Deterrence, Detention and Denial: Asylum Seekers in Australia

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Australia has signed the Convention¹ and Protocol relating to the Status of Refugees² and is party to the major international human rights treaties. Consequently it has accepted certain obligations towards the protection of persons arriving in Australia, including those who arrive unlawfully and in particular those who qualify as refugees. In the aftermath of World War II and again in the mid-1970s, Australia has displayed a good record as an international citizen. It has accepted hundreds of thousands of refugees from around the world and has actively engaged in the promotion and recognition of human rights both nationally and internationally.

But the growing number of boat people arriving after the year 1989 has brought with it a change in Australia's treatment of refugees. The introduction of mandatory detention of unauthorised arrivals in particular marks the beginning of a gradual slide into a policy of 'deterrence, detention and denial' by systematically discriminating against asylum seekers. Since 1989 the status and rights of persons seeking asylum in Australia have been significantly restricted. Moreover, the protection of those who are found to be refugees has been limited to a period of three years and they no longer have access to family reunification and a range of welfare benefits.

This article analyses the legal framework that governs the status of onshore asylum seekers in Australia, the support they can obtain from government authorities, and their legal rights upon arrival and throughout their stay in Australia. It outlines Australia's protection obligations under international refugee and human rights law and the way that Australia has implemented these obligations. Particular emphasis is placed on the categories of protection visas that are available to persons who apply for asylum onshore and who are found to be refugees within the meaning of the Refugee Convention. The protection visa provisions have received much criticism since 1999 when the Government limited the protection granted to onshore applicants to a period of three years. The differences between permanent and temporary protection and the concern associated with this distinction are discussed in Part 1.

Along with the time limit placed on protection granted to onshore asylum seekers, the Government has severely restricted the legal rights of persons held in immigration detention and the support and welfare benefits available to them during detention and after their release. Governmental support and legal assistance available to unauthorised arrivals is the subject of Part 2. Further restrictions have been placed on the right to legal review of refugee claims that have been rejected at the primary level. Part 3 examines the rights of appeal and review available to protection visa applicants.

The principal focus of domestic and international critiques of Australia's refugee policy has undoubtedly been the mandatory detention of unauthorised arrivals. Starting in the 1990s and up until this day, Australian immigration detention centres have been described

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¹ 189 UNTS 150; 1954 ATS 5 [hereinafter Refugee Convention]. Australia initially ratified the Convention with reservations to arts 17–19, 26, 28 and 32. On 1 December 1967 the reservations to arts 17–19, 26 and 32 were withdrawn. The reservation to art 28 was withdrawn on 11 March 1971.

as ‘concentration camps’ because of their remote and isolated location, the inhumane treatment of detainees, their prolonged detention and the limitation of their rights. Not surprisingly the detention centres have repeatedly been the scene of riots, violence, hunger strikes and suicide attempts by detainees. Despite international criticism, Australia maintains its mandatory detention policy with bipartisan support. Part 4 outlines the current detention practice and discusses its rationale and legitimacy in the light of international human rights standards.

I. The Refugee and Humanitarian Immigration Regime in Australia

In the aftermath of World War II, Australia started to offer protection to refugees fleeing persecution and other serious human rights violations. Australia is one of the few countries in the world that actively maintains a refugee and humanitarian program to ‘assist in alleviating the plight of refugees and others in humanitarian need.’3 The program comprises arrangements to determine the eligibility of refugees within the meaning of the Refugee Convention and Protocol, and people in humanitarian need wanting to settle or remain in Australia.4

The majority of refugees in Australia who have been resettled here from abroad have undergone assessment overseas, approximately 82% in the 1999–2000 financial year.5 Australia, although under no international obligation, allocates approximately 12,000 asylum places each year for persons who apply from abroad and who, if their applications are successful, come to Australia as permanent residents on humanitarian grounds.6

This offshore humanitarian program is unavailable to people who lodge their applications for protection in Australia. Broadly speaking these onshore asylum seekers fall into two categories: (a) people who become refugees sur place, that is because of events occurring after their departure from their country of origin,7 and (b) people who have come to Australia to seek protection, most of them unauthorised arrivals by sea and air.

In the former case, unless repatriation is feasible in the short term, the protection provided by Australia is a permanent residence visa, as for example granted to the Chinese students in Australia after the 1989 events in the People’s Republic of China.8 In the latter case, Australia has established a complex onshore protection regime to accept those applicants who flee for reasons recognised in international refugee law, and to remove those who do not. In recent years, the number of persons granted protection onshore has been deducted from the asylum places set aside for offshore applicants.

1. Australia’s obligations under international refugee law

The 1951 Convention relating to the Status of Refugees and 1967 Protocol are the key instruments protecting refugees and safeguarding their rights and liberties. The Refugee Convention recognises a person as a refugee if he or she:

4 See generally Senate Legal and Constitutional References Committee, A Sanctuary under Review: An Examination of Australia’s Refugee and Humanitarian Determination Processes, the Committee, June 2000 at 11–2.
7 Sur place refugees are refugees who are unable or unwilling to return to their country of origin because of events occurring after their departure from that country.
owing to 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 nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.\(^9\)

In a nutshell, the *Refugee Convention* seeks to protect specific types of refugees from the country from which they fear persecution by placing obligations on Signatory Nations to provide refuge. The Convention contains provisions relating to the definition of a refugee (art 1), provisions that define the rights and legal status of refugees (arts 2–24), and provisions dealing with the implementation of the instrument (arts 25–46).

