his family arrives, they will be placed in detention as his visa status does not permit family reunion. Several human rights obligations are relevant here, among them:

- Article 23 (1) of the International Covenant on Civil and Political Rights which provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State";
- Article 17 of the International Covenant on Civil and Political Rights, which provides that "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, *family*, home, or correspondence, not to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks" [emphasis added];
- Article 24(1) of the International Covenant on Civil and Political Rights, which provides that "[e]very child shall have, without any discrimination as to

[11] HREOC, *A Last Resort?*, 6.5.1.a.
[12] DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p. 42, HREOC, *A Last Resort?* 6.7.4 (b).
[13] Press Release by Minister Vanstone, "All Families Out of Detention", VPS 098/2005, available at http://www.minister.immi.gov.au/media_releases/media05/index05.htm

race, colour, sex, religion or social origin, property or birth, the right to such measures of protection as are required by his [sic] status as a minor, on the part of his family, society and the State;"

- Article 9 (1) of the Convention on the Rights of the Child, which provides that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. ….;
- Article 10(1) of the Convention on the Rights of the Child, which provides that "[i]n accordance with the obligation of States Parties under Article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner." … and
- Article 22 (1) of the Convention on the Rights of the Child, which provides that "states parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said states are parties."

In Bakhtiyari v Australia,[14] the Human Rights Committee held that where one member of a family had travelled to Australia and been granted a TPV, if the remaining family members who followed soon after had their applications for asylum rejected this would be in violation of Art. 17 ICCPR.[15] The Committee also noted the potential of the separation entailed by the detention itself to violate the same provisions:

"[T]he Committee observes that to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant. In the present case, however, the State party contends that, at the time Mrs Bakhtiyari made her application to the Minister under section 417 of the *Migration* Act, there was already information on Mr Bakhtiyari's alleged visa fraud before it. As it remains unclear whether the attention of the State party's authorities was drawn to the existence of the relationship prior to that point, the Committee cannot regard it as arbitrary that the State party considered it inappropriate to unite the family at that stage."[16]

The recent addition of section 4AA (1) of the Migration Act, which provides that "the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort" is a very welcome addition to the Migration Act. It will be necessary to monitor the implementation of the new changes for children and families, especially the success or otherwise of Residential Housing Projects, in addressing the issues relating to mental health, education and physical safety. However, it is hoped that s4AA will ensure that instead of arguing that detention of minors should continue

[14] Bakhtiyari v Australia, UNHRC Communication No. 1069/2002, 6 November 2003, paras 9.6-10.
[15] Ibid, para 11.
[16] Ibid para 9.6.

because it is in the interests of family unity, as in *Bakhtiyari v Australia*[17] than to be detained in separate housing facilities or community detention. ***Importantly, the addition of section 4AA of the Migration Act also demonstrates the necessity of the parliament ensuring that Australian values are respected by the Minister and Department and the desirability of implementing relevant international legal obligations in order to achieve this goal.***

Recommendation 3: We recommend that parliament builds on the welcome introduction into the Migration Act of s4AA with further provisions enacting Australia's international obligations to protect the family, such as Articles 17 and 23 of the International Covenant on Civil and Political Rights.

2. Detention and outsourcing

The numerous problems relating to detention outlined above are exacerbated by the policy of outsourcing responsibilities in relation to immigration detention. Transparency regarding the treatment of asylum-seekers, whose treatment is already well-obscured behind barbed wire, is further obscured by the policy of outsourcing as illustrated by the incident involving mistreatment of detainees during a road transfer last year, and the fact that the details have only recently come to light.[18]

The contract and its administration has been criticised in a number of reports, including the Report of the Working Group on Arbitrary Detention, the Palmer Report, and a report by the Australian National Audit Office ("ANAO"). In the Palmer report, it is stated that the contract does not manage the "significant risks – individual, national and individual" to which the Commonwealth is exposed by contracting out immigration services.[19] Nor does it appear that contracting out such services saves money. The ANAO has pointed out that "payments for detention population have increased under the Contract [with "GSL" – Global Solutions Ltd Australia Pty Ltd]. At the same time, the detention population has declined slightly since 2003."[20]

There is a focus on preventing misconduct, enforced by way of fines. This has resulted in the company emphasising the avoidance of such penalties. For example, under the contract with ACM, the company was financially penalised for escapes. This sanction led to the implementation of much stricter security measures, precluding developments that would improve quality of life for detainees.[21] Conversely, there are no provisions in place to reward innovation or positive developments, which is in effect a disincentive for pursuing them. The Palmer Report describes the contract as

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[17] Ibid., 5.8.

