

Assistance and Protection of Smuggled Migrants: International Law and Australian Practice

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Abstract

The United Nations *Protocol against the Smuggling of Migrants by Land, Sea and Air* obliges States Parties to provide ‘appropriate assistance’ to smuggled migrants. The understanding of the precise content of this provision is, however, often overshadowed by the broader criminal justice purpose of the Protocol and by the approach taken by States Parties, including Australia. This article critically examines the obligations to assist and protect smuggled migrants by identifying the content and expectations of relevant provisions, illustrating their practical implementation within the Australian context, and evaluating these practices against international best practice guidelines in order to establish whether Australia is meeting its international commitments.

I Introduction and Background

The topic of migrant smuggling (or ‘people smuggling’ as it is referred to locally) has dominated Australian federal politics, media headlines and public debate for more than a decade. Usually arriving by boat on wooden vessels from southern Indonesia, smuggled migrants who are brought to Australia have been demonised by some parts of politics and many media outlets. This is despite the fact that the vast majority of these so-called ‘illegal maritime arrivals’ arrive with genuine claims for asylum and are ultimately recognised as refugees and permitted to stay in Australia.

During the long journey from their home countries, through various transit points, to Australia as their final destination, the lives, freedom and safety of smuggled migrants are frequently at risk and they are extremely vulnerable to exploitation by their smugglers and by others. When apprehended by authorities, smuggled migrants may be in urgent need of shelter, food and basic medical care. Many migrant smugglers expose their passengers to life-threatening risks. Thousands of people have suffocated in containers, perished in deserts, drowned or

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dehydrated at sea. In 2012 alone, several migrant smuggling vessels sank on their journey from Indonesia to Australia, killing hundreds of people.

Smuggled migrants are frequently subjected to exploitation, deception, threats, and violence. They are particularly vulnerable if they reside in the host country illegally or clandestinely and if they do not speak the local language and are unfamiliar with local procedures and customs. Often they fall victim to gangs and other criminals, and sometimes they engage in petty crimes as they cannot engage in legitimate ways to earn money to support themselves and their families. For these reasons, it is important that international and domestic frameworks protect the fundamental rights and liberties of smuggled migrants, and that any action taken against the smuggling of migrants adheres to the basic principles of international human rights law.

As the first indication of consensus within the international community towards the criminalisation of migrant smuggling, the *Protocol against the Smuggling of Migrants by Land, Sea and Air* ('*Smuggling of Migrants Protocol*') is a significant instrument of international criminal justice.¹ It forms the basis for a collaborative approach to the prosecution and prevention of a dangerous, exploitative crime.

While the *Smuggling of Migrants Protocol's* emphasis is on mutual assistance between States Parties in the criminalisation of migrant smuggling, it also creates an obligation to 'afford appropriate assistance' to smuggled migrants.² In the midst of the numerous criminal justice provisions, this assistance obligation sticks out like the proverbial sore thumb. Yet there has been little academic enquiry into the exact content of these assistance provisions or exploration of their practical implementation.

This article explores the degree to which the *Smuggling of Migrants Protocol* protects those directly affected by the crime — the individuals who seek the services of migrant smugglers who promise to facilitate their illegal entry into another country but place their 'human cargo' in the back of unventilated trucks, on unseaworthy boats, or equip them with false passports and other documents. To this end, this article isolates and analyses the content of the assistance provisions under the *Smuggling of Migrants Protocol*, and critiques the relatively low threshold the Protocol sets. This involves an initial consideration of the historical origins and drafting approaches underpinning the purposes of the *Smuggling of Migrants Protocol* and its parent, the *Convention against Transnational Organized Crime*,³ explaining how the assistance provisions came into being and why they set a very low standard. The provisions obliging States Parties to provide assistance to smuggled migrants are then identified and analysed.

Next, the article conceptualises migrant smuggling and smuggled migrants in the Australian context. This exercise serves two functions; first, it defines the scope of assistance measures under consideration by this article and, second, it

¹ Opened for signature 12 December 2000, 2241 UNTS 507 (entered into force 28 January 2004).

² *Smuggling of Migrants Protocol*, art 16(3)–(4).

³ Opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) ('*Convention against Transnational Organized Crime*').

facilitates the identification of government support for smuggled migrants. While this necessarily involves consideration of asylum seekers and refugees in Australia, the details of status determination processes and the intricacies of the visa system lie outside the purview of this article. Instead, the assistance measures available to smuggled migrants are outlined as an illustration of practical implementation of the assistance provisions under the *Smuggling of Migrants Protocol*. Appreciative of the highly mutable nature of immigration law and policy in Australia, this article's discussion of these measures draws on the most current government guidelines, academic observations, and information from other sources. Insofar as relevant, the article also takes due account of the policy changes and legislative amendments that followed the release of the *Report of the Expert Panel on Asylum Seekers* in August 2012.⁴

The article concludes with observations about the standard and operation of the international and domestic protection and assistance of smuggled migrants and by reflecting on further steps to prevent the smuggling of migrants more effectively while saving the lives and safety of those most vulnerable to this crime.

II International Law and Best Practice

A Background

The precursors to the *Smuggling of Migrants Protocol* were two originally unrelated yet serendipitously timed initiatives by the governments of Italy and Austria, both seeking to address the growing problem of migrant smuggling. Experiencing a significant increase in the number of migrants arriving on its shores, particularly from North Africa, Albania, the Balkans and the eastern Mediterranean, Italy proposed a convention to the International Maritime Organisation ('IMO') specifically to combat migrant smuggling by sea.⁵ The purpose of this proposal was to criminalise the smuggling of migrants by sea under international law. The IMO's Legislative Committee, however, felt that the proposal was primarily a matter of international criminal law that went well beyond maritime issues, and thus beyond the IMO's mandate.⁶

Separately, led by the then Foreign Minister Dr Wolfgang Schüssel, the Austrian Government sought a multilateral approach to address the issue of migrant smuggling, proposing to the United Nations ('UN') General Assembly a convention criminalising this phenomenon.⁷ The Austrian draft, like that of Italy,

⁴ Australian Government, *Report of the Expert Panel on Asylum Seekers* (2012) ('Expert Report').

⁵ IMO Legal Committee, *Proposed Multilateral Convention to Combat Illegal Migration by Sea*, IMO Doc LEG 76/11/1 (1 August 1997); Andree Kirchner and Lorenzo Schiano di Pepe, 'International Attempts to Conclude a Convention to Combat Illegal Migration' (1998) 10 *International Journal of Refugee Law* 662, 665; Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 347–8.

⁶ Kirchner and Schiano di Pepe, above n 5, 665–6.

⁷ International Council on Human Rights Policy, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence* (2010) 66; Ernst Sucharipa, *Letter dated 16 September 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General*, UN Doc A/52/357 (17 September 1997) ('Austrian Letter').

sought to criminalise the smuggling of migrants under international law and, in pursuit of this objective, primarily focused on methods of investigation and the prosecution of offenders. While acknowledging the non-criminalisation of smuggled migrants, Austria's proposal did not contain any provisions alluding to standards for their protection and assistance.⁸ Unable to further its submission via the IMO, Italy supported the Austrian proposal for the development of an international instrument that would identify the smuggling of migrants as a Transnational Organized Crime.⁹ The Italian and Austrian proposals thus constitute the main textual influences of the *Smuggling of Migrants Protocol*.¹⁰

Following a recommendation of the Commission on Crime Prevention and Criminal Justice made to the UN General Assembly, an open-ended intergovernmental Ad Hoc Committee was established for the Elaboration of a Convention against Transnational Organized Crime (AC.154) including the 'elaboration, as appropriate', of an international instrument on illegal trafficking in and transporting of migrants, including by sea.¹¹ The *Protocol against the Smuggling of Migrants by Land, Sea and Air* and the *Convention against Transnational Organized Crime* were opened for signature at a high-level conference in Palermo, Italy, in December 2000. The *Convention against Transnational Organized Crime* entered into force on 29 September 2003; the *Smuggling of Migrants Protocol* followed on 28 January 2004. Currently, the Protocol has garnered considerable support: 129 countries have signed it; 112 countries have also ratified it.¹²

Both Italy's and Austria's initiatives sought to establish a multilateral, international approach to combat the increasing problem of migrant smuggling through the criminalisation of such activities. Examination of the Ad Hoc Committee's deliberations and background material reflects this original intent, with an absence of any references to protection or assistance for smuggled migrants in the original drafts of the *Smuggling of Migrants Protocol*.¹³ Instead, the inclusion of such provisions directly resulted from intervention by an 'Inter-Agency Group', comprising the Office of the United Nations High Commissioner

⁸ *Austrian Letter* UN Doc A/52/357 2, [3]; Kirchner and Schiano di Pepe, above n 5, 670; Schloenhardt, above n 5, 348–50.

⁹ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 983.

¹⁰ United Nations Office on Drugs and Crime ('UNODC'), *Travaux Préparatoires of the Negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 451 ('*Travaux Préparatoires*') 451. See also Andreas Schloenhardt and Jessica Dale, 'Twelve Years On: Revisiting the UN Protocol against the Smuggling of Migrants by Land, Sea and Air' (2012) 67 *Zeitschrift für Öffentliches Recht/ Journal of Public Law* 129, 133–5.

¹¹ *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions: Addendum: Interpretative notes for the official record (travaux préparatoires) of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 (3 November 2000) xxv ('*Interpretative Notes*'); *United Nations Resolution on Transnational Organized Crime*, GA Res 53/111, UN Doc A/RES/53/111 (20 January 1999, adopted 9 December 1998).

¹² UNODC, *Signatories to the United Nations Convention against Transnational Crime and its Protocols* <<http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>>.

¹³ See UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft elements for an international legal instrument against illegal trafficking and transport of migrants*, 1st sess, UN Doc A/AC.254/4/Add.1 (15 December 1998).

for Human Rights ('OHCHR'), the United Nations High Commissioner for Refugees ('UNHCR'), the International Organisation for Migration ('IOM'), and the United Nations Children's Fund ('UNICEF').¹⁴ In an address to the Ad Hoc Committee, the then UN High Commissioner for Human Rights, Mary Robinson, urged the Committee to recognise the increased vulnerability of irregular migrants and incorporate into the *Smuggling of Migrants Protocol* provisions protecting their human rights, as established under international customary law.¹⁵ The initial idea was to include a savings clause that operates to preserve the rights of smuggled migrants, particularly those protected under the *Convention against Transnational Organized Crime* and the *Protocol relating to the Status of Refugees*.¹⁶

The position of the Inter-Agency Group was subsequently endorsed by the Group of Latin American and Caribbean States which affirmed that 'the protocol could not be used as an instrument for criminalizing migration ... nor should it stimulate xenophobia, intolerance and racism'.¹⁷ Building on these principles, a later note by the OHCHR, UNICEF, and IOM called for the specific consideration of smuggled migrants who are women and children, as well as recognition of the right of return with respect to the principle of non-refoulement to ensure migrants who are covered by protection obligations under international refugee law are afforded protection by the relevant state.¹⁸

In response, the Ad Hoc Committee drafted a provision incorporating protection and assistance measures for smuggled migrants. The final entry of the reference to smuggled migrants' rights was not without contention. Following disagreement as to the preferred wording and placing of the provision, the inclusion of such a reference was not finalised and not approved until the 11th session of the Ad-Hoc Committee in October 2000.¹⁹ The final content of this provision, now contained in the *Smuggling of Migrants Protocol* art 16, was drawn from proposals composed by Azerbaijan, Belgium, Italy, Mexico and Norway. The protection of the rights of smuggled migrants was subsequently also included as an express purpose of the *Smuggling of Migrants Protocol* in art 2.²⁰

¹⁴ Tom Obokata, 'The Legal Framework on Immigration Control at Sea' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff, 2010) 151, 163.