The key aspect of the protection granted under the *Refugee Convention* is that a refugee\(^10\) must neither be expelled ('refouled')\(^11\) nor returned to 'the frontiers of territories where his [or her] life or freedom would be threatened.'\(^12\) 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. Moreover, Contracting States are asked not to penalise refugees for their illegal entry and presence,\(^13\) to give them free access to courts of law\(^14\) and to assist in their naturalisation.\(^15\) Finally, the Convention provides that Member Countries should provide refugees with welfare including housing, public education\(^16\) and the opportunity for employment.\(^17\)

Australia acceded to the Convention in January 1954\(^18\) and to the Protocol in December 1973.\(^19\) The refugee definition was implemented in domestic law in 1980.\(^20\) The other provisions under the Convention have not yet been implemented by legislation.

The accession to the *Convention* and *Protocol* created an obligation to adequately protect and host refugees. This has few consequences for the selection of refugees through Australia's offshore humanitarian program, but it creates important responsibilities towards asylum seekers who lodge refugee claims on or after arrival in Australia as they must not be sent back to a place where they may face persecution.

In addition to the *Refugee Convention* and *Protocol*, the non-refoulement obligation also arises from a number of other international human rights treaties which Australia acceded to. For example, article 7 of the *International Covenant on Civil and Political Rights (ICCPR)*\(^21\) 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.'\(^22\) Article 45 of the 1949 [Fourth] Geneva Convention relative to the Protection of Civilians

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\(^9\) Art IA(2) *Refugee Convention* as amended by the *Refugee Protocol*.


\(^11\) Note 1, art 32 *Refugee Convention*, 'save on grounds of national security or public order'.

\(^12\) Note 1, art 33.

\(^13\) Note 1, art 31.

\(^14\) Note 1, art 16.

\(^15\) Note 1, art 34.

\(^16\) Note 1, arts 20–24.

\(^17\) Note 1, arts 17–19.

\(^18\) 1954 ATS 5.

\(^19\) 1973 ATS 37.

\(^20\) *Migration Amendment Act* (No 2) 1980 (Cth), No 175 of 1980.


in Time of War\textsuperscript{23} provides that a protected civilian, as defined in article 4,\textsuperscript{24} ‘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.’\textsuperscript{25} Also, the 1984 Convention against Torture and other Cruel or Degrading Treatment or Punishment\textsuperscript{26} states in article 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.’ Similar provisions can be found in article 3(1) of the 1967 Declaration on Territorial Asylum\textsuperscript{22} and in article 22 of the 1989 Convention on the Rights of the Child.\textsuperscript{28} Finally, article 14 of the Universal Declaration of Human Rights provides that every person has a right to seek and enjoy in other countries asylum from persecution.

Unlike most other Western countries, Australian law contains no provisions to grant protection to persons who fall outside the narrow refugee definition of the Refugee Convention. Instead, Australia has chosen to meet the non-refoulement obligations arising from the 1984 Convention against Torture, the ICCPR and the 1989 Convention of the Rights of the Child through the provision of Ministerial discretion contained in s 417 Migration Act.\textsuperscript{29}

2. Protection of onshore applicants in Australia

The Refugee Convention contains no information about the appropriate method for determining refugee status. The final arbiter of whether a person is a refugee is the International Court of Justice (ICJ),\textsuperscript{30} but in the absence of a ruling from the ICJ it is left to the Contracting State to decide the way in which refugee status is determined and the protection that it grants to refugees.\textsuperscript{31}

To meet its obligations under the Convention, Australia offers protection visas to refugees who apply for asylum in Australia. At present, four different kinds of visa exist for onshore applicants. The principal visa class is a permanent protection visa under s 36 Migration Act, subclass 866 Migration Regulations. Secondly, persons who arrive in Australia unlawfully and who are found to be refugees can be granted a temporary three-year protection visa: subclass 785 Migration Regulations. In 2001 the Government introduced two additional visa categories for applicants who are in one of the ‘excised offshore places’ (Ashmore and Cartier Island, Christmas Island, and Cocos (Keeling) Islands): subclass 447, or who apply for protection from a transit country: subclass 451.

\textsuperscript{23} 75 UNTS 287; 1958 ATS 21. Signed by Australia on 4 January 1950. Other regional instruments such as the Organisation of African Unity Convention, Governing the Specific Refugee Problems in Africa, 10 Sep 1969, and the 1984 Cartagena Declaration include war and internal civil strife in their definition of refugees, thus protecting those who flee from external and internal military threats. See McMaster D, Asylum Seekers: Australia’s Response to Refugees, Melbourne University Press, Melbourne, 2001 at 27-8.

\textsuperscript{24} Article 4 reads: ‘Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.’

\textsuperscript{25} Art 45 [Fourth] Geneva Convention relative to the Protection of Civilians in Time of War, n 23.


\textsuperscript{27} UN General Assembly Res 2312(XXII) (14 Dec 1967).

\textsuperscript{28} 1577 UNTS 3; 1991 ATS 4. See Senate Legal and Constitutional References Committee, n 4 at 55-6.

\textsuperscript{29} No 62 of 1958 [hereinafter Migration Act]. See infra Part 3.1, and see generally the discussion in Senate Legal and Constitutional References Committee, n 4 at 57-60.

\textsuperscript{30} Art 38 Refugee Convention, art IV Refugee Protocol.