[18] Press release by Minister Vanstone, "Transfer of Detainees from Maribyrnong to Baxter", VPS 096/2005, available at http://www.minister.immi.gov.au/media_releases/media05/index05.htm.

[19] Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: REPORT* (July 2005) 177 [7.5.1].

[20] Australian National Audits Office, Audit Report No 1 *Management of Detention Centre Contracts – Part B* (2005-2006), key findings, [33].

[21] Economic and Social Council, Commission on Human Rights, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention iE/CN.4/2003/8/Add.2*, 17[59].

entrenching a 'master-slave' relationship between the government and the company.[22] "It works against commonsense implementation and penalises initiative … The dilemma for GSL is that if it institutes 'better practice' immediately, it runs the risk of being financially penalised if the arrangements are audited. This is nonsense."[23] This kind of atmosphere is not conducive to realising an environment where the stated aims of efficiency and effectiveness. Rather, such a hierarchical environment has the potential to encourage cover ups. Much as a naughty child will attempt to hide their mistakes from a strict parent, the Company could well be encouraged to cover up any flaws in their management.

Recommendation 4

We reiterate that the best solution to many of these problems is to abolish the system of mandatory detention (see recommendations 1 and 2 above). However, it will be necessary sometimes to detain persons. We think it is unwise to outsource detention at all, but in any event recommendations concerning better management of the contract concerning immigration detention have been made by others more qualified to comment. We recommend that proper conditions of detention be governed by the legislative implementation of Article 10 (1) of the International Covenant on Civil and Political Rights, which provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person", and other related, more detailed international instruments such as the UN Body of Principles for All Persons Under any Form of Detention or Imprisonment.[24]

3. Offshore detention pursuant to the "Pacific Solution"

Detention pursuant to the "Pacific Solution" is gradually winding down. There are around 30 people still detained in Nauru. However, it is important to consider the points made earlier concerning the scheme of mandatory detention within Australia as applicable to detention under the "Pacific Solution", because of their impact on detainees, the possibility that the Minister might again decide to utilise the arrangements for offshore detention of asylum-seekers, and the way in which the asylum-seekers detained under the Pacific Solution are effectively removed from public scrutiny.

The "Pacific Solution" creates the impression that Australia is not responsible either for accepting the asylum-seekers sent to Nauru or PNG or for their detention. Participating countries (there have only been two) are clearly at least partly responsible for the detention of the asylum-seekers as they are within that state's territory. In the case of Nauru, the special purpose visas issued to asylum-seekers required that they remain in detention.[25] However, it appears that the camps are run by the International Organisation of Migration under a contract for services with Australia. Without access to this contract, it is difficult to assess exactly what IOM has done, or to scrutinise whether improvements in the running of the centres should

[22] Palmer, above n 19 *supra*, 176 [7.8.1].
[23] Ibid 177 [7.5.1].
[24] Adopted by General Assembly Resolution 43/173, 9 December 1988.
[25] John Pace, Amnesty International, Report of Mission to the Republic of Nauru, Nov, 8 – 13, 2001, at para 53.

be made. In other words, the same problems relating to outsourcing arise in the context of the "Pacific Solution" and they are magnified.