¹⁵ UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Informal note by the United Nations High Commissioner for Human Rights*, 4th sess, UN Doc A/AC.254/16 (1 June 1999) 1 [1]–[3].

¹⁶ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*'); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Protocol*').

¹⁷ UNODC, *Travaux Préparatoires* above n 10, 537.

¹⁸ UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organisation for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, 8th sess, UN Doc A/AC.254/27 (8 February 2000).

¹⁹ UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime*, 11th sess, UN Doc A/AC.254/4/Add.1/Rev.6 (19 July 2000, adopted 2–27 October 2000) 6 art 3.

²⁰ Obokata, above n 14, 164. See also, UNODC, *Travaux Préparatoires*, above n 10, 461.

The inclusion of assistance and protection provisions has created a compromise —some might say a conflict — between the criminal justice focus of the *Smuggling of Migrants Protocol* and the human rights considerations now expressed in several of its articles.²¹ On the one hand, the Inter-Agency Group held grave concerns for the effect of the *Smuggling of Migrants Protocol* on the status and claims of those smuggled migrants who were also asylum seekers or refugees. The inclusion of assistance and protection provisions seeks to ensure that international refugee and human rights standards as well as basic humanitarian considerations would not be compromised by the strong criminal justice focus of the *Smuggling of Migrants Protocol* and the *Convention against Transnational Organized Crime*. On the other hand, many countries were — and continue to be — hesitant to support the inclusion of any provision that would generate an obligation on States Parties to take positive measures in relation to the protection and assistance of smuggled migrants.²² This tension remains evident in the final text of the *Smuggling of Migrants Protocol* and in its implementation, interpretation, and observance by States Parties.

B Assistance and Protection under the Protocol

Several provisions under the *Smuggling of Migrants Protocol* identify the minimum standards of protection and assistance States Parties should provide to smuggled migrants. Article 16 provides the clearest expression of these standards, while art 19 offers further direction on the issue.

1 Assistance to Smuggled Migrants

Article 16 of the *Smuggling of Migrants Protocol* contains several provisions relating to assistance measures. Article 16(1) establishes that States Parties shall take ‘all appropriate measures, including legislation if necessary, to preserve and protect the rights of [smuggled migrants], as accorded under applicable international law’. This provision does not confer any rights upon smuggled migrants, nor does it create new obligations on States Parties, beyond those already recognised in international humanitarian law.²³

Article 16(2) requires States Parties to protect smuggled migrants from physical violence. The paragraph contains no specific guidelines about the way in which such protection may be provided. For example, there is no explicit requirement that the host country provide safe accommodation or other types of physical protection. While the wording of art 16(2) is mandatory, States Parties have discretion to provide assistance as they consider ‘appropriate’. The reference to ‘individuals or groups’ is seen to draw particular ‘attention to the vulnerability of migrants who may meet intense opposition from groups of people who do not wish them to enter or remain in’ the country.²⁴

²¹ See, eg, Gallagher, above n 9, 998.

²² UNODC, *Travaux Préparatoires*, above n 10, 538.

²³ *Interpretative Notes*, above n 11, 20 [109].

²⁴ *Ibid* [110]; UNODC, ‘Smuggling of Migrants by Sea’ (Issue Paper, United Nations, 2011) 42–3.

Article 16(3) calls on States Parties to ‘afford appropriate assistance to migrants whose lives or safety are endangered by reason of being [smuggled migrants]’. Article 16(4) recognises the particular vulnerability of women and children. The *Convention against Transnational Organized Crime* also includes a number of provisions requiring States Parties to take measures to assist and protect victims, and to cooperate with other enforcement authorities to offer protection to victims and witnesses.²⁵

While the general content of art 16 is mandatory, the method by which it is achieved remains within the ambit of the state’s legislative and procedural discretion.²⁶ For example, the *Model Law*, a template developed by the United Nations Office on Drugs and Crime to facilitate the domestic implementation of *Smuggling of Migrants Protocol* obligations by States Parties, proposes that smuggled migrants shall have the right to receive urgent medical care where their life is at risk or they face irreparable harm to their health.²⁷ This is drawn from the inherent right to life of all human beings under the *International Covenant on Civil and Political Rights*.²⁸ The implication of this assistance measure is reasoned on the basis that a State Party will likely have to take positive action to respect the right enshrined in the ICCPR. These rights remain unaffected by the *Smuggling of Migrants Protocol*,²⁹ especially in consideration of the increased vulnerability of smuggled migrants by virtue of the life-threatening journey they may undertake.³⁰ Following a similar line of reasoning, a combined reading of the *Smuggling of Migrants Protocol* art 16(1) and provisions under the *Convention on the Rights of the Child*³¹ would appear to imply assistance measures could also extend to the provision of education to smuggled migrants who are children.³²

While international law does not mandate the provision of specific support and services to victims of smuggling of migrants, international guidelines suggest that it may be desirable to explore, in conjunction with international organisations such as IOM and donor countries, the feasibility of offering smuggled migrants temporary protection and basic access to accommodation, food, medical care, and legal assistance.³³ In the medium and long term, it is desirable to develop a set of standards pertaining to the treatment of smuggled migrants to ensure they obtain basic assistance. In dealing with smuggled migrants, the special needs of children and persons with disabilities should also be recognised.³⁴

²⁵ *Convention against Transnational Organized Crime*, arts 24–6.

²⁶ See, eg, United Nations Office on Drugs and Crime (‘UNODC’), *Model Law against the Smuggling of Migrants* (United Nations, 2010) 66 (‘*Model Law*’).

²⁷ *Ibid* 65–6.

²⁸ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6(1) (‘*ICCPR*’); see also art 12(1).

²⁹ *Smuggling of Migrants Protocol* art 19(1).

³⁰ UNODC, *Model Law*, above n 26, 66.

³¹ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

³² UNODC, *Model Law*, above n 26, 71.

³³ See, eg, UNODC, *Toolkit to Combat Smuggling of Migrants: Tool 8 Protection and assistance measures* (United Nations, 2010); UNODC, *Model Law*, above n 26.

³⁴ See also, UNODC, *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 9: Human Rights* (United Nations, 2010) 8–9 (‘*Basic Training Manual Module 9*’).

The *Model Law* further recommends that States Parties designate the power to determine appropriate assistance lies with the ‘competent authority [or] relevant Minister’,³⁵ the content of which will depend on the circumstances and may encompass the ‘provision of physical security ... access to emergency food, shelter and medical care; access to consular services; and legal advice’.³⁶

2 *Protection of the Rights of Smuggled Migrants*

UNODC notes that:

It is a fundamental principle of international human rights law that all persons have a right to be recognized as a person before the law, are to be treated as equal before the law and are entitled without any discrimination to equal protection of the law. [...]

Regardless of their immigration status, smuggled migrants have the right to expect that their human rights and dignity will be upheld and prioritised at all stages by those who intercept and identify them, those who detain them and those who remove them from the country [...].³⁷

Article 16 of the *Smuggling of Migrants Protocol* contains several provisions relating to the protection of smuggled migrants that apply equally to the receiving state and the country of origin or habitual residence of smuggled migrants. These provisions:

are intended to set an appropriate standard of conduct for officials who deal with smuggled migrants and illegal residents and to deter conduct on the part of offenders that involves danger or degradation to the migrants.³⁸

Article 16(1) contains a general statement to protect the basic human rights of smuggled migrants:

In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

While this paragraph refers to specific rights such as life and protection from torture, cruel, inhuman or degrading treatment or punishment, art 16(1) is generally seen as emphasising the protection of all fundamental human rights and freedoms as accorded in relevant international treaties, especially the ICCPR and the *International Covenant on Economic, Social, and Cultural Rights*.³⁹ The paragraph

³⁵ UNODC, *Model Law* above n 26, 68.

³⁶ Ibid 69.

³⁷ UNODC, *Basic Training Manual Module 9*, above n 34, 2, 3.

³⁸ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 2004) 364 [69] (*‘Legislative Guides’*).

³⁹ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*‘ICESCR’*); cf *Interpretative Notes*, above n 11, 20 [108].

does not create any new obligations for States Parties.⁴⁰ Accordingly, the *Legislative Guides* note:

Assuming national conformity with the basic pre-existing rights and the instruments in which they are established, none of the requirements to protect or preserve the human rights of migrants and illegal residents should raise legislative issues, although they should be carefully considered in developing administrative procedures and the training of officials.⁴¹

As a general point, it is recommended that:

Where a State is not already in conformity with the pre-existing standards, they may have to be established to the extent necessary to conform to the Protocol. [...] Where existing national laws do not meet the basic requirements of the Protocol, the following amendments to the laws may be needed:

- (a) To preserve and protect the basic rights of smuggled migrants and illegal residents (art. 16, para. 1);
- (b) To protect against violence (art. 16, para. 2);
- (c) To provide information on consular notification and communication (art. 16, para. 5).⁴²

The interpretative notes for the official record of the negotiations for the *Convention against Transnational Organized Crime* and the Protocols thereto further stress that art 16(1) only refers 'to migrants who have been smuggled [and] is not intended to refer to migrants who do not fall within the ambit of art 6.'⁴³

Article 16(5) of the *Smuggling of Migrants Protocol* also implies an obligation on States Parties to facilitate communication between smuggled migrants and their relevant consulate, especially in situations in which the receiving countries detain smuggled migrants because of their illegal entry or to facilitate their removal.⁴⁴ Reflecting provisions under the *Vienna Convention on Consular Relations*,⁴⁵ this encompasses assistance measures such as informing migrants of their right to contact their relevant consulate, notification of a migrant's request to do so, and facilitation of this communication, in person or otherwise.⁴⁶ In the event that a State Party is not a Signatory to the *Vienna Convention*, the *Smuggling of Migrants Protocol* implies that directing the relevant officials 'to afford the necessary access when required or requested' will suffice.⁴⁷ A similar standard is expected from those states that are signatories to the *Vienna Convention*; assuming they meet their pre-existing obligations, the assistance

⁴⁰ *Interpretative Notes*, above n 11, 20 [109]; UNODC, *Legislative Guides*, above n 38, 365 [71].