\textsuperscript{31} See Crock M, n 6 at 126; McKenzie F, ‘What Have We Done with the Refugee Convention?’ (1996) 70 ALJ 813 at 815.
a. Permanent protection

In s 36 the Migration Act provides a visa class (‘protection visa’) for non-citizen immigrants who meet the refugee definition of article 1A of the Refugee Convention. If people apply for a protection visa, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) assesses their applications against the Convention. Additional legislation to clarify and limit the interpretation of the refugee definition by immigration officials and at the review level was introduced in 2001. Applicants who are found to be refugees within the meaning of the Refugee Convention and who meet Australia’s health and character requirements are granted protection visas which give permanent residence in Australia.

There are, however, significant exceptions and limitations to the protection visas granted under s 36. Under legislation introduced in 1999, onshore asylum seekers are not eligible for protection visas if they have failed to seek effective protection in countries in which they resided, temporarily or permanently, prior to arriving in Australia (s 36(3)), unless they had a well-founded fear of persecution or refoulement in the that country (s 36(4), (5)). Furthermore, the persons listed in articles 1C–1F of the Refugee Convention are ineligible for refugee status although they may have a well-founded fear of persecution. These exceptions include persons who have acquired a new nationality outside the persecuting country, persons who receive protection from UNHCR and other UN agencies, and those who have committed crimes against humanity, war crimes, or other serious non-political crimes. Also, applicants who arrive in Australia from designated safe third countries and persons who are covered by the 1989 Comprehensive Plan of Action approved by the International Conference on Indochinese Refugees and have previously been assessed overseas for refugee status are ineligible for refugee status.

b. Temporary protection

The high number of unauthorised boat arrivals in 1999, which resulted in a large increase of applications for protection visas, led the Australian Government to amend the provisions governing the protection offered to onshore applicants. Most of the new arrivals were Iraqi and Afghan nationals who fled persecution in their home countries and had been denied protection by neighbouring countries such as Iran and Jordan. Hence they had substantiated grounds to be granted refugee status, but the Government

References
32 Section 36 Migration Act reads: ‘(1) There is a class of visas to be known as protection visas. (2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.’ For general information see DIMA, Fact Sheet 61: Seeking Asylum within Australia, DIMA, 13 Nov 2001.
33 For the interpretation of the refugee definition in Australia see, for example, Senate Legal and Constitutional References Committee, n 4 at 5–8, 42–9; Crock M, n 6 at 135–53.
34 Section 91R Migration Act, introduced by Migration Legislation Amendment Act (No 6) 2001 (Cth), No 131 of 2001.
35 For the criteria of protection visas see Migration Regulations 1994 (Cth), subclass 866 — Protection.
38 Section 91E Migration Act.
feared that allowing successful applicants to remain in Australia permanently would attract even more refugees.

In October 1999, the *Migration Amendment Regulations 1999 (No 12)* came into operation, introducing a new category of temporary protection visas for successful onshore applicants (subclass 785). The amendments provide that asylum seekers who are found to be genuine refugees within the meaning of the *Refugee Convention* and who have arrived in Australia without a valid visa are no longer eligible for permanent residence. Instead, they can only obtain temporary protection visas that are valid for a maximum of three years. Those who obtain a temporary protection visa do not have access to family reunion. The visa also disallows persons who leave Australia from re-entering the country; if the holder of a temporary protection visa decides to leave, the visa will cease automatically.

Further restrictions have been introduced in the aftermath of the Tampa incident in August 2001. The *Migration Amendment (Excision from Migration Zone) Act 2001*, passed on 27 September 2001, bars unauthorised entrants from applying for any visa, including protection visas, if they land in one of the excised offshore places including Ashmore and Cartier Islands, Christmas Island and the Cocos (Keeling) Islands, which have been the major landing points for illegal boat arrivals. In June 2002 the Government announced it will extend the excised offshore places to include all islands off Australia's north and north-western coasts. The amendments introduced in 2001 also allow the immediate detention and removal of unauthorised arrivals. If, however, persons entering excised offshore places unlawfully are found to be fleeing persecution, they can be granted temporary protection visas valid for three years. At the end of the three-year period, they can renew their application for a temporary visa, but they are barred from obtaining permanent residence.

In order to discourage persons from applying for refugee status onshore, a second new visa class has been established for persons who are found to be refugees and who are applying from transit countries. Unlike excised offshore entrants, successful applicants from transit countries are granted protection for 4.5 years and can subsequently apply for permanent residence if protection is still needed.

The temporal limitation placed on the protection granted to onshore asylum seekers has been a key feature of Australia's policy to deter unauthorised arrivals and gradually restrict their legal rights. There are, however, strong humanitarian objections to this regime and to the concept of temporary protection of refugees. Although international refugee law

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42 No 243 of 1999.
44 In August 2001 an Indonesian vessel with 433 Afghan and Sri Lankan boatpeople sank near Christmas Island en route to Australia. The MV Tampa, a Norwegian cargo ship, rescued the migrants. Indonesia, Australia, and Norway debated who was responsible for the migrants. When the captain of the Tampa refused to turn away from Australia, the Government sent armed Special Air Service (SAS) troops to seize the Tampa and prevent it from approaching Christmas Island. After six days, approximately 300 migrants were taken to the tiny island nation of Nauru and 160 migrants to New Zealand to determine if they are refugees.
45 Sections 5(1), 46A *Migration Act*.
50 Subclass 451 *Migration Regulations* (secondary movement relocation (temporary)) introduced by *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*.
does not explicitly oblige receiving countries to offer permanent protection, the limitations of the new visa classes and barring temporary protection visa holders from applying for permanent protection creates severe uncertainty for people who are already traumatised by persecution and war. In particular the distinction between permanent protection offered to offshore applicants and temporary protection available to refugees who apply onshore appears to be a way to circumvent international obligations, disregarding the basic element of refugee law: that is to protect refugees outside their country of origin. Moreover, the fact that successful onshore applicants cannot bring their family members to Australia can interfere with the right of family life as set out in article 17 of the ICCPR. Also, if people are removed from Australia when it is found that protection is no longer necessary this does not take into account the relationships and links that have been formed during the time in Australia.