Australia remains responsible for the detention and the same international legal obligations analysed in part one above are relevant. In addition to the contract of services with IOM, it is clear that the asylum-seekers would not be in countries participating in the "Pacific Solution" in the absence of Memoranda of Understanding with Australia, and it is clear that Australia is paying for the detention. Even if Australia was successfully able to argue that those other countries are primarily responsible for any violations of human rights (this is governed by the treaties to which they are party – which include the Convention on the Rights of the Child – and customary international law), Australia would be liable for effectively aiding and abetting the detention by sending the asylum-seekers to these countries. Australia funds the construction of the detention centres and it is aware (despite some protestations to the contrary)[26] that the asylum-seekers are in detention and that this is what Australian taxpayers' money is being used for.[27]

The only human rights safeguard for offshore detainees under the Migration Act is section 198A of the Migration Act. The Minister must declare that countries to which asylum-seekers are sent provide access to refugee determination procedures, provide protection for asylum-seekers, and meet relevant human rights standards. Yet it is clear that the countries participating in the Pacific Solution do not provide "protection" for refugees in the sense required by the 1951 Convention Relating to the Status of Refugees – and in the case of Nauru, which is not party to the treaty, it could scarcely be expected that it would. Furthermore, it is unclear what the Minister deems to be "relevant" human rights standards, given that the asylum-seekers have been subjected to arbitrary detention in the participating countries, much as they would have been had they been allowed to land in Australia. Indeed, at the time that Nauru was selected to participate, it was party to very few human rights treaties – the Convention on the Rights of the Child being one of the only such treaties to which it was party.

Furthermore, it should be noted that the question of whether the Memoranda of Understanding articulate legally binding commitments is debatable. The reason that Australia entitles such documents "MOUs" is precisely to avoid legal obligations. If countries participating in the "Pacific Solution" also took this view (which we think unlikely – they are more likely to want to ensure that the MOUs are complied with by Australia) what provides protection against chain *refoulement* – that is, return to a place of persecution via countries participating in the "Pacific Solution"?

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[26] See for example, *Hearing on Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 before the Senate Legal and Constitutional References Committee*, Australian Senate, 163 (August 19, 2002), testimony of Mark Andrew Zanker, Acting First Assistant Secretary, Office of International Law, Attorney-General's Department. Mr Zanker said that the asylum-seekers "are not in what are called detention centres. The International Organisation for Migration, which runs these places, does not have it in its charter to operate a detention centre, and it would not do so. They are processing centres."

[27] For information concerning the facts relating to detention on Nauru and PNG and a preliminary analysis of some of the issues concerning Australia's international legal responsibility for that detention, see P. Mathew, "Legal Issues Concerning Interception", 17 *Georgetown Immigration Law Journal* 221 (2003), 245 – 248.

Stricter controls could be placed on the Minister by requiring tighter application of relevant human rights standards and scrutiny of the declarations she makes. Given the humanitarian and economic problems with the "Pacific Solution" it would be desirable to repeal s 198A. However, this should only happen if s 7A is also removed and the policy of simply repelling boats of asylum-seekers so that they return to places like Indonesia, which is not even party to the Refugee Convention, is also dropped. Section 7A provides that "the existence of statutory powers under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders." It is unnecessary given the ruling in *Ruddock v Vadarlis*,[28] but it is also thoroughly undesirable. Section 7A should be replaced by a provision that enacts Article 33(1) of the Refugee Convention. Article 33(1) is the cardinal protection for refugees and it states that,

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [sic] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

If this course is not pursued, then, at the very least, we would recommend the following:

- a connection should be made between s 7A and s 245F(9) (a provision which deals with transfer of persons on board ships), on the one hand, and s 198A, on the other, so that it is clear that asylum-seekers are only ever returned to places where they may apply for refugee status, receive protection as refugees and enjoy their human rights; and
- the standards according to which the Minister makes s 198A declarations should be tightened and subjected to proper parliamentary scrutiny, with the option of judicial review.

Recommendation 5

Repeal s 7 A and legislatively enact Article 33 of the 1951 Convention Relating to the Status of Refugees **or, alternatively,**

ensure that powers under s 7A and s245F(9) are controlled by declarations under s 198A, tighten the standards by which the Minister declares a country to be "safe" under s198A, and explicitly subject the process of making declarations to proper parliamentary scrutiny, with the option of judicial review.