⁴¹ UNODC, *Legislative Guides*, 366 above n 38, [74].

⁴² *Ibid.*

⁴³ *Interpretative Notes*, above n 11, 20 [107].

⁴⁴ *Smuggling of Migrants Protocol* art 16(5).

⁴⁵ Opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) art 36 ('*Vienna Convention*').

⁴⁶ *Ibid.*; UNODC, *Model Law*, above n 26, 73.

⁴⁷ UNODC, *Legislative Guides*, above n 38, 366 n 15.

measures under the *Smuggling of Migrants Protocol* will merely influence administrative and training procedures, rather than require direct legislation.⁴⁸

3 *Refugee and Human Rights Law*

Articles 2 and 19 of the *Smuggling of Migrants Protocol* operate to preserve the rights of smuggled migrants established under international refugee and human rights law, independently from the *Convention against Transnational Organized Crime* and the *Smuggling of Migrants Protocol*. Article 2 identifies the protection of the rights of smuggled migrants as complementary to the criminal justice purpose of the Protocol, while art 19 operates as a saving clause.

Article 19(1) recognises existing international humanitarian law concerning migrant or illegal residents who are also asylum seekers. The paragraph draws particular attention to the specific obligations stemming from the *Refugee Convention* and *Protocol*:

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 *Convention* and the 1967 *Protocol relating to the Status of Refugees* and the principle of non-refoulement as contained therein.

The *Refugee Convention* is the key instrument to protect refugees and safeguard their rights and liberties. It recognises a person as a refugee if he or she:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his/her nationality and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country.⁴⁹

The *Refugee Convention* places obligations on States Parties to provide refuge for persons who fear persecution in another country. The key aspect of the protection granted under the *Refugee Convention* is that a refugee must neither be expelled nor returned ('refouled')⁵⁰ to 'the frontiers of territories where his [or her] life or freedom would be threatened'.⁵¹ A country is in breach of this non-refoulement obligation if its authorities fail to properly identify and protect persons who are entitled to the benefits of refugee status.⁵² States Parties are prohibited from penalising refugees for their illegal entry and presence⁵³ and must give them free access to courts of law⁵⁴, as well as assistance in their naturalisation.⁵⁵ Finally, the

⁴⁸ Ibid 366 [74].

⁴⁹ *Refugee Convention*, art 1A(2) as amended by the *Refugee Protocol* art 1(2).

⁵⁰ 'Save on grounds of national security': ibid art 32.

⁵¹ Ibid art 33.

⁵² See also UNODC, *Basic Training Manual Module 9*, above n 34, 6.

⁵³ *Refugee Convention*, art 31.

⁵⁴ Ibid art 16.

⁵⁵ Ibid art 34.

Refugee Convention provides that States Parties should provide refugees with welfare, including housing, public education⁵⁶ and opportunity for employment.⁵⁷

In addition to the *Refugee Convention* and *Protocol*, the non-refoulement obligation also arises from a number of other international human rights treaties. For example, the ICCPR art 7 implies that no one shall be returned to a country where she or he may be 'subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Article 45 of the *1949 Geneva Convention Relative to the Protection of Civilians in Time of War*⁵⁸ provides that a protected civilian, as defined in art 4, 'in no circumstances shall [...] be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs'. Also, the *1984 Convention against Torture and other Cruel or Degrading Treatment or Punishment*⁵⁹ states in art 3(1) that no one shall be returned to a country 'where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture'. A similar provision can be found in the *Convention of the Rights of the Child* art 22.⁶⁰ Although not binding, art 3(1) of the *1967 Declaration on Territorial Asylum*⁶¹ and art 14 of the *Universal Declaration of Human Rights* provide that every person has a right to seek and enjoy in other countries asylum from persecution, respectively.⁶²

Article 19 of the *Smuggling of Migrants Protocol* seeks to ensure that the obligations under the *Refugee Convention* and other relevant international treaties are not infringed by any provision contained in the Protocol (in countries that are States Parties to the Protocol as well as the international refugee law instruments). In addition, art 19(2) seeks to ensure that domestic laws pertaining to migrant smuggling are not designed or applied in a manner that discriminates against smuggled migrants or illegal residents by reason of their status as such.⁶³

Articles 2 and 19 neither create new obligations for States Parties nor new rights for smuggled migrants but rather seek to uphold those already recognised by international law.⁶⁴ The degree to which States Parties assist and protect smuggled migrants will depend on the international agreements the individual state is a party to. There are limited circumstances in which the *Smuggling of Migrants Protocol* requires a state to legislate to an acceptable standard in the absence of its support for a recognised right under an international legal instrument.⁶⁵ Provided the State Party has affirmed and committed to the rights contained in these additional instruments, the Protocol does not envisage States Parties will have to perform

⁵⁶ Ibid arts 20–4.

⁵⁷ Ibid arts 17–19.

⁵⁸ Opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention*').

⁵⁹ Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁶⁰ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁶¹ GA Res 22/2312, 22 UN GAOR, Supp No 16, UN Doc A/6716 (14 December 1967) 81.

⁶² GA Res 3/217A, UN Doc A/810 (10 December 1948) 74.

⁶³ UNODC, *Legislative Guides*, above n 38, 367 [75].

⁶⁴ Ibid 364–5 [69]–[75].

⁶⁵ See, eg, the interaction between *Smuggling of Migrants Protocol* art 18 and the *Vienna Convention*: UNODC, *Legislative Guides*, above n 38, 390 [107].

extensive legislative action to comply with these assistance provisions; rather they may be recognised through policy and training considerations.⁶⁶

C *Critique and Comment*

While the *Smuggling of Migrants Protocol* suggests that States Parties ‘shall take’ appropriate steps to provide basic assistance and protect the fundamental human rights of smuggled migrants, relevant provisions in the Protocol are not mandatory. It is left to states’ discretion to provide assistance and protection as they consider appropriate.⁶⁷ This does not necessarily undermine the significance of the assistance measures under the *Smuggling of Migrants Protocol*, nor does it impede on their capacity to be swiftly confirmed as ‘enforceable norms of customary international law’ through state practice.⁶⁸

This vague, discretionary approach to assistance and protection of smuggled migrants is reflective of the *Smuggling of Migrants Protocol*’s criminal justice focus, which, as Sharon Pickering notes, requires ‘single definitions of criminality and the marginalization of various rights-based instruments that challenge the intent of crime-orientated conventions’.⁶⁹ As mentioned previously, the Protocol primarily serves a criminal justice purpose through criminalising the smuggling of migrants and establishing a system to facilitate the prosecution of perpetrators. Significantly, the Protocol does not view smuggled migrants as victims of this crime (and avoids using such language).⁷⁰ As a result, measures relating to the protection and assistance of smuggled migrants are only marginally developed.

Despite the clear prioritisation of the criminalisation of migrant smuggling, there is a growing body of literature that attempts to assess the *Smuggling of Migrants Protocol* against a human rights framework, often drawing on the international protection principles for asylum seekers and refugees to highlight the Protocol’s inadequacies insofar as the assistance and protection of smuggled migrants are concerned.⁷¹ Tom Obokata, for instance, remarks that the Protocol fails to recognise the human rights aspects of migrant smuggling and that it shows little regard for ‘political, social and economic solutions’ to the problem.⁷²

A number of authors contend that by failing to recognise them as victims of their smugglers, smuggled migrants are commoditised as objects of this offence; a

⁶⁶ UNODC, *Legislative Guides*, above n 38, 366 [74].

⁶⁷ *Smuggling of Migrants Protocol* art 16(3).

⁶⁸ B S Chimni, ‘Development and Migration’ in T Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (T M C Asser Press, 2003) 255, 263.

⁶⁹ Sharon Pickering, ‘Transnational Crime and Refugee Protection’ (2007) 34(2) *Social Justice* 47, 52.

⁷⁰ UNODC *Travaux Préparatoires*, above n 10, 461; cf Obokata, above n 14, 164.

⁷¹ See, eg, Gallagher, above n 9; Claire Brolan, ‘An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Sea and Air (2000) from a Refugee Protection Perspective’ (2002) 14 *International Journal of Refugee Law* 561; Erika Feller, ‘Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come’ (2006) 18 *International Journal of Refugee Law* 509; Pickering, above n 69; Tom Obokata, ‘Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law’ (2005) 17 *International Journal of Refugee Law* 394; Obokata, above n 14.

⁷² Obokata, ‘Smuggling of Human Beings’ above n 71, 414–15.

point that is also reflected in the language of art 5.⁷³ To this end, migrant smuggling is conceptualised in the same way as offences such as drug trafficking and arms smuggling, which involve the illicit transfer of contraband across international borders without adequately recognising the vulnerability and frequent exploitation of smuggled migrants.⁷⁴

Some commentators see little difference between the experience of smuggled migrants and that of victims of trafficking in persons and equate the protection of smuggled migrants accordingly, by offering smuggled migrants assistance with 'return and reintegration and medical, psychological, counselling and legal support'.⁷⁵ While many official sources acknowledge that the division between the two offences is often unclear and shifting,⁷⁶ the *Smuggling of Migrants Protocol* deliberately omitted the extensive protection and assistance provisions included in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.⁷⁷ There has been, and continues to be, little support from the international community for a stronger human rights focus in official responses to migrant smuggling. Some authors also argue that more extensive, mandatory protection and assistance measures in the *Smuggling of Migrants Protocol* would deter countries from signing and ratifying this instrument.⁷⁸

The lack of support for a 'comprehensive international human rights treaty in the field of migration'⁷⁹ is similarly evidenced by the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. This treaty was first opened for signature on 18 December 1990 but it took more than 12 years to find the necessary 20 Signatories for this Convention to enter into force on 1 July 2003.⁸⁰ Even today, more than 20 years since its creation, the Convention lacks ratification by a number of major receiving nations.

⁷³ See, eg *Smuggling of Migrants Protocol* art 5: 'Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the *object* of conduct set forth in article 6 of this Protocol' (emphasis added).

⁷⁴ Pickering, above n 69, 48.

⁷⁵ Md Shahidul Haque, 'Ambiguities and Confusions in the Migration-Trafficking Nexus: A Development Challenge' in Karen Beeks and Delila Amir (eds), *Trafficking and the Global Sex Industry* (Lexington, 2006) 3, 10.

⁷⁶ UNODC, 'A Short Introduction to Migrant Smuggling' (Issue Paper, UNODC, 2010) 6; Fiona David, 'Human Smuggling and Trafficking: An Overview of the Response at a Federal Level', Research and Public Policy Series Report No 24 (Australian Institute of Criminology, 2000) 9–10.