II. Government Assistance and Legal Support

Until recently, unauthorised arrivals who sought to enter Australia by sea were met by an official vessel and escorted to the nearest harbour on the mainland, and then placed in immigration detention. In a series of events starting in September 2001, suspect illegal boat arrivals have been transferred to Australian Navy vessels and transported to Nauru and Papua New Guinea for detention and processing. It is yet unclear whether these persons will obtain access to Australia's protection system.

In the case of unauthorised arrivals by air, illegal immigrants are brought directly to the nearest detention facility. DIMIA officers then interview all detained immigrants individually. The initial interview seeks to establish the identity and nationality of immigrants, the reasons why they left their home country and came to Australia, and whether they have reasons for not wishing to return. On the basis of written summaries of the interviews, senior DIMIA officers in Canberra determine whether an immigrant has prima facie engaged Australia's obligation not to return that person, or whether that person can be removed.

51 On 19 Nov 1999 the UNHCR issued a statement which confirmed that the temporary visa subclass is consistent with Australia's international obligations; Senate Legal and Constitutional References Committee, n 4 at 21. On the obligations under international refugee law see Castillo M & Hathaway J, 'Temporary Protection' in Hathaway J (ed), Reconciling International Refugee Law, Martinus Nijhoff, The Hague, 1997, 1 at 2.

52 Article 17 ICCPR provides that everyone has the right to the protection of interference or attacks of family life. In 1989 the UN Human Rights Committee stated that 'the exclusion of a person from a country where close members of family are living can amount to an interference within the meaning of article 17(1).' Plender R & Mole N, Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments' in Nicholson F & Twomey P (eds), n 37, 81 at 99.


56 See infra Figure 1. For details of the initial interview and primary decision see, for example, HREOC, Those Who've Come Across the Seas: Detention of Unauthorised Arrivals, HREOC, 1998 at 23–29; Senate Legal and Constitutional References Committee, n 4 at 110–41; Crock M, n 22 at 272–7; id, n 6 at 120–30; Taylor S, ‘Rethinking Australia’s Practice of “Turning Around” Unauthorised Arrivals’ (1999) 11(1) Pacifica Review 43 at 46–7.
Many of the people who arrive in Australia illegally are refugees fleeing persecution. Hence, it is important that their cases are assessed carefully. But even if their claims do not fall within the narrow scope of the Refugee Convention they may be traumatised by war, famine or environmental disasters in their home country, or by the clandestine journey to Australia. Although these persons may not be granted refugee status, it is necessary to consider all aspects of their cases as they may invoke Australia's protection obligations under other international human rights treaties.

Naturally, new immigrants — both legal and illegal — are unfamiliar with the Australian legal and immigration system and the technical requirements of international refugee and human rights law. Also, many migrants do not understand English and know little about Australia, which makes it even more difficult for them to express their claims and explain why they migrated. For these reasons it is important that they obtain access to interpreters as well as legal and humanitarian assistance.

The Australian Government provides assistance and legal support to asylum seekers. The support schemes, however, differentiate between persons who are held in immigration detention and those who are not. In a deliberate attempt to deter unauthorised arrivals, the Government has significantly restricted the assistance available to persons who arrive in Australia unauthorised, while persons who live in the community have access to a greater range of support schemes. The following Sections outline the different kinds of assistance available to immigrants in detention and to those who are not detained. The group of asylum seekers who are held in Papua New Guinea and Nauru for processing obtain assistance from international organisations such as IOM and UNHCR; they do not have access to the Australian assistance schemes.

1. Asylum seekers in immigration detention

After arrival in Australia it is important to familiarise new immigrants with their environment and their status and legal rights, and provide them with information about Australia's legal and immigration system. For that reason, s 194 Migration Act requires an immigration officer to ensure 'as soon as possible' that people, when they arrive in immigration detention, are made aware that they may apply for a visa (s 195) and that they will be removed from Australia unless they obtain a visa (s 196).

This information, however, is not made available to persons who arrive in Australia unlawfully. Subsection 193(1), introduced in 1992, prescribes that s 194 does not apply to unlawful non-citizens (ss 189, 14). A range of additional provisions effectively leave unauthorised arrivals completely uninformed about their status, the circumstances of their detention and the few legal rights they do have. For example, s 193(2) provides that immigration officers are under no obligation to advise unauthorised arrivals that they can apply for a visa. Also, '[n]othing in this Act or in any other law (whether written or unwritten) requires the Minister of any officer' to give them any opportunity to apply for a visa, give them visa application forms, or to allow them to obtain legal or other advice on these matters. Section 256 Migration Act restricts access to visa application forms and legal advice to detainees who explicitly request such facilities or advice. In order to reduce the number of visa applications, DIMIA does not ask unauthorised arrivals if they wish to apply for a (protection) visa or if they want to contact lawyers or independent advisers. A recent study stated that, according to DIMIA, approximately 80 percent of the unauthorised boat arrivals who were removed from Australia in 1996 and 1997 did not

57 See HREOC, n 56 at 25–29; Poynder N, 'The Incommunicado Detention of Boat People: A recent development in Australia's refugee policy.' (1997) 3(2) AJHR 53 at 64; Taylor S, 'Should unauthorised arrivals in Australia have free access to advice and assistance?' (2000) 6(1) AJHR 34 at 35.
59 See Poynder N, n 57 at 63. See also Taylor S, n 57 at 42.
request legal advice. In 1996 the Federal Court approved this practice by rejecting 'any proposition' that immigration officers are 'obliged to inform [unauthorised entrants] that they may apply for a visa'.