4. Operation of the visa regime

The final issue that this submission addresses is the complicated visa regime and its operation by the Minister and Department. We will first outline the scheme of the visa regime and various problems with it as a matter of international law. We will then focus on what has been one of the most problematic issues – the management of .those

[28] (2001) 111 FCR 49.

who are recognised as a refugee and granted a Temporary Protection Visa, and then, three or five years later, are asked to prove their need for protection again.

4.1. The visa regime

Below, we outline the most salient visa classes.

Refugee Protection visas (subclasses 866 and 785)

866[29]

If someone who hasn't previously held any other refugee or humanitarian visa:

- is outside their country of origin,
- is in Australia
- is immigration cleared,
- entered Australia on a genuine and valid visa in their own name, has not been convicted in the last four years of an offence attracting a maximum penalty of 12 months or more, and
- the Minister (or her delegate or the RRT) is satisfied that they are a person to whom Australia has protection obligations under the Refugees Convention

that person (or their family member) is eligible, subject to health checks, for the grant of an 866 - Permanent Protection Visa. The 866 visa is the only one of those here discussed to confer upon its holder the right to travel and to sponsor his or her family

785[30]

If, however, the applicant to whom the Minister is satisfied Australia has protection obligations under the Convention is either not immigration cleared or does not arrive on a genuine visa in their own name, they (or their family member) will only be prima facie eligible for the grant of a subclass 785 – Temporary Protection Visa.

This includes not only those arriving "illegally" by boat, but those arriving by aeroplane on false or fraudulent travel documents (which many refugees are forced, through circumstance, to use). It even includes people arriving on valid visas in their own name who have the integrity to declare their intention to seek refugee status prior to passing through immigration – because they are not immigration cleared, they are only eligible for temporary visas.

A holder of a subclass 785 visa may, after 30 months, apply for a Permanent Protection Visa.

However, if they have

- ever held a subclass 447 visa,

[29] *Migration Regulations 1994, Schedule 2* – reg 866
[30] *Migration Regulations 1994, Schedule 2* – reg 785

- been convicted in the last four years of an offence carrying a maximum penalty of 12 months imprisonment or more, or
- spent seven days or more *en route* to Australia in a country in which they could have sought and obtained effective protection,

even though they show that they are still a person to whom Australia owes protection obligations under the Convention, they will only be eligible for another 785 visa. This is very serious in terms of the possibility of family reunion, which is a fundamental human right.

Secondary movement visas (subclasses 447 and 451)

These visas were introduced as part of the "Pacific Solution".

447[31]

This visa is, in practice, for those who come to Australia by boat, but only get as far as an "excised" island.

According to the criteria, the applicant must, at the time of application, be subject to either persecution or substantial discrimination in their home country; or be a "woman-at-risk".

At the time the decision is made, the Minister's delegate must be satisfied that there are compelling reasons for special consideration and having regard to the extent of the applicant's connection with Australia and "whether there is any suitable country available, other than Australia, that can provide for the applicant's stay and protection from persecution, discrimination, victimisation, harassment or serious abuse; and the capacity of the Australian community to provide for the temporary stay of persons such as the applicant in Australia."[32]

The visa lasts for three years, by which time the holder may apply for a 785 – Temporary Protection Visa. **Under the current regulations, the holder of a 447 visa can never apply for a permanent protection visa, even after having held a TPV for three years. They can only ever apply for another TPV, unless the Minister "raises the bar".**

This is the visa that was granted, for example, to those who got as far as Ashmore reef after it was excised and were then taken to Nauru.

451[33]

The criteria for this visa are, in many respects, similar to those for the 447, the difference being that this visa was granted to those who never even got as far as the excised islands, but were intercepted (at sea, for example) and taken to offshore detention centres for processing.

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[31] *Migration Regulations 1994, Schedule 2* – reg 447
[32] Regulation 447.222 (e) & (f)
[33] *Migration Regulations 1994, Schedule 2* – reg 451

The holders of this visa may apply, after 4 ½ years, and be granted after 5, a subclass 866 – Permanent Protection Visa.