⁷⁷ *Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('*Trafficking in Persons Protocol*').

⁷⁸ Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49 *Virginia Journal of International Law* 789, 793.

⁷⁹ Antoine Pécoud, 'The UN Convention on Migrant Workers' Rights and International Migration Management' (2009) 23 *Global Society* 333, 333.

⁸⁰ United Nations Treaty Collections, *Status of Treaties: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (30 August 2011) <<http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>>.

III Smuggled Migrants in Australia

Australia has no specific, separate legislative or administrative regime to provide assistance and protection to smuggled migrants. In fact, use of the term smuggled migrant is not commonplace in Australia at all. Australian law refers to the phenomenon of smuggling of migrants as ‘people smuggling’ and relevant legislative provisions are limited to a range of criminal offences in the *Criminal Code Act 1995* (Cth) and the *Migration Act 1958* (Cth). Many of these provisions depart fundamentally from the requirements of the *Smuggling of Migrants Protocol*.

Persons brought to Australia with the assistance of migrant smugglers (or ‘people smugglers’) are generally referred to as unauthorised arrivals or, in reference to s 14 of the *Migration Act 1958* (Cth), as unlawful non-citizens, that is, persons with no valid travel authority to enter into (or remain in) Australia. To understand the assistance and protection that may be available to persons who arrive in Australia as smuggled migrants it is necessary to identify different types of migrant smuggling and illegal entry into Australia.

A Sea and Air Arrivals

Given the lack of a land border with any other country, smuggled migrants can only arrive in Australia either by sea or by air. Migrant smuggling by air will usually involve the use or attempted use of forged or fraudulently obtained travel and identity documents to enable the smuggled migrant to embark on an Australia-bound flight and pass through immigration controls on arrival.⁸¹ Information about the smuggling of migrants by air into Australia is extremely limited and little is known about the precise magnitude and characteristics of this phenomenon. There have been reports that immigration and customs officials at airports regularly apprehend persons travelling on fraudulent, stolen or lost documentation, with one source suggesting such activity is indicative of involvement by organised criminal groups.⁸² However, ‘the extent ... [of this involvement] can often only be assumed’⁸³ and it is not clear what percentage of document fraud causes are indeed instances of migrant smuggling.

At least since 1999, migrant smuggling in Australia has been equated with the unauthorised arrivals of persons by boat, officially referred to as ‘irregular maritime arrivals’ (‘IMAs’).⁸⁴ Several thousand people, mostly of Middle Eastern and South Asian backgrounds, have arrived in Australia in this way over the past 12 years. There is ample evidence that the majority of these arrivals have been

⁸¹ UNODC, ‘Migrant Smuggling by Air’ (Issue Paper, 2010) 4; Freya Douglas, Joseph Lelliott, and Andreas Schloenhardt, *The Hidden Side of Migrant Smuggling: Document Fraud and Migrant Smuggling in Australia* (2012) UQ Migrant Smuggling Working Group (forthcoming).

⁸² David, above n 76, 6–7.

⁸³ UNODC, ‘Migrant Smuggling by Air’, above n 81, 5; see also Friedrich Heckmann, ‘Towards a Better Understanding of Human Smuggling’ (Policy Brief No 5, International Migration, Integration, and Social Cohesion Research Network, November 2007) 3.

⁸⁴ Australian Federal Police, *Annual Report 09–10* (Commonwealth of Australia, 2010) 39.

facilitated by migrant smugglers and that their passengers have paid vast amounts of money for their journey to Australia, usually via Malaysia or Indonesia.⁸⁵ This, in turn, explains why the focus of Australia's 'whole of government approach to combatting people smuggling' always has been centred on IMAs.⁸⁶ Accordingly, in the Australian context the term 'smuggled migrants' is best suited for this category.

B *Overt and Covert Arrivals*

A further distinction can be drawn based on the intentions of migrants once they have reached their destination. This will frequently determine the modus used for arrival and explain whether the persons attempt to arrive covertly — bypassing official immigration points without being apprehended by the authorities — or overtly, where the persons present themselves to the authorities upon arrival.⁸⁷

In Australia, IMAs, who, as mentioned previously, represent the vast majority of smuggled migrants, overwhelmingly arrive overtly. Generally, they are apprehended by Navy or customs vessels or by surveillance aircraft when they approach Australian territory and they do not seek to disguise their journey and their intention to enter into and remain in Australia. Most of the persons arriving unlawfully by boat seek asylum in Australia and usually express that intention when first contact with Australian authorities is made.⁸⁸

This in sharp contrast to covert arrivals, a far less frequent method of migrant smuggling by which persons seek to bypass official border control and immigration channels or use sophisticated means to disguise their arrival, their identity, or their true intentions in coming to Australia. Persons arriving in Australia with forged or fraudulently obtained documents generally fall into this category as do a very small number of boat arrivals (mostly in the late 1990s) that sought to land in Australia clandestinely and disappear into the communities of Australia's metropolitan areas.⁸⁹

C *Smuggled Migrants, Asylum Seekers, and Refugees*

Irregular migration, such as migrant smuggling, is frequently linked to the movement of asylum seekers and refugees. Many migrant smugglers deliberately

⁸⁵ Janet Phillips and Harriet Spinks, 'Boat Arrivals in Australia Since 1976' (Background Note, Parliamentary Library, Parliament of Australia, 11 February 2011); Fabrizio Sarrica, 'The Smuggling of Migrants. A Flourishing Activity of Transnational Organized Crime' (2005) 5(3) *Crossroads* 7, 12.

⁸⁶ The 'whole of government' approach involves the Department of Immigration and Citizenship, Department of Prime Minister and Cabinet, Australian Customs and Border Protection Service, Department of Foreign Affairs and Trade, the Ambassador for People Smuggling, the Australian intelligence community and the Australian Attorney-General's Department: Australian Federal Police, above n 84, 40.

⁸⁷ Schloenhardt, above n 5, 138.

⁸⁸ Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, 2006) 33–5; Andreas Schloenhardt, 'Organised Crime and Migrant Smuggling: Australia and the Asia-Pacific' (Research and Public Policy Series Report No 44 (Australian Institute of Criminology, 2002) 51.

⁸⁹ Schloenhardt, above n 5, 150–1.

prey on persons seeking to flee from persecution and take advantage of their plight, vulnerability, and desperation. The strong nexus between migrant smuggling and refugee movements has been observed around the world as asylum seekers take up the services of migrant smugglers ‘in the absence of practical and legal means in which to leave their country and enter another’.⁹⁰ This relationship between illegal movements such as migrant smuggling and the legitimate claims for protection by genuine refugees has also raised many questions in the literature about how to reconcile the *Smuggling of Migrants Protocol’s* goal to criminalise migrant smuggling with the protection of refugees and asylum seekers.⁹¹ In art 19, as discussed earlier, the Protocol acknowledges the protection safeguards provided by the *Refugee Convention* and other instruments of international human rights law.

The connection between migrant smuggling and refugee flows is particularly prominent in Australia where the vast majority of irregular maritime arrivals seek asylum and obtain refugee protection after their claims have been assessed by Australian authorities.⁹² It has been estimated that between 70 and 97 per cent of all irregular maritime arrivals are found to be genuine refugees engaging Australia’s protection obligations under the *Refugee Convention*.⁹³ It is for this reason that any assessment of the assistance and protection offered to smuggled migrants in Australia ultimately involves an assessment of the assistance and protection offered to refugees and asylum seekers. The Australian Government’s response to migrant smuggling has become inseparable from its response to asylum seekers and refugee flows.

D *Smuggled Migrants and Victims of Trafficking in Persons*

A further distinction to be drawn, especially insofar as assistance and protection measures are concerned, is that between the seemingly similar phenomena of migrant smuggling and trafficking in persons. Despite many attempts by the international community to separate the two issues clearly and develop separate and unique legislative and administrative regimes, there is still much confusion and overlap.⁹⁴ This is not helped by the fact that Australian Government sources have been inconsistent in their use of terminology and, unlike any other country, have now settled on the terminology ‘people smuggling’ and ‘people trafficking’. Many media outlets and writers in the field contribute to the mix-up by using terms such as ‘human trafficking’, ‘alien smuggling’ or the like. The distinction between the two concepts of migrant smuggling, on the one hand, and trafficking in persons, on the other, is, however, imperative, as both phenomena are addressed by separate

⁹⁰ Brolan, above n 71, 577.

⁹¹ See, eg, Feller, above n 71; Brolan, above n 71; Pickering, above n 69.

⁹² For example, during the 2009–10 financial year, 5647 IMAs were intercepted in Australian waters, from which 3396 Refugee Status Assessments were initiated: Refugee Council of Australia, *2009–10 Australian Statistics for Refugees and Asylum Seekers: A compilation of statistics from the 2009–10 Annual Report of the Department of Immigration and Citizenship* (1 November 2010) <http://www.refugeecouncil.org.au/docs/current/2009-10_DIAC_stats.pdf>.

⁹³ Janet Phillips, ‘Asylum seekers and refugees: what are the facts?’ (Background Note, Parliamentary Library, Parliament of Australia, 22 July 2011) 8.

⁹⁴ Khalid Koser, ‘Irregular Migration, State Security and Human Security’ (Thematic Expert Report, Global Commission on International Migration, September 2005) 6.

international legal instruments and distinct domestic laws with widely different requirements and consequences, especially in relation to the assistance and protection provided to smuggled migrants vis-à-vis victims of trafficking in persons.

The *Trafficking in Persons Protocol* provides an internationally agreed definition of ‘trafficking in persons’ that is instructive in drawing a distinction between the two concepts. Article 3(a) of this Protocol defines ‘trafficking in persons’ as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

In summary, trafficking in persons has been conceptualised as an offence that seeks to protect the rights, freedom, and physical integrity of human beings. Smuggling of migrants, on the other hand, is primarily conceptualised as an offence protecting state sovereignty, border security, and immigration control.

UNODC has identified three principal points to clarify the difference between smuggling of migrants and trafficking in persons.⁹⁵ The first point relates to the purpose of the criminal enterprise. ‘[T]he primary source of profit and thus also the primary purpose of trafficking in persons is exploitation.’⁹⁶ In the case of migrant smuggling, however, there is typically ‘no intention to exploit the smuggled migrant after having enabled him or her to irregularly enter or stay in a country.’⁹⁷ Rather, migrant smugglers seek payment in advance or upon arrival from the smuggled migrant. In many cases this distinction is not an easy one to draw.⁹⁸ For example, a person may agree to be smuggled, unaware that on arrival he or she will be forced to work in poor or restrictive conditions for the smuggler in order to pay off a ‘debt’ for the service. This situation would be considered an instance of trafficking because of the exploitation of the smuggled person and the means of deceptions used.