This 'incommunicado detention' has led to harsh criticism by lawyers, academics and human rights organisations and has been regarded as a breach of international law. It has been stated that the current practice fails to recognise the difficulties that new immigrants face and that it leaves all unauthorised arrivals, including those who may be genuine refugees, uninformed about their rights. Competent advice and assistance is essential for all members of society, including those who are new to it and those who arrive with claims for asylum. No evidence has yet been found to support DIMIA’s position that informing detainees would result in more unfounded claims and thereby lengthen and complicate the determination process. DIMIA, in return, declared that the legislation prevents its officers from informing asylum seekers about their rights.

But — contrary to DIMIA’s view — if people remain unaware of their rights and the assistance they can obtain, it becomes more likely that they may be refouled. In other cases the administrative procedures, including refugee determination and detention, are prolonged unnecessarily simply because authorities are dealing with uninformed applicants. A recent Senate inquiry also supported the suggestion that it is preferable to inform persons in immigration detention about their status, their rights, the deadlines they have to meet and about the legal and financial assistance they can obtain. Not only would it help applicants to give them access to this information irrespective of language and literacy, it would also accelerate the application process and ultimately save resources.

Despite the adversarial process many immigration detainees apply for protection visas, presumably because they obtain information and assistance from other detainees and the few lawyers and human rights groups who have access to the detention centres. Those immigrants who express their intention to apply for a protection visa and who after the initial interview have been assessed as prima facie engaging Australia’s protection obligations, can obtain assistance in preparing and lodging their applications under the Immigration Advice and Application Assistance Scheme (IAAAS). IAAAS is not however designed ‘to provide universal assistance to all visa applicants.’ The assistance provided under the scheme usually gives applicants free access to migration agents, lawyers, community and legal aid organisations that have been selected and are contracted by DIMIA. But the decision about which lawyer or organisation is contacted remains with DIMIA, and generally DIMIA will not change the primary adviser unless serious errors or misconduct occur.

The assistance provided under IAAAS also includes application assistance at the merits review stage when a primary application has been refused, but does not provide funding for attendance of hearings of the Refugee Review Tribunal and for judicial review through the Federal Court.

Apart from IAAAS, asylum seekers could also apply for legal assistance through the Attorney-General Department’s Legal Aid branch. This option was discontinued after July

60 Taylor S, n 57 at 43.
61 Wu v Minister for Immigration and Ethnic Affairs (1996) 64 FCR 245 at 291.
62 See infra Part 4.
63 See Huyör J, n 53 at 239; Taylor S, n 57 at 42–3; Crock M & Mathew P, n 26 at 161.
64 Senate Legal and Constitutional References Committee, n 4 at 84–5; Crock M, n 22 at 269–70
65 See generally HREOC, n 56 at 209–11; Senate Legal and Constitutional References Committee, n 4 at 69–70, 72–76; Crock M, n 22 at 265–6; DIMA, Fact Sheet 70: Immigration Advice and Application Assistance Scheme, DIMA, 16 May 2000.
66 DIMIA, Fact Sheet 70, n 65.
67 Australian National Audit Office, n 55 at 67–8; Taylor S, n 57 at 44–5.
68 DIMIA, Fact Sheet 70, n 65.
1998 as it partly overlapped with the support provided under IAAAS. But Legal Aid assistance remains available for judicial review of decisions of the Refugee Review Tribunal if ‘the issues to be raised are issues about which “there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court or the High Court”’.69

2. Non-detained immigrants

People who have been released from immigration detention and those who have not been detained have access to a greater variety of assistance and support schemes. The kind of support they can obtain depends on whether they hold temporary or permanent protection visas.

a. Permanent protection visa

People who hold permanent protection visas and the few immigrants who have been released from immigration detention on bridging visas while their applications for protection visas are determined70 have access to a broader range of assistance than holders of temporary protection visas.

During the application process applicants can obtain financial assistance through the Asylum Seeker Assistance Scheme (ASA). This scheme provides food, accommodation and health care for applicants who are unable to meet their most basic needs while their cases are considered. The scheme is administered by DIMIA through contractual arrangements with the Australian Red Cross. Since 1 July 1999, unsuccessful applicants in financial hardship whose cases are under review are also eligible for support under the ASA scheme.71

People who have been granted a permanent protection visa have full work rights in Australia and unrestricted access to Medicare, Australia’s government health insurance scheme.72 Applicants and bridging visa holders cannot seek employment unless individual exceptions are made. They are ineligible for Medicare unless they have work rights or they are the spouse, child or parent of an Australian citizen or permanent resident. Some State and Local Governments offer additional assistance to onshore asylum seekers.73

Immigrants who arrive in Australia illegally and who are granted protection visas (temporary and permanent) do not have access to the On-Arrival Accommodation Program (OAA) and to the Community Refugee Settlement Scheme (CRSS). Assistance under these schemes is exclusive to persons who apply from outside Australia and come here as permanent residents under the Refugee and Special Humanitarian Program.74

b. Temporary protection visa

The vast majority of people who successfully apply for protection onshore are now granted temporary protection visas. As mentioned earlier, in an attempt to deter further arrivals this visa category has been specifically designed to deprive unauthorised arrivals of the