The trauma to individuals who are required to prove their need for protection, in some instances, every three years *ad infinitum*, is enormous. Below, we address the rationale for the visa system and we demonstrate that it is a flawed rationale factually and from the perspective of international law. We then examine the administrative problems created by the visa regime and the recent ruling of the Federal Court in *QAAH of 2004 v MIMIA* as to how the cases of those on temporary visas need to be handled.[34]

4.2 The flawed rationale for the visa regime

The system of temporary protection visas was introduced in 1999. The Minister's reasons for introducing the temporary protection visa were explained in question time on 30 October 1999 as follows:

We have been experiencing a huge increase in the level of unauthorised arrivals. They are people who are not local to our region; they have travelled halfway round the world from places like Iraq, Afghanistan and Turkey to seek protection here. In many cases they are relinquishing situations of security they are now in or passing other countries where they can properly make asylum claims in order to come to Australia …The temporary protection visa that I announced is to be introduced by regulation. The regulations were proclaimed this morning. This is one element of a range of measures we are working on.[35]

Both the proposition that the increase had been "huge" and the notion that asylum-seekers were leaving situations of safety are highly questionable. The implication that it is the phenomenon of asylum-seekers giving up protection elsewhere that had lead to the increase is also questionable. As one of us has commented elsewhere, the increase in numbers is better explained by the turmoil in the relevant areas at the time: "[d]uring 1999 … UNHCR's statistical overview showed that Iraq and Afghanistan respectively generated the second and third largest number of asylum applications world wide, behind Yugoslavia."[36] As for the reasons why asylum-seekers move from countries closer to the scene of persecution, we refer to the research of Human Rights Watch which documents the compelling nature of these reasons in many cases.[37] Frequently, asylum-seekers have only been able to flee to a country that is not party to the Refugee Convention and, as a result, asylum-seekers, while tolerated, do not have a legal status and their human rights are therefore diminished. For example, how is an asylum-seeker supposed to support him or herself if unable to work legally? (And it should be noted that many of the countries we are talking about are developing countries – assumptions about social security safety nets are often inapplicable.)

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[34] [2005] FCAFC 136 (unreported, Wilcox, Madgwick and Lander JJ).
[35] Hansard, REPRESENTATIVES Wednesday, 20 October 1999, 11981
[36] P. Mathew, "Safe for Whom? The Safe Third Country Concept Finds a Home in Australia", in S. Kneebone, ed, *The Refugees Convention 50 Years On: Globalisation and International Law*(2003), at 138, citing UNHCR, *Asylum Applications Lodged in 27 Industrialised Countries, January – April 2001,* (Geneva, UNHCR, 2001).
[37] Human Rights Watch, "By Invitation Only": Australian Asylum Policy, December 2002, Vol. 14, No. 10(C), at 15 – 29, 34 – 38.

These sorts of reasons are well within the language of Article 31(1) of the Refugee Convention, which is the provision that countries cite in order to suggest that they can rely on the idea of a "safe third country" or "protection elsewhere". Article 31(1) states that:

"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

The provision is actually about *not penalising* unlawful entrants. In any event, as one of us has written elsewhere, the provision's language is broad enough to protect those who cannot get refugee protection elsewhere as documented by Human Rights Watch's research.

"The language "coming directly" and "good cause" is construed broadly. Article 31 does not refer solely to refugees coming directly from their country of origin. If a refugee is unable to secure protection in a country through which he or she has travelled after leaving the country of origin, the protection of Article 31 will still apply. Moreover, it is generally accepted that mere transit in another country is not sufficient to deflect the protection of Article 31. It is notable that in relation to returns to countries through which an asylum-seeker has sojourned, the executive committee of UNHCR has referred to cases in which protection has already been secured in that country. Ex com [the executive committee of UNHCR] has also referred to the possibility of requesting persons to seek asylum from countries to which they have some sort of connection, if fair and reasonable. … It should also be noted that the idea that asylum-seekers on State territory may simply be moved involuntarily from state territory to another country, particularly one to which the asylum-seeker has no links and through which she has not previously sojourned is certainly not uniformly accepted in State practice. Even in cases of mass influx, such as the flight of Albanian Kosovars, the practice has been to secure asylum-seekers' consent before their transfer. A recent EU directive on temporary protection confirms that consent of both the proposed safe third country and the asylum-seeker is required before transfer occurs."[38]