Second, the two concepts have differing requirements relating to transnationality and the legality/illegality of the trafficked/smuggled person’s entry into another state. For the smuggling of migrants, there must be ‘illegal entry of a person into a State Party of which the person is not a national or a permanent resident’.⁹⁹ There is thus both a cross-border element as well as a requirement of

⁹⁵ UNODC, ‘A Short Introduction to Migrant Smuggling’, above n 76, 10.

⁹⁶ Ibid 10; see also Natalia Ollus, *Protocol Against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention Against Transnational Organized Crime: A Tool for Criminal Justice Personnel* (Resource Material Series No 62 (United Nations Asia and Far East Institute, February 2004) 33.

⁹⁷ UNODC, ‘A Short Introduction to Migrant Smuggling’, above n 76, 10.

⁹⁸ Koser, above n 94, 7.

⁹⁹ *Smuggling of Migrants Protocol* art 3(a).

illegal entry. Alternatively, migrant smuggling may arise by enabling a person to remain in a country that he or she has entered illegally. Trafficking in persons, in contrast, may involve illegal or legal entry into a country. Furthermore, there is no requirement that trafficking in persons can only occur transnationally; trafficking can also occur completely within one country.

A further difference between the two concepts is the issue of consent, which is considered to be irrelevant by the *Trafficking in Persons Protocol*.¹⁰⁰ The Protocol is based on the understanding that:

[v]ictims of trafficking have either never consented — for instance if they have been abducted or sold — or, if they have given an initial consent, their initial consent has become void through the means the traffickers have used to gain control over the victim, such as deception or violence.¹⁰¹

Smuggling of migrants, in contrast, involves a voluntary agreement whereby a person may pay or give some other benefit to a smuggler in order to facilitate that person's illegal migration.¹⁰² It has been recognised that smuggled migrants might retract their initial consent during a smuggling operation but be forced to continue on the journey.¹⁰³ Retracting consent, however, does not automatically denote an instance of trafficking. Other elements of the trafficking definition, such as the purpose of exploitation, would still need to be satisfied.

IV Assistance for Smuggled Migrants in Australia

A Background, Context, and Scope of Analysis

Australia's *Migration Act 1958* (Cth) mandates that any non-citizen entering or remaining in Australia without a valid visa is an unlawful non-citizen who must be detained until the person receives permission to remain in Australia or their removal is effected.¹⁰⁴ By definition, smuggled migrants lack the appropriate authority to enter a country,¹⁰⁵ thus they are unlawful non-citizens under Australian law and, as such, subjected to mandatory detention.¹⁰⁶ Consequently, where Australian authorities are able to detect smuggled migrants, the assistance initially available to them is that offered within Australia's immigration detention framework. It is these assistance measures and the protection afforded to smuggled

¹⁰⁰ *Trafficking in Persons Protocol* art 3(b).

¹⁰¹ UNODC, 'A Short Introduction to Migrant Smuggling', above n 76, 10.

¹⁰² Alexis A Aronowitz, 'Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive It and the Organisations that Promote It' (2001) 9 *European Journal on Criminal Policy and Research* 163, 165, citing A Bajrektarevic, 'Trafficking in and Smuggling of Human Beings: Linkages to Organised Crime: International Legal Measures: Statement Digest' (International Centre for Migration Policy Development, 2000).

¹⁰³ UNODC, *Legislative Guides*, above n 38, 340–1; UNODC, 'A Short Introduction to Migrant Smuggling', above n 76, 10.

¹⁰⁴ *Migration Act 1958* (Cth) ss 189, 196. For the purposes of the *Migration Act*, the Australian migration zone refers to the area requiring non-citizens to possess a visa on entry and includes the states, territories and their ports, as well as Australian resource and sea installations.

¹⁰⁵ *Smuggling of Migrants Protocol* art 3(a).

¹⁰⁶ *Migration Act 1958* (Cth), ss 13–14.

migrants in immigration that need to be assessed against the benchmarks set by the *Smuggling of Migrants Protocol* and international best practice guidelines.

This situation is not fundamentally changed by policy announcements and legislative amendments made in August 2012¹⁰⁷ — duplicating similar arrangements in operation between October 2001 and November 2007¹⁰⁸ — which enable Australian authorities to deny entry to persons arriving in Australia illegally by boat and transfer them to Nauru or Papua New Guinea for detention.¹⁰⁹ These initiatives, designed ‘to actively discourage irregular and dangerous maritime voyages to Australia for the purpose of claiming protection or seeking asylum’,¹¹⁰ create a separate category of smuggled migrants who are subjected to offshore detention under agreements with Nauru and Papua New Guinea, but who no longer fall under Australian law. Instead, the assistance and protection smuggled migrants may obtain on these islands is regulated by a complex web of formal and informal agreements between the governments involved. Much of the relevant detail about these arrangements was still under development at the time of writing and may indeed not become public. As a result, the assistance and protection of smuggled migrants in offshore detention facilities is not discussed in further detail here (although it gives rise to considerable concern).

It should also be stressed that the offshore detention and processing of smuggled migrants and their claims is not a model endorsed or envisaged by international law and best practice guidelines pertaining to migrant smuggling. These international materials provide no basis to delegate the accommodation, protection, and processing of smuggled migrants to another country or to international organisations such as UNHCR or IOM.

A separate question, not further explored in this article, is the appropriateness and justification of Australia’s universal mandatory immigration policy and practice. Since its introduction in 1992, this policy has been supported by both sides of politics, but has been fiercely criticised on a number of levels, from both domestic and international perspectives.¹¹¹ The Australian Government maintains that its policy is justified as an ‘essential component of strong border control’¹¹² and necessary ‘for security reasons’.¹¹³ The question whether

¹⁰⁷ Australian Government, *Expert Report*, above n 4.

¹⁰⁸ *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth). See also, Schloenhardt, above n 5, 85–8; Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration* (Federation Press, 2011) 101–4.

¹⁰⁹ *Migration Act 1958* (Cth), former s 198A, introduced by *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) sch 1 item 6.

¹¹⁰ Australian Government, *Expert Report* above n 4, 47 [3.41].

¹¹¹ See, eg, Australian Human Rights Commission, Submission No 112 to the Joint Select Committee on Australia’s Immigration Detention Network, August 2011; Navi Pillay, ‘Human Rights Council 17th Session Opening Statement by Ms Navi Pillay United Nations High Commissioner for Human Rights (Speech delivered at the 17th session of the Human Rights Council, Geneva, 30 May 2011).

¹¹² Chris Evans, ‘New Directions in Detention — Restoring Integrity to Australia’s Immigration System’ (Speech delivered at the Australia National University, Canberra, 29 July 2008).

¹¹³ Matthew Franklin and Mark Dodd, ‘Gillard Champions Mandatory Detention in Face of Criticism by Australian of the Year’, *The Australian* (online), 27 January 2010, <<http://www.theaustralian.com.au/news/nation/gillard-champions-mandatory-detention-in-face-of-criticism-by-australian-of-the-year/story-e6frg6nf-1225823751976>>.

Australia's detention policy and practice violates the non-criminalisation principle articulated in the *Smuggling of Migrants Protocol* art 5 has been examined elsewhere.¹¹⁴ Despite the controversies surrounding immigration detention in Australia, the focus of this article remains on the assistance and protection provided to smuggled migrants within this domestic framework.

B *Immigration Detention Arrangements*

The initial assistance provided to smuggled migrants in Australia will depend on the circumstances under which they are discovered by the authorities and where they are consequently placed in the immigration detention framework. This framework encompasses several placement options including immigration detention centres, community detention, and alternative forms of detention such as residential housing and transit accommodation.¹¹⁵

Government policy outlines the factors that determine the type of immigration detention in which unauthorised arrivals such as smuggled migrants will be placed. These factors include considerations such as their security and flight risk, the method in which they travelled to Australia, their family structure and health needs.¹¹⁶

Alternative detention arrangements such as immigration residential housing are usually offered to 'families and low-risk individuals'. Prior to policy changes announced in August 2012, the Australian Government has endeavoured to consider all smuggled migrants who are minors (accompanied or unaccompanied)¹¹⁷ for alternative detention arrangements in an attempt to spare children from the hostile and seemingly punitive environment of immigration detention centres.¹¹⁸ Persons with special needs that cannot be met in an immigration detention centre or other facilities are also generally considered for alternative forms of detention.¹¹⁹ It is not clear how the measures designed to enable offshore detention of unauthorised boat arrivals will impact on unaccompanied minors and other smuggled migrants with special needs or vulnerabilities, though it has been suggested that such persons will be issued with a temporary visa and moved to Australia.¹²⁰ Transit accommodation is usually used for persons requiring short-term services, such as so-called 'airport turn-arounds';

¹¹⁴ See, Andreas Schloenhardt and Hadley Hickson, 'Non-Criminalisation of Smuggled Migrants: Rights, Obligations and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air' (2013) 25 *International Journal of Refugee Law* (forthcoming).

¹¹⁵ Department of Immigration and Citizenship ('DIAC'), *Managing Australia's Borders — Understanding Immigration Detention* <<http://www.immi.gov.au/managing-australias-borders/detention/about/understanding.htm>>.

¹¹⁶ DIAC, *Detention Health Framework: A Policy Framework for Health Care for People in Immigration Detention* (Commonwealth of Australia, 2007) 18 ('*Detention Health Framework*').

¹¹⁷ DIAC, *Managing Australia's Borders — Community Detention* <<http://www.immi.gov.au/managing-australias-borders/detention/services/community-detention.htm>>.

¹¹⁸ DIAC, *Media — Fact Sheet 82 — Immigration Detention* (May 2012) <<http://www.immi.gov.au/media/fact-sheets/82detention.htm>> ('*Fact Sheet 82*').

¹¹⁹ DIAC, *Detention Health Framework*, above n 116, 20.

¹²⁰ Australian Government, *Expert Report*, above n 4, 48 [3.48].

that is, persons arriving unlawfully by air and who await return to their point of embarkation by a commercial air carrier.¹²¹

In November 2011, the Australian Government announced that some persons would be released from immigration detention on bridging visas until their status has been determined.¹²² Prioritising those who had been in detention for an extended period of time, the government committed to an ongoing assessment of the detention population for suitability for a bridging visa.¹²³ The practice of approving bridging visas has also previously been used for a small number of asylum applicants who arrived in Australia unlawfully by air.¹²⁴ As mentioned earlier, under the new policy and legislative changes announced in August 2012, smuggled migrants who arrive by boat may no longer be able to obtain bridging visas and will instead be moved to Nauru and Papua New Guinea for detention and further processing. It is understood, however, that the high number of boat arrivals in 2012 meant that some smuggled migrants arriving boat as well as persons who arrive unlawfully by air are issued with bridging visas, even if they have been smuggled. Persons with special needs or vulnerabilities arriving by boat also have access to temporary or bridging visas.