69 Senate Legal and Constitutional References Committee, n 4 at 70–2; Crock M, n 22 at 266; Taylor S, n 57 at 48.
70 Section 72 Migration Act and reg 2.20 Migration Regulations 1994 provide a ‘prescribed class’ of certain unlawful non-citizens who are eligible for a bridging visa. Also, under s 72(3) of the Act the Minister may independently determine that an unlawful non-citizen is eligible for a bridging visa. However, both options are very limited in practice. See HREOC, n 56 at 19–21.
72 DIMA, Fact Sheet 42, n 71; Taylor S, n 71 at 73–5, 77.
73 For the assistance available in New South Wales, Queensland and Victoria see Taylor S, n 72 at 77–82.
benefits and support mechanisms that are available to persons who apply from outside Australia and/or who are granted permanent protection.

Temporary protection visas, including the new categories established in 2001, entitle their holders to receive Special Benefit payments, rent assistance, maternity and family allowances and family tax payments. They also have the right to work and can gain access to Medicare. Temporary protection visa holders are eligible for referral to the Early Health Assessment and Intervention Program, and for torture and trauma counselling. Persons holding subclass 785 (Temporary Protection) or subclass 451 (Secondary Movement Relocation (Temporary)) visas can also apply for permanent visas if protection is still needed when the temporary visa expires. Persons who arrive in one of the offshore excised places and who have been granted Secondary Movement Offshore Entry (Temporary) protection visas (subclass 447) do not have access to permanent protection; if protection is still required, they can apply for another temporary visa.

Compared with the permanent protection visas, the holders of temporary visas are not entitled to obtain English language training or to access the mainstream social welfare system to obtain pensions and new-start allowances. Holders of temporary protection visas also do not have access to the settlement services provided to refugees who enter Australia lawfully.

The severe limitation of support available to holders of temporary protection visas has been criticised as creating a ‘second class’ of refugees. Most persons are released into the community by simply transporting them from the detention centre to the central bus station of a capital city and abandoning them without assistance. Local volunteer groups around the country usually take care of released refugees, but as they cannot obtain the new start allowance it is very difficult (and in some cases impossible) to organise accommodation, furniture and other basic supplies. The lack of English language training also creates great difficulties for newly arrived immigrants, especially when they start looking for work. The Government is well aware of these difficulties and the dangers they entail. Asked, for example, why English tuition has been denied to onshore refugees, the Immigration Minister responded:

Why would I knowingly allow that situation [unauthorised arrivals] to go on by putting in place programs which I know were going to add an additional layer of incentive for people to seek to come to Australia. Why would I do it?

It has been argued earlier that marginalising new immigrants by excluding them from Government assistance, health insurance, language training, and work rights not only renders their integration more difficult, it also forces them to look for other sources of income — which in some cases may entail illegal activities.

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77 See Mathew P, ‘Recent Diminution of Refugee Rights’ (2000) 9(1) Human Rights Defender 18 at 18–9; Esmaeli H & Wells B, n 41 at 235–8; and the comments made by Mr John Olsen, then Premier of South Australia, on ABC Television, ‘The Queue Jumpers’ Four Corners, ABC, 16 Oct 2000: ‘I think the point is if they are granted refugee status after due process, then there is only one class of refugees. You shouldn’t have two classes.’ and ‘My view is if you’re going to give the people temporary permits as refugees and you want them to assimilate and make their own way within the Australian society, then they’ve got to have English language as a prerequisite to be able to do so.’
78 Note 77.
79 Note 77 per Mr Phillip Ruddock, Minister for Immigration and Multicultural Affairs.
III. Rights of Appeal and Review

Although the Refugee Convention contains no information as to whether or not asylum seekers should be given the right to appeal against refugee determination decisions, the High Court of Australia has held that refugee decisions are reviewable and that onshore asylum seekers are entitled to be heard before being removed.

Asylum seekers whose applications for protection visas have been rejected by DIMIA at the primary level can seek review from the Refugee Review Tribunal and, depending on the basis and stage of the refusal, from the Administrative Appeals Tribunal, the Federal Court or the High Court of Australia.

Figure 1 provides an overview of the refugee determination system in Australia at primary and review/appeal levels as it was on 15 August 2001.

81 Minister for Immigration and Ethnic Affairs v Mayer (1985) 157 CLR 290.
82 Kioa and Others v West and Another (1985) 159 CLR 550.
83 Note 4 at 111.
Figure 1: Refugee Determination Process, Australia 2001

Lawful Non-Citizen

PV Application from community

Application Accepted – Meets 1951 Refugee Definition

Public interest and medical tests

Meets tests

Appeal to AAT

Wins appeal

Granted Protection Visa

Unlawful Non-Citizen

PV Application from detention

Application Rejected – Fails 1951 Refugee Definition

Appeal to RRT

Primary decision set aside

Primary decision affirmed

Appeal to Federal Court

Wins appeal

Remitted for reconsideration by RRT

Appeal to Minister on humanitarian grounds

Minister substitutes more favourable decision. Most appropriate visa granted.

Minister does not substitute a more favourable decision.