Although it is also true that the Refugee Convention does not contain a right of entry and it is therefore arguable that other countries may be expected to provide protection in some circumstances, we think that Australia's interpretation of "protection elsewhere" as embodied in the "Pacific Solution" may be an unsustainable interpretation of the Convention for one very salient reason. Any interpretation of the Convention's language must be in context and in light of the object and purpose of the Convention. For the object and purpose of the treaty, one looks to the preamble. The preamble recalls the fact that all human beings enjoy fundamental human rights, that the United Nations is concerned to ensure that refugees have the "***widest possible exercise of these fundamental rights***", and that "it is desirable to revise and

[38] P. Mathew, "Legal Issues Concerning Interception", 17 *Georgetown Immigration Law Journal* 221 (2003), at 238.

consolidate previous international agreements relating to the status of refugees and to ***extend the scope of and protection*** accorded by such instruments by means of a new agreement."[39] In other words, the purpose of the Convention is to extend the protection for refugees, not to offer the least possible form of protection humanly possible. It is one thing to deny admission on the basis that there is another country that will accept and protect the asylum-seeker, it is quite another to send them to countries participating in the "Pacific Solution" who refuse to take ultimate responsibility for the asylum-seekers and who will only offer to detain asylum-seekers while their claims are processed.

The visa regime as complicated by further amendments in 2001 is an extension of this strained interpretation of the Refugee Convention and puts in place a punitive hierarchy of steadily decreasing levels of protection. When introducing these amendments, Minister Ruddock stated that:

The stricter visa regime that will also be included in the bill, that deals with the other measures that we will be implementing, ensures that those people from countries of first asylum, who are processed in an orderly way, will get permanent protection. Those who are processed from places like Indonesia will receive a temporary protection visa, with access at a later point in time to permanent entry. Those who are processed from Christmas Island or from Nauru will only ever—unless the minister lifts the bar—be eligible for a temporary protection permit. The point we are making is that, if people want to get outcomes where their protection claims are properly recognised, they should do it in the country of first asylum or they should do it in Indonesia. They should certainly not seek to do it in one of Australia's external territories.[40]

As explained by the Minister on the Law Report, the visa system establishes a hierarchy.

It's a hierarchy, and the best outcome is to apply from a situation of first asylum. The second best outcome is to apply in a country which might be en route, where you are able and secure enough to be able to do so. The third best outcome is if you come to Australia, and that's a very deliberate hierarchy in policy terms.[41]

Indeed, when one looks closely at the visa regime, we see that, as one of us has written elsewhere:

"The [amendments have] created a many-layered hierarchy of refugees in Australia that has little bearing on protection needs. Successful onshore claimants for protection who arrive in Australia on a visa, and successful offshore claimants who are not perceived to have given up prior protection opportunities, are given permanent protection. Successful onshore claimants who arrive on the mainland unlawfully are given three-year temporary protection visas in the first instance, though they may eventually apply for a permanent protection visa. Asylum seekers will now find it rather difficult to access this kind of visa, since many of them will arrive in the excised offshore areas. Successful offshore claimants intercepted while attempting to journey

[39] 1951 Convention Relating to the Status of Refugees, preambular paragraphs 1, 2 and 3.
[40] Hansard, REPRESENTATIVES Tuesday, 18 September 2001, 30846
[41] Law Report, 2/10/2001, available at: http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s380546.htm

to Australia are given a five-year temporary entry permit in the first instance. Successful "offshore entry persons" – those onshore claimants who arrive in one of the excised territories of Christmas, Cocos, or Ashmore and Cartier Islands, rather than the mainland – are granted rolling three-year temporary visas after effectively (barring the exercise of the minister's discretion) being treated as offshore claimants. The last three kinds of visa do not carry reentry rights and so long as the person's status is temporary – which is indefinitely in the case of offshore entry persons – family reunion is prevented.