C *Assistance within Australia's Immigration Detention Framework*

The Australian Government's nine 'Core Operating Principles' of immigration detention 'are directed at ensuring people are provided with timely access to quality accommodation, health service, food and other necessary services'.¹²⁵ Case managers are assigned to individuals to assess their 'circumstance, history, need and risk' and to facilitate a more efficient process by identifying and engaging with both internal and external services that may be available to the individual.¹²⁶ This client case management system also seeks to facilitate the resolution of particularly complex immigration cases.¹²⁷ Promisingly, the number of case managers assigned by the Department of Immigration and Citizenship (DIAC) has increased in the

¹²¹ Susan Banki and Ilan Katz, *Resolving Immigration Status, Part 2: Comparative Case Studies* (Report for The Department of Immigration and Citizenship, Social Policy Research Centre, University of New South Wales, November 2009) 92.

¹²² *Migration Act 1958* (Cth) s195A; Chris Bowen, Minister for Immigration and Citizenship, 'Bridging Visas to be Issued for Boat Arrivals' (Media Release, 25 November 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb180599.htm>>.

¹²³ DIAC, *Media — Fact Sheet 65 — Onshore Processing Arrangements for Irregular Maritime Arrivals* (November 2011) <<http://www.immi.gov.au/media/fact-sheets/65onshore-processing-irregular-maritime-arrivals.htm>> ('*Fact Sheet 65*').

¹²⁴ DIAC, Submission No 32 (Supplementary Submission) to the Joint Select Committee on Australia's Immigration Detention Network, September 2011, 49–50 ('*Submission No 32 (Supp)*').

¹²⁵ Andrew Metcalfe, 'Designing Public Policy and Programmes: Case Study in Compliance and Detention Reforms' (Speech delivered at the Australian and New Zealand School of Government, Canberra, 15 June 2007) <http://www.immi.gov.au/about/speeches-pres/_pdf/2007-06-15-ANZSOG-transcript.pdf>.

¹²⁶ Banki and Katz, above n 121, 95.

¹²⁷ DIAC, *Annual Report 2009–10* (Commonwealth of Australia, 2010) 167.

2010–11 financial year in response to growing numbers of unauthorised arrivals.¹²⁸ The recent move towards offshore detention of some smuggled migrants may, however, see the number of case managers decline again.

1 *Accommodation*

Within the onshore immigration detention framework, several types of accommodation arrangements are available. Immigration detention centres assign detainees to compounds, dormitories, single or ensuite rooms, depending on an assessment of the individual's security risk, as well as 'broader social and health needs'.¹²⁹ Those in immigration residential housing are lodged in 'independent family-style housing in a community setting' while remaining under formal detention status.¹³⁰ Immigration transit accommodation facilitates 'semi-independent living' in 'hostel-style accommodation' with limited services, taking into account the short-term stay of its residents.¹³¹

Where a smuggled migrant receives a favourable residence determination to be placed in community detention, they reside in accommodation sourced by non-governmental organisations (NGOs) funded by the Australian Government.¹³² The Australian Red Cross is the primary agency engaged by the government to facilitate the community detention program; it ensures individuals within the program have access to healthcare, education, case management, and some welfare support services.¹³³ Where deemed appropriate, smuggled migrants may also be placed in 'alternative places of detention' such as correctional or medical facilities, schools and rented accommodation.¹³⁴ The conditions of these forms of detention, including restrictions on movement, will depend on the specific arrangements made by DIAC.¹³⁵

The Government does not provide housing to people on bridging visas.¹³⁶ Rather, they must arrange their own accommodation through the private rental market, family or friends already residing in Australia or with the assistance of independent NGOs. For example, the Australian Homestay Network facilitates a program that places people on bridging visas in short-term homestay accommodation while they seek more permanent accommodation.¹³⁷

¹²⁸ During 2009–10, there was a 92 per cent increase in officers receiving formal case management training, more than doubling the total number of case managers available for deployment throughout the immigration detention framework: DIAC, *Annual Report 2009–10* above n 127, 169.

¹²⁹ DIAC, *Detention Health Framework*, above n 116, 19.

¹³⁰ DIAC, *Managing Australia's Border — About Immigration Residential Housing (IRH)*, <<http://www.immi.gov.au/managing-australias-borders/detention/facilities/about/rhcs.htm>>.

¹³¹ DIAC, *Fact Sheet 82*, above n 118.

¹³² Banki and Katz, above n 121, 92.

¹³³ Australian Red Cross, *Migration Support — Community Detention Program* <<http://www.redcross.org.au/community-detention-program.aspx>>.

¹³⁴ DIAC, *Managing Australia's Borders — Alternative Places of Detention (APOD)* <<http://www.immi.gov.au/managing-australias-borders/detention/facilities/about/apod.htm>>.

¹³⁵ Australian Human Rights Commission, *Immigration Detention and Human Rights* <http://www.hreoc.gov.au/human_rights/immigration/detention_rights.html#alternatives>.

¹³⁶ DIAC, *Fact Sheet 65*, above n 123.

¹³⁷ Australian Homestay Network, *CPN — Community Placement Network*, <<http://www.homestaynetwork.org/cpn>>.

On several occasions, the quality, cleanliness, and suitability of accommodation facilities provided by the government, particularly those in immigration detention centres, have been called into question. Following independent visits to various facilities around Australia, a number of organisations have observed the ‘dilapidated infrastructure’¹³⁸ and ‘run down’ facilities¹³⁹ provided to the residents. For example, visitors to the Curtin Immigration Detention Centre in Western Australia observed issues with excessive security measures, overcrowding, and the use of temporary marquees instead of proper recreation rooms, concluding the accommodation facilities to be ‘inconsistent with DIAC’s’ minimum design standards.¹⁴⁰ In 2012, the Joint Select Committee on Australia’s Immigration Detention Network’s final report particularly noted the poor condition of infrastructure at Villawood, Curtin and Northern Immigration Detention Centres.¹⁴¹

2 Health Services

The Australian Government’s Detention Health Framework aims to provide a standard of health care services that ‘is comparable to [that] available to the Australian population’.¹⁴² Such health care services are intended to provide ‘initial, continuing, comprehensive and coordinated medical and allied health care (including mental health)’.¹⁴³

While all entrants into the detention system receive an initial health assessment, the continued provision of health care services depends on the form of detention the individual is placed in.¹⁴⁴ The Australian Government contracts International Health and Medical Services (‘IHMS’), a private health care provider, to offer primary health services in immigration detention centres, while those in community detention are able to access community-based services coordinated by IHMS.¹⁴⁵ Individuals living in the community on bridging visas are also eligible for Medicare assistance.¹⁴⁶

A recent internal review of the Detention Health Framework noted that the guidelines set by the government require ‘better implementation to address the

¹³⁸ Referring to Villawood Immigration Detention Centre (Stage One): Human Rights and Equal Opportunity Commission, Submission No 99 to the Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, 4 August 2008, 32.

¹³⁹ Referring to Phosphate Hill Immigration detention Centre: Joint Standing Committee on Migration, Parliament of Australia, *Immigration detention in Australia: Facilities, Services and Transparency* (2009) 37.

¹⁴⁰ Australian Human Rights Commission, *Immigration Detention at Curtin: Observations from Visit to Curtin Immigration Detention Centre and Key Concerns across the Detention Network* (2011) 40–1.

¹⁴¹ Joint Select Committee on Australia’s Immigration Detention Network, Parliament of Australia, *Final Report* (2012) 28–9.

¹⁴² DIAC, *Detention Health Framework*, above n 116, 12.

¹⁴³ The Royal Australian College of General Practitioners, *Standards for Health Services in Australian Immigration Detention Centres* (June 2007) 3.

¹⁴⁴ DIAC, *Managing Australia’s Borders — Immigration Detention Health Services* <<http://www.immi.gov.au/managing-australias-borders/detention/services/health-services.htm>>.

¹⁴⁵ DIAC, *Submission No 32 (Supp)*, above n 124, 60.

¹⁴⁶ DIAC, *Fact Sheet 65*, above n 123.

health needs of people in immigration detention'.¹⁴⁷ Several formal complaints have been made regarding the waiting times for access to medical, dental, and mental health services within immigration detention centres.¹⁴⁸ In particular, the facility on Christmas Island has been criticised for: failing to staff its health services with sufficient medical practitioners and translators; inappropriate facilities to treat mental health patients appropriately; and the long waiting list for dental services.¹⁴⁹ The government continues to deal with civil claims by former detainees seeking compensation for the physical, mental and emotional trauma suffered during their time in detention.

Clinical research conducted into the health status of immigration detainees in 2010 identified a 'clear association between time in detention and rates of mental illness',¹⁵⁰ prompting calls for the enhanced delivery of mental health services within the immigration detention framework and for improvements of the physical environment in immigration detention centres.¹⁵¹ As a result of this research, in late 2010 the Australian Government introduced a set of new policies relating to the provision of mental health services in detention. A review of these policies is currently underway.¹⁵²

3 *Legal Assistance*

While Australian law provides that all individuals in immigration detention must be provided with the relevant visa application forms and assistance with the facilitation of legal advice, such assistance will only be offered on request by the detainee and not automatically.¹⁵³ Government officials are under no obligation to inform an unauthorised arrival of this right.¹⁵⁴ New detainees are thus reliant upon other detainees or visiting migration agents for immigration information in the first instance.

Persons applying for a refugee protection visa can seek legal and immigration advice via the government's Immigration Advice and Application Assistance Scheme ('IAAAS') which is further explored in the next section of this article. Under the *National Partnership Agreement on Legal Assistance Services*,

¹⁴⁷ DIAC, *Submission No 32 (Supp)*, above n 124, 60.

¹⁴⁸ Commonwealth and Immigration Ombudsman, *Christmas Island Immigration detention Facilities: Report on the Commonwealth and Immigration Ombudsman's Oversight of Immigration Processes on Christmas Island October 2008 to September 2010* (2011) 11.

¹⁴⁹ Yuval Ginbar, 'Amnesty International's Report on Immigration Detention — October 2010', Submission to the United Nations Committee against Torture, 3 November 2010, 4–5.

¹⁵⁰ Janette P Green and Kathy Eagar, 'The Health of People in Australian Immigration Detention Centres' (2010) 192(2) *The Medical Journal of Australia* 65, 65.

¹⁵¹ Note the Australian Government continues to deal with compensation claims by former detainees. For example, the law firm Slater & Gordon is currently assessing 40 former detainees' claims that the government breached the duty of care it owed to them while in detention, resulting in mental illness: Debra Jopson and Catherine Armitage, 'Government Faces 'Mass Action' to Compensate Refugees Held in Detention Centres', *Sydney Morning Herald* (online), 14 July 2012 <<http://www.smh.com.au/opinion/political-news/government-faces-mass-action-to-compensate-refugees-held-at-detention-centres-20120713-2219u.html>>.