No appeal

Removed from Australia

Point of Entry

Primary Determination Process

Removal

Public interest and medical tests

Fails public interest test

Fails medical test

No appeal
1. Refugee Review Tribunal

Merits review of a decision to refuse to grant or cancel a protection visa is available from the Refugee Review Tribunal (RRT): s 411 Migration Act. The RRT was established as an independent, administrative merits review tribunal in 1992 and is set up along lines similar to the Migration Review Tribunal.84

After notification that refugee status has been denied, applicants in detention are given seven working days to apply for review to the RRT, and 28 days in any other case.85 The RRT has no discretion to consider an out-of-time application.

As a merits review tribunal the RRT 'exercises all the powers and discretions' and applies the same criteria as those of the primary decision maker: s 415 Migration Act. The Tribunal examines the application for a protection visa against the Refugee Convention in a comparatively informal, non-adversarial setting to hear evidence. In its decision the RRT must take into account all available information and evidence, including new evidence that was unavailable at the primary stage. If the Tribunal cannot make a favourable decision on the basis of the written submissions, it must give the applicant the opportunity for a personal hearing.86

It is interesting to note that in the early years of the RRT more applicants were granted protection visas at review stage than at the primary level. For example in 1994–95, the first full financial year of RRT operation, 662 applicants or 15.7% of reviewed cases were successful at review stage while only 503 or 10.4% of all primary applicants were granted protection visas.87 In recent years this imbalance appears to have been overcome with less applications being successful at review than at primary stage. However, concern has been expressed about the fact that refugee determination remains the only administrative decision making system with higher approval rates at review than at the primary level.88

If the protection visa application remains unsuccessful at review stage, applicants are charged a fee of $1,000 for the review and have 28 days to leave Australia voluntarily. Otherwise they are removed forcibly.

Ministerial discretion under s 417 Migration Act

The Minister for Immigration can overrule a rejection by the RRT if he or she thinks that 'it is in the public interest to do so'.89 Section 417 Migration Act authorises the Minister to substitute a RRT decision with a more favourable one. In that respect, the section provides a humanitarian exception to the narrow scope of the Refugee Convention to which the RRT is bound under ss 411 and 415. Most writers in the field agree that s 417 serves as an option to grant protection visas to applicants who must not be refouled for reasons contained in the Convention against Torture, the Convention of the Rights of the Child and the ICCPR.90 This is also emphasised by the Guidelines for the exercise of the discretion granted under s 417, which outline the main criteria to be considered in relation to the three conventions.91

84 Migration Reform Act 1992 (Cth), No 184 of 1992, see now Part V Migration Act.
85 Section 412(1)(b) Migration Act and Reg 4.31(1), (2) Migration Regulations 1994.
86 Section 425 Migration Act. For details of the RRT, its structure and operation, see Australian National Audit Office, n 55 at 88; Senate Legal and Constitutional References Committee, n 4 at 143–79; Crock M, n 22 at 277–80; id, n 6 at 130–2; Fonteyne J-P, n 8 at 255; Kneebone S, n 22 at 80–1.
87 See also Australian National Audit Office, n 55 at 90; and Kiong and Others v West and Another (1985) 159 CLR 550.
88 Note 55 at 90.
89 Note 4 at 237–67.
90 See Part 4.1; and Senate Legal and Constitutional References Committee, n 4 at 57–64; Crock M, n 22 at 282.
91 See paras 4.2.2–4.2.4 Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where it May Be in the Public Interest to Substitute a more Favourable Decision under ss 354, 351, 391, 417, 454 of the Migration Act 1958, issued on 4 May 1999, reprinted in Senate Legal and Constitutional References Committee, n 4 at Appendix 9, 399–400.
Unsuccessful visa applicants at primary and review stage are not officially informed about the right to request intervention under s 417. However, in the 1998–99 financial year, 62.0% of all failed RRT applications requested such intervention. In that financial year, the Minister received 4,236 requests for intervention and granted 154 visas (3.6%) under s 417.92

The Minister's powers under s 417 cannot be delegated or compelled. In practice, the RRT makes recommendations to the Minister if it has found that a refugee claim falls outside the Refugee Convention, but nevertheless has strong humanitarian grounds to be granted protection.93 These recommendations are, however, unenforceable and they can be overruled and ignored by the Minister at any time although there may be international obligations to protect the asylum seeker. It raises serious concerns that absolute obligations under international law, such as the non-refoulement obligations, are based on the non-reviewable discretion granted to the Minister under s 417, and that the Minister has no enforceable duty to exercise this discretion.94

2. Federal Court

Part 8, ss 474–486 Migration Act gives asylum seekers the right to appeal on points of law to the Federal Court if the Refugee Review Tribunal affirms the primary decision. Appellants may lodge their application to the Federal Court within 28 days of notification of the RRT decision (s 477(1)) and there is no explicit prohibition on the Court to consider out of time applications. Appeal to the Federal Court is limited to reasons specified in s 474; the Federal Court may not review the merits of a case. In its decision the Federal Court can uphold the RRT's refusal, vary the decision made by the RRT, or if the appeal is successful, refer the application back to the RRT for reassessment.95

3. Administrative Appeals Tribunal

The Administrative Appeals Tribunal (AAT) plays a very limited role in the context of refugee status determination. If a review of the RRT ‘involves an important principle, or issue, of general application’ the Tribunal can refer the decision to the AAT: s 443 Migration Act. Secondly, the Federal Court decided in 1998 that decisions to refuse or cancel protection visas on the basis of s 502 Migration Act, articles 1F, 32 and 33(2) Refugee Convention96 are reviewable by the AAT and not the RRT.97 The new s 501J Migration Act, introduced in 2001,98 provides that the Minister has authority to set aside an AAT protection visa decision by a more favourable one.