… The new visa regime grants Australian "protection" to a degree, but it also serves to punish people who are perceived as having given up protection options elsewhere, without much consideration as to whether those options were adequate or are currently available. Thus it may be challenged on the basis that it constitutes invidious discrimination and, effectively, a form of punishment for illegal entry into Australia. The new visa regime may also violate or put at risk other substantive rights, among them protection against *refoulement* and the right to family unity.

[…]

… Furthermore, while the new Australian legislation may be intended to target refugees who have transited other countries en route to Australia and could have accessed protection there, visa subclass 447 for offshore entry persons is actually premised on the point of arrival in Australia. This is a nonsensical basis for providing different levels of protection."[42]

4.3. Management of the process

The practical administration of the temporary protection visa regime so far has been disturbing in its operation. After thirty months of holding a 785, for example, the applicant received a letter inviting them to submit further protection claims to the DIMIA. Some time later they have been invited in for an interview and asked to prove that they still required protection, or had new claims under which they required protection. In the case of the Hazaras of Afghanistan, many were rejected at the DIMIA level on the basis of regime change and the fall of the Taliban. Thankfully, since the Petro Georgiou breakaway earlier in the year, this regime seems to have changed somewhat.

It is our submission, however, that the practice of calling a person to reprove their claim after three years (and especially if this is ongoing) is fundamentally contradictory to the letter and spirit of the Refugee Convention.

On 27 July of this year, two days before this Inquiry was scheduled to close its doors to submissions, the Full Court of the Australian Federal Court, constituted by Wilcox, Madgwick and Lander JJ, handed down its decision in the case of *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs*[43] *("QAAH").* The leading judgment was that of Wilcox J who, along with Madgwick J, upheld the appeal by a Hazara from Afghanistan, who had held a TPV but had his application for

[42] P. Mathew, "Australian Refugee Protection After the Tampa", 96 *American Journal of International Law* 661 (2002), at 673 - 4.
[43] [2005] FCAFC 136

permanency rejected by the DIMIA delegate and then the RRT. As a result of this decision, it is now clear that the onus to show that a person who has been recognised as a refugee under the Convention is no longer a refugee or, in the Convention's terms, "that the circumstances in connexion with which s/he was previously recognized have now ceased to exist" (Refugee Convention, Article 1C(5) – one of the "cessation clauses"), rest upon the State who recognised him or her a refugee. As Justice Madgwick explained:

> (a) the legislative requirement is that before the relevant temporary visa could be granted, the Australian Government through the agency of the Minister or the latter's delegate must have determined substantively that Australia owed the appellant protection obligations under the Convention;
>
> (b) thereafter, Australia's acceptance of the Convention (not in any relevant respect qualified by the Act) means that, having regard to the Act's own criterion of protection obligations being owed, because of that determination the appellant was to be regarded as a refugee and therefore owed protection obligations until such time as there was a positive determination on behalf of the Australian Government that the circumstances in connection with which the appellant had been recognized as a refugee had ceased to exist: Art 1.C.5; and
>
> (c) the potential consequences of depriving a previously recognized refugee of his or her refugee status properly impact upon the meaning to be ascribed to the notion of the cessation of those circumstances and upon the process of determination of whether such cessation has occurred. [44]

The majority in *QAAH* have, in our submission, correctly characterised the law in relation to the cessation clauses of the Refugees Convention and Australia's obligations thereunder, as enshrined in the Migration Act.

Put simply, the obligation to show that one is deserving of refugee status being granted rests upon the person claiming to be a refugee. The onus to show that a person who has been recognised as a refugee under the Convention is no longer a refugee or, in the Convention's terms, that the circumstances in connexion with which he was previously recognized have now ceased to exist, rest upon the State which recognised him as a refugee in the first place.

It is for this reason that the current regime of temporary protection and humanitarian visas needs to be changed.

Once a person has been recognised by Australia as a refugee, they should not have to prove their case again three years later. Rather, it should be on the Minister to show that the cessation clause can be made out, *before* any further requests for information or interviews take place.

[44] *QAAH*, para 112.

Given that many of those who are granted 447 or 451 visas are also refugees since, regardless of the kind of visa they have been granted, they meet the definition of a refugee set out in the Convention, the logical approach is that they also should not have to reprove claims for protection. In practice they have so far, at any rate, been recognised as refugees by Australia.[45] It is useful to bear in mind here that the relevant question as a matter of international law is not whether a State has recognised a person as a refugee, but whether they are in fact a refugee according to the definition. As stated in the UNHCR handbook,

> *A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.*[46]

Recommendation 6

Given the numerous problems with the complicated visa system, we recommend that:

a) the "Pacific Solution" be abandoned; and

b) that permanent visas be granted to those to whom Australia owes refugee protection obligations, and to those whom Australia has decided require what is sometimes called (in Europe and by UNHCR) "complementary protection" – namely those who fall outside the refugee definition but who are in refugee-like situations and should not be returned home.

c) At a minimum, that at any subsequent determination for a person previously having been recognised by Australia as a refugee under the Convention, the onus be on the Minister to show that all circumstances in connection with which he has been recognised as a such have ceased to exist.

Conclusion and summary of recommendations

The focus of this inquiry is the administration and operation of the Migration Act. In our view, one major contributing factor to the failings of the Minister and Department is the lack of legislative guidance and control. Our recommendations are thus focussed on amendments to the Migration Act which enact into Australian domestic

[45] See, eg, "Asylum Decisions Handed Down on Nauru and Manus", 10 September 2002, DPS 67/2002, available at http://www.immi.gov.au/media_releases/media02/d02067.htm; and "Afghan Refugees Arriving in Australia from Nauru", VPS 100/2004, 13 July 2004, http://www.minister.immi.gov.au/media_releases/media04/v04100.htm.

[46] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979) at para 28.

law relevant international human rights standards. In summary our recommendations are:

1. The Migration Act should clearly state that immigration detention is only permitted in any individual case for valid reasons specific to that individual – for example, that the individual is a threat to the security of Australia – and periodic judicial review of detention be required under the Act in order to ensure that a person is justly detained for such reasons.

2. Release into appropriate psychiatric institutions, as recommended by the Royal Australian and New Zealand College of Psychiatrists, for those asylum-seekers whom it is necessary to sequester from the Australian community (for example, because they pose a security threat) should be required under the legislation. As with Australian citizens, any asylum-seeker or refugee in the community who requires psychiatric treatment should receive it. It would be appropriate in this regard for the parliament to consider the proper legislative implementation of the International Covenant on Economic, Social and Cultural Rights, including Article 12 concerning the right to health.

3. Parliament should build on the welcome introduction into the Migration Act of s4AA with further provisions enacting Australia's international obligations to protect the family, such as Articles 17 and 23 of the International Covenant on Civil and Political Rights.

4. Proper conditions of detention should be governed by the legislation through the legislative implementation of Article 10 (1) of the International Covenant on Civil and Political Rights, which provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person", and other related, more detailed international instruments such as the UN Body of Principles for All Persons Under any Form of Detention or Imprisonment.

5. Section 7 A of the Migration Act should be repealed and Article 33 of the 1951 Convention Relating to the Status of Refugees should be enacted in its place **or, alternatively,**

the powers under s 7A and s245F(9) of the Migration Act should be controlled by declarations under s 198A of the Migration Act, the standards by which the Minister declares a country to be "safe" under s198A should be tightened, and the process of making declarations should be subjected to proper parliamentary scrutiny, with the option of judicial review.

6. a) The "Pacific Solution" should be abandoned; and

   b) permanent visas be granted to those to whom Australia owes refugee protection obligations, and to those whom Australia has decided require "complementary protection".

   c) At a minimum, at any subsequent determination for a person previously having been recognised by Australia as a refugee under the Convention, the onus should be on the Minister to show that all circumstances in connection with which he has been recognised as a such have ceased to exist.

Submitted by:

Dr Penelope Mathew, Reader, Faculty of Law, ANU

and the ANU Law Students for Social Justice society, represented by Mr Cade Badawy, Ms Stephanie Elliott, Mr Will Fitzgibbon, Mr Emrys Nekvapil and Ms Anna Talbot.