¹⁵² Joint Select Committee on Australia's Immigration Detention Network, *Final Report* above n 141, 17.

¹⁵³ *Migration Act 1958* (Cth) s 256.

¹⁵⁴ *Ibid* s 193(1).

'matters where assistance is not available from services funded by [DIAC]'¹⁵⁵ are designated as a priority area for Commonwealth funding, as demonstrated by the government's increased investment in legal aid and community legal services announced in the 2010 federal budget.¹⁵⁶

The impact of this additional funding on access to legal advice for those in immigration detention is, however, difficult to discern. A detainee's ability to engage with legal services appears restricted by several practicalities. The UNHCR, for instance, has noted that the remote location of a number of detention facilities restricts detainees' access to and considerably increases the cost of legal services and other support measures.¹⁵⁷ Other organisations have noted insufficient communication facilities in detention centres to allow adequate access to legal aid.¹⁵⁸ Consideration of these factors, especially in light of the very complex nature of Australian migration law, provokes concern that a number of individuals are 'unable to obtain timely, accurate legal and migration assistance or to fully understand their legal rights'.¹⁵⁹

4 Food, Education, and Other Services

The Australian Government identifies a number of additional services it provides to those in immigration detention, including facilitation of excursions and physical activity; educational courses, including English language lessons; nutritional food, catering to cultural and religious sensitivities; and facilities for religious practices as well as access to qualified religious representatives and religious resources.¹⁶⁰

For those in immigration residential housing arrangements, opportunities for recreational activities and excursions to community facilities are also offered.¹⁶¹ Serco, a private company contracted by the government to provide immigration detention services, is required to provide detainees with at least one activity in the morning and afternoon.¹⁶² The Joint Select Committee on Australia's

¹⁵⁵ Council of Australian Governments, *National Partnership Agreement on Legal Assistance Services*, (2010) A-14.

¹⁵⁶ Attorney-General's Department, 'Additional \$154 Million for Legal Assistance Services' (Media Release, 11 May 2010).

¹⁵⁷ UNHCR, Submission No 110 to the Joint Select Committee on Australia's Immigration Detention Network, 19 July 2011, 2–3, 18. See also, Joint Select Committee on Australia's Immigration Detention Network, *Final Report*, above n 141, 30.

¹⁵⁸ National Legal Aid, Submission No 137 to the Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, 17 October 2008, 3.

¹⁵⁹ Law Council of Australia, Submission No 101 to the Joint Select Committee on Australia's Immigration Detention Network, 17 August 2011, 13.

¹⁶⁰ DIAC, *Managing Australia's Borders — Services Provided at Immigration Detention Facilities* <<http://www.immi.gov.au/managing-australias-borders/detention/services/services-at-facilities.htm>>. For an inventory of the additional services and facilities by immigration detention facility, see DIAC, Answer to Question No 12 of the Questions on Notice asked by the Joint Select Committee on Australia's Immigration Detention Network, 16 August 2011.

¹⁶¹ DIAC, *Managing Australia's Borders — Recreation and Education* <<http://www.immi.gov.au/managing-australias-borders/detention/facilities/about/rhcs-recreation.htm>>.

¹⁶² Joint Select Committee on Australia's Immigration Detention Network, *Final Report*, above n 141, 34 [2.99].

Immigration Detention Network recently noted that Serco struggles to meet this contractual commitment because of a lack of facilities, suitable staff and ‘the increased risk profile of detainees’.¹⁶³ Those in community detention arrangements are assigned an allowance for daily living costs to cover food, public transport, and other living expenses.¹⁶⁴ Children have access to primary and secondary schooling, in addition to English language classes.¹⁶⁵ There have been several occasions, however, where the remote location of detention facilities and limited spaces available in schools has resulted in a number of students not attending school for months.¹⁶⁶

D Assistance Specifically Available to Asylum Seekers

In addition to the measures outlined above, smuggled migrants, if they apply for a protection visa on arrival in Australia, are eligible to engage several specific assistance schemes as asylum seekers.

1 Immigration Advice and Application Assistance Scheme

The IAAAS provides some asylum applicants with access to free migration and legal advice to assist with the completion of application forms, facilitate liaison with DIAC, and provide advice for other complex matters.¹⁶⁷ The IAAAS is primarily available to protection visa applicants in immigration detention facilities. Some visa applicants in community detention may also be able to access this service, depending on their level of vulnerability and the type of visa they are seeking.¹⁶⁸ The IAAAS only assists asylum applicants during the initial application and independent review processes; it will not assist applicants seeking judicial review of a DIAC determination.¹⁶⁹ The service is provided by contracted migration agents or officers of legal aid commissions.¹⁷⁰

2 Asylum Seeker Assistance Scheme

The Asylum Seeker Assistance Scheme (‘ASAS’) is an income support scheme administered by the Australian Red Cross for vulnerable protection visa applicants.¹⁷¹ Services available under the ASAS include support for living expenses, basic health care, medical costs, and referrals to other service

¹⁶³ Ibid 50–1 [2.27].

¹⁶⁴ DIAC, Answer to Question No 44 of the Questions on Notice asked by the Joint Select Committee on Australia’s Immigration Detention Network, 10 August 2011.

¹⁶⁵ DIAC, *Media — Fact Sheet 83a — Community Detention* (May, 2012) <<http://www.immi.gov.au/media/fact-sheets/83acommunity-detention.htm>>.

¹⁶⁶ Joint Select Committee on Australia’s Immigration Detention Network, *Final Report* above n 141, 33.

¹⁶⁷ DIAC, *Media — Fact Sheet 63 — Immigration Advice and Application Assistance Scheme* (January 2013) <<http://www.immi.gov.au/media/fact-sheets/63advice.htm>> (‘*Fact Sheet 63*’).

¹⁶⁸ Australian Government, Budget Estimates Hearing (54) Program 2.1: Refugee and Humanitarian Assistance, 26 May 2010.

¹⁶⁹ DIAC, *Fact Sheet 63*, above n 167.

¹⁷⁰ DIAC, *Annual Report 2009–10* above n 127, 123.

¹⁷¹ Ibid 127.

agencies.¹⁷² The scheme can only be accessed by those in community detention arrangements who are suffering financial hardship and have lodged their protection visa application more than six months ago. The scheme is also open to bridging visa holders who are not eligible for any other form of income support or who are the partner of an Australian permanent resident.¹⁷³ Unaccompanied minors, elderly persons, parents with dependents and those unable to work because of physical or psychological disabilities may also be eligible to receive assistance under the ASAS.¹⁷⁴ The exact amount of assistance will depend on the individual's circumstances.

3 *Community Assistance Support Program*

As asylum seekers, smuggled migrants may also be able to access assistance under the Community Assistance Support program, another scheme facilitated by the Australian Red Cross and funded by DIAC. This program is only available to those in community detention arrangements or on bridging visas who are assessed as being 'highly vulnerable' and possessing complex needs.¹⁷⁵ 'Complex needs' may include suffering from the effects of past trauma and torture or serious physical or mental health condition and also requires taking into consideration the special needs of the elderly and unaccompanied minors. Accepting direct referrals from DIAC, the Australian Red Cross will then provide complex case management to access services such as income support, health care, counselling, and accommodation assistance.¹⁷⁶ Access to a one-off emergency payment is also available under the program for clients in situations requiring emergency medical treatment, urgent accommodation or a basic living allowance.¹⁷⁷

E *Removal from Australia*

As previously mentioned, the *Smuggling of Migrants Protocol* obliges States Parties to facilitate the return of smuggled migrants without undue or unreasonable delay,¹⁷⁸ while respecting the non-refoulement commitments under the *Refugee Convention* (if the country is a State Party to that Convention).¹⁷⁹ Smuggled migrants in Australia will be returned to their country of origin under two sets of circumstances.

¹⁷² Australian Red Cross, *Migration Support — Asylum Seeker Assistance Scheme* <<http://www.redcross.org.au/asylum-seeker-assistance-scheme.aspx>>.

¹⁷³ DIAC, *Media Fact Sheet 62 — Assistance for Asylum Seekers in Australia* (March 2010) <<http://www.immi.gov.au/media/fact-sheets/62assistance.htm>>.

¹⁷⁴ Australian Red Cross, *Fact Sheet — Migration Support Programs — Asylum Seeker Assistance Scheme* <http://www.redcross.org.au/files/20120203_ASAS_Fact_Sheet_.pdf>.

¹⁷⁵ DIAC, *Media Fact Sheet 64 — Community Assistance Support Program* (November 2011) <http://www.immi.gov.au/media/fact-sheets/63advice_providers.htm> ('*Fact Sheet 64*').

¹⁷⁶ Australian Red Cross, *Migration Support — Community Assistance Support* (2011) <<http://www.redcross.org.au/community-assistance-support.aspx>>.

¹⁷⁷ DIAC, *Fact Sheet 64*, above n 175.

¹⁷⁸ *Smuggling of Migrants Protocol* art 18.

¹⁷⁹ *Ibid* art 19.

First, an individual can voluntarily request facilitation of his or her own return. IOM partners with the Australian Government to provide assisted voluntary return services to these individuals, consisting of impartial immigration information, the facilitation of travel arrangements, and financial assistance with the costs of return for those experiencing hardship.¹⁸⁰ According to information provided by IOM, those eligible to access this service include 'unsuccessful asylum seekers, irregular migrants, [and] stranded migrants'.¹⁸¹ To further encourage voluntary returns, the Australian Government in partnership with IOM introduced the Individual Reintegration Assistance package in 2010 to provide financial and other assistance, with a focus on vocational training and skills development, to irregular maritime arrivals who return to their country of nationality voluntarily.¹⁸² The package includes a cash component of up to A\$550.00 and 'in-kind' assistance such as small business start-up assistance, skills training, or job placement.¹⁸³

If smuggled migrants are unable to obtain a visa to remain in Australia lawfully and will not voluntarily depart from Australia, DIAC will effect their forced removal 'as soon as practically possible after they become available for removal'.¹⁸⁴ Similarly, those found to hold insufficient or fraudulent immigration documentation to enter at an Australian airport will be removed from the country unless they obtain a visa to enter.¹⁸⁵ This return of smuggled migrants, especially of irregular maritime arrivals, is usually also assisted by IOM. Specifically, IOM will engage in the negotiation of return agreements with the person's home country or their place of usual residence to obtain the necessary travel documents and ensure the individual's safety on return.¹⁸⁶ A number of previous return agreements brokered between Australia and host countries have involved the delivery of Australian aid packages to support the reintegration of returned individuals.¹⁸⁷

The Australian Government maintains that the principle of non-refoulement is considered at all times when arrangements for voluntary return and forced removal are made so that no smuggled migrant is returned or taken to a country where he or she may face or be in fear of persecution. Despite this, there have been a number of reports of individuals being returned to places where their lives or

¹⁸⁰ DIAC, *Assisted Voluntary Return* (2009) <http://www.immi.gov.au/managing-australias-borders/compliance/community-status-resolution/_pdf/english-assisted-voluntary-return.pdf>.