4. High Court of Australia

If an applicant has missed the opportunity for review of a Refugee Review Tribunal decision in the Federal Court, judicial review can be sought directly in the High Court. Under s 75(v) of the Constitution the High Court has jurisdiction with respect to decisions made under the Migration Act in which a writ of mandamus or prohibition is sought against any primary decision maker. There are no restrictions as to the grounds of review and there is no time limit for seeking review from the High Court.99

92 Note 4 at 255.
93 Note 4 at 179; see also Fonteyne J-P, n 8 at 255–6; Kneebone S, n 22 at 82; Taylor S, n 56 at 46.
94 Note 4 at 64.
95 Section 481 Migration Act.
96 See Part 4.2.
97 Crock M, n 6 at 157 referring to Vaitaki, FFC, 15 Jan 1998, unreported.
98 Migration Legislation Amendment Act (No 6) 2001 (Cth).
99 See Taylor S, n 57 at 40.
IV. Detention and Removal

1. The Australian practice

Australian law provides that people who arrive without authority are to be placed in immigration detention until they are granted a visa or removed from Australia. Under s 273 Migration Act the Minister for Immigration established immigration detention centres in Sydney, Melbourne, Perth, Darwin and in the isolated country towns of Port Hedland (WA), Derby (WA) and Woomera (SA). In 2002 the Minister announced the creation of additional facilities in Christmas Island, Port Augusta (SA) and Brisbane. Most unauthorised air arrivals are held in the facilities in Villawood, Sydney, and Maribyrnong, Melbourne, while most people at the other centres are unauthorised boat arrivals.

Removal

Great caution must be exercised when decisions are made about the status of unlawful non-citizens and about their removal. If genuine refugees or other persons protected under international human rights law are removed, Australia violates the non-refoulement obligations and puts the removees at risk of further persecution. But even if there are no international law objections against removal, there may be other humanitarian concerns if persons are forcibly removed.

Figure 2: Status and departures of boatpeople in Australia, 1989–16 February 2000

<table>
<thead>
<tr>
<th>Status of boat people</th>
<th>% of total</th>
<th>number</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL NO OF BOATPEOPLE</td>
<td>100%</td>
<td>10,224</td>
</tr>
<tr>
<td>Total granted entry</td>
<td>48.9%</td>
<td>4,991</td>
</tr>
<tr>
<td>• Granted refugee status</td>
<td>11.8%</td>
<td>1,201</td>
</tr>
<tr>
<td>• Granted Temporary Protection Visa</td>
<td>36.6%</td>
<td>3,737</td>
</tr>
<tr>
<td>• Entry on other grounds</td>
<td>0.5%</td>
<td>53</td>
</tr>
<tr>
<td>Total remaining in Australia</td>
<td>18.9%</td>
<td>1,936</td>
</tr>
<tr>
<td>• Released on bridging visa</td>
<td>0.2%</td>
<td>24</td>
</tr>
<tr>
<td>• Escaped from custody</td>
<td>0.1%</td>
<td>8</td>
</tr>
<tr>
<td>• In custody</td>
<td>18.6%</td>
<td>1,904</td>
</tr>
<tr>
<td>Departures</td>
<td>32.2%</td>
<td>3,297</td>
</tr>
</tbody>
</table>

Of the 10,224 persons who arrived in Australia illegally by boat between 1989 and 16 February 2000, 4,991 or 48.9 percent have been granted visas to stay in the country, most of them on temporary protection visas. 3,297 persons or 32.2 percent have left Australia voluntarily or have been removed or deported forcibly. A substantial number of the cases contained in Figure 2 have not yet been finalised (1,936 cases or 18.9%). It is however noticeable that the majority of boatpeople who arrive in Australia have genuine claims for asylum. 60.2 percent of all cases that have been finalised have been granted protection or other humanitarian visas.

100 Sections 176–197 Migration Act 1958 (Cth).
102 DIMA, Fact Sheet 81: Unauthorised arrivals by air and sea, DIMA, 25 July 2000. No equivalent data is available for unauthorised arrivals by air. More recent data was unavailable when this study was completed.
Consequently statements that the majority of illegal immigrants who come to Australia are opportunity seeking economic migrants (who are not recognised by Australia's protection system) are wrong. In other words, a significant portion of persons arriving in Australia unauthorised are found to evoke Australia's protection obligations. It is therefore particularly important that the claims of unauthorised entrants are carefully assessed. Also, asylum seekers need to be given immediate and appropriate access to lawyers, human rights organisations and interpreters so that they can express their claims and avoid refoulement to a country where they may be in danger of further persecution.

2. Legitimacy of the current practice

In recent years there have been numerous court decisions and substantial academic and public debate surrounding the legitimacy of Australia's detention policies and practice.

The Australian Government argues that it is necessary to place all illegal immigrants in detention centres in order to monitor their whereabouts; otherwise the migrants may simply disappear into the wider community. Secondly, detention facilitates the removal of applicants should their applications for asylum be rejected. Essentially, the Government considers its decision to detain all unauthorised arrivals as an issue of national sovereignty and security. From this perspective, mandatory detention of illegal immigrants is necessary for 'compelling reasons of domestic policy' and to secure the integrity of Australia's immigration programs.

On the other hand, it has been argued that the fact that and the way in which unauthorised migrants are detained are breaches of Australia's international obligations. Moreover, the length of the detention, the treatment of detainees and the remoteness of