¹⁸¹ IOM, *Assisted Voluntary Return and Reintegration (AVRR)* (2011) 2 <<http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/activities/regulating/AVRR-Leaflet-Jan-2011.pdf>>.

¹⁸² Chris Bowen, 'Asylum Seeker Return Reintegration Package Announced' (Media Release, 9 November 2010) <<http://www.chrisbowen.net/media-centre/media-releases.do?newsId=3881>>.

¹⁸³ The total value of this assistance package is up to US\$4000 for Iraqi and Afghani nationals and US\$3300 for other nationalities: DIAC, Answer to Question No 70 of the Questions on Notice asked by the Joint Select Committee on Australia's Immigration Detention Network, 29 September 2011.

¹⁸⁴ DIAC, *Annual Report 2009–10*, above n 127, 193.

¹⁸⁵ DIAC, *Managing Australia's Borders — Air Travel* <<http://www.immi.gov.au/managing-australias-borders/border-security/air/airport.htm>>.

¹⁸⁶ 'Failed Asylum Seekers Face Forced Return', *ABC News* (online), 17 January 2011 <<http://www.abc.net.au/news/2011-01-17/failed-asylum-seekers-face-forced-return/1908206>>.

¹⁸⁷ See, eg, Yuko Narushima, 'Australian Officials to Help Reintegrate Afghan Deportees' *The Sydney Morning Herald* (online), 9 June 2010 <<http://www.smh.com.au>>; DIAC, *Annual Report 2009–10* above n 127, 124–5.

safety have been threatened.¹⁸⁸ For example, in 2010, refugee advocates claimed that Sri Lankan asylum seekers sent back by the Australian Government were being arrested on their return and mistreated by authorities.¹⁸⁹ Some authors advocated for the introduction of a complementary protection regime to prevent instances like this from occurring.¹⁹⁰ On 14 October 2011, the *Migration Amendment (Complementary Protection) Act 2011* (Cth) received assent. This amendment establishes a framework for the government to assess asylum claims under its international human rights obligations, outside of the *Refugee Convention*. Whether this approach will successfully prevent the Australian Government from incorrectly returning asylum seekers to their countries of origin remains to be seen.

V Observations and Conclusions

Australia has accepted obligations under the *Smuggling of Migrants Protocol* to 'afford appropriate assistance to migrants whose lives or safety are endangered by reason of being' smuggled migrants without reservation.¹⁹¹ This analysis of assistance and protection offered to smuggled migrants in Australia, however, casts doubts that Australia fulfils the requirements it signed up for. These doubts are further augmented in light of recent moves to detain in other countries smuggled migrants who arrive in Australia by boat, thus handballing Australia's obligations elsewhere.

An evaluation of the treatment of smuggled migrants and of any support, care, and other assistance offered to them is complicated by the fact that Australia has not set up specific, separate assistance and protection mechanisms for smuggled migrants. Such separation may, however, not be necessary as smuggled migrants are subsumed into broader immigration categories, such as unauthorised arrivals, irregular maritime arrivals, asylum seekers, et cetera, and are given access to support measures accordingly, primarily through the immigration detention framework. There is no mandatory requirement within the Protocol to legislate on these measures, and assistance and protection may well be provided within other, pre-existing frameworks.

Examining the various categories that may apply to smuggled migrants when they arrive in Australia, it appears that the Australian Government provides the minimum standards of assistance and protection required by art 16 of the *Smuggling of Migrants Protocol* insofar as it offers basic practical assistance in terms of accommodation, food, healthcare, and the provision of case managers and

¹⁸⁸ See, eg, Phil Glendenning et al, *Deported to Danger: A Study of Australia's Treatment of 40 Rejected Asylum Seekers* (Research Report, Edmund Rice Centre for Justice and Community Education, September 2004); David Corlett, *Following Them Home: The Fate of Returned Asylum Seekers* (Black Inc, 2005).

¹⁸⁹ Michael Vincent, 'Returned asylum seekers killed, jailed: advocate', *ABC News* (online), 19 May 2010, <<http://www.abc.net.au/news/2010-05-19/returned-asylum-seekers-killed-jailed-advocate/832342>>.

¹⁹⁰ See, eg, David Corlett, *Returning Failed Asylum Seekers from Australia*, Discussion Paper (2007) <<http://www.sisr.net/apo/asylum-corlett.pdf>>; Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper No 76 (2011) 22.43.

¹⁹¹ *Smuggling of Migrants Protocol* art 16(3)–(4).

access to legal aid to assist with the resolution of their immigration status. States Parties to the *Smuggling of Migrants Protocol* have some discretion as to the method by which they deliver the assistance and protection under the Protocol.¹⁹² It is for the ‘relevant Minister’ or ‘competent authority’ to determine the content and delivery of appropriate assistance measures in the circumstances.¹⁹³

Australia complies with international requirements by tying these support measures to its policy and practice of mandatory detention of all unauthorised arrivals, including smuggled migrants. Domestically, the Minister for Immigration and DIAC are the relevant authorities mandated with providing relevant assistance to and protection of smuggled migrants and maintain a system that offers smuggled migrants physical safety as well as ‘access to emergency food, shelter and medical care’ as required under the *Smuggling of Migrants Protocol*.¹⁹⁴ One factor complicating an effective assessment of the government’s ability to do this is the use of a contractor to provide most services in immigration detention facilities. To this end, the Australian Government has been criticised for failing adequately to enforce contractual obligations to ensure appropriate services are provided to detainees.

On the surface it appears that Australia meets its international obligations and complies with or, in some cases, even exceeds international best practice guidelines. There are, however, ongoing concerns about the quality and reach of these services, particularly considering the increasing demand being placed on Australia’s immigration detention system by increasing number of unauthorised arrivals in recent years.¹⁹⁵ Anecdotal evidence from those working in immigration detention centres suggests that while relevant services are notionally available, demand outstrips supply, and the quality of the available assistance measures is severely diminished.¹⁹⁶

Criticism has been aimed especially at the limited access to legal services for those in immigration detention facilities. It is crucial for individuals to articulate and submit accurate, cohesive, and compelling explanations why they engage Australia’s protection obligations, adequate access to legal and immigration advice, and translators to facilitate these services.¹⁹⁷ Failure to provide smuggled migrants with such services may result in Australia returning smuggled migrants to a country where their life or safety is threatened, thus violating the non-refoulement obligation under the *Refugee Convention* and contravening art 19 of the *Smuggling of Migrants Protocol*.

¹⁹² See, eg, UNODC, *Model Law*, above n 26, 66.

¹⁹³ *Ibid* 68–9.

¹⁹⁴ *Ibid*.

¹⁹⁵ For example, as at 30 June 2011, the facilities on Christmas Island and Perth immigration detention centres have been over contingency capacity 16 and 15 times respectively: DIAC, Answer to Question No 9 of the Questions on Notice asked by the Joint Select Committee on Australia’s Immigration Detention Network, 16 August 2011. Contingency capacity refers to the upper limit of detainees able to be accommodated at the facility in the event of unforeseen circumstances that may arise.

¹⁹⁶ See, eg, Linda Briskman, Susie Latham and Chris Goddard, *Human Rights Overboard: Seeking Asylum in Australia* (Scribe, 2008).

¹⁹⁷ See, eg, E Odhiambo-Abuya, ‘Refugee Status Determination in Australia: Breaking the Rules?’ (2004) 25 *Liverpool Law Review* 221.

The absence of any accurate and complete statistics of the number of smuggled migrants, their background, the circumstances of their arrivals, and their medium and long-term immigration status further complicates a comprehensive assessment of the assistance and protection available to smuggled migrants. No agency in Australia consistently collects such information or produces systematic research and analysis of such data. The inclusion of smuggled migrants in broader categories of unauthorised arrivals and the like may distort some figures and conceal some of the unique experiences of smuggled migrants. To this end, it would be desirable if government agencies were to isolate information pertaining to migrant smuggling from that relating to other types of unauthorised arrivals. With the existing office of an Ambassador for People Smuggling and a network of National Intelligence Officers throughout Australia engaged to 'collect, analyse and report on people smuggling',¹⁹⁸ it would appear that the Australian Government already has the infrastructure to collect, analyse, and disseminate such data. More publicly available information about the phenomenon of migrant smuggling, its levels and characteristics, and about the background of smuggled migrants and their treatment in Australia would also go a long way to demystify this issue and counter inaccurate media reporting and the many xenophobic remarks that have been made.

The lack of insight into and objective information about Australia's immigration detention system compounds the difficulties in making an accurate assessment of the assistance available to smuggled migrants. Requests for greater transparency of Australia's immigration centres have been made on numerous occasions, particularly since the privatisation of their management.¹⁹⁹ Increasing independent review mechanisms of immigration detention, a recommendation recently made to the Australian Government by the UN High Commissioner for Human Rights,²⁰⁰ would assist greatly in providing a more complete assessment of Australia's compliance with the assistance and protection provisions in the *Smuggling of Migrants Protocol*.

In summary, the *Smuggling of Migrants Protocol* establishes a relatively low threshold for the assistance and protection States Parties must provide to smuggled migrants. On the surface, Australia's current policies appear to meet this commitment. Yet, in practice, it must be asked whether Australia is genuinely fulfilling its obligations under international law or merely paying lip service to them. The apparent gap between the processes for government assistance to smuggled migrants and the services they actually receive must be addressed. From a policy perspective, any suggestion relating to the enhancement of Australia's support for smuggled migrants would extend beyond its obligations currently

¹⁹⁸ DIAC, *Managing Australia's Borders: Combatting People Smuggling and Unauthorised Arrivals* <<http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/combat.htm>>.

¹⁹⁹ See, eg, The Refugee Advice and Casework Service (Australia) Inc, Submission No 25 to the Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, 15 July 2008, 2; The International Coalition on Detention of Refugees, Asylum Seekers and Migrants, Submission No 109 to the Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, 12 August 2008, 12.

²⁰⁰ *Report of the Working Group on the Universal Periodic Review: Australia*, UN HRC, 17th sess, Agenda Item 6, UN Doc A/HRC/17/10 (24 March 2011) 13 [86.5].

established at the international level. Although the protection and assistance provisions under the *Smuggling of Migrants Protocol* may 'reflect the lowest common denominator rather than the best available tools to protect and safeguard the rights, integrity and interests of smuggled migrants',²⁰¹ it was never the intention of the drafters to produce a more comprehensive — and perhaps more generous — human rights instrument.

²⁰¹ Schloenhardt, above n 5, 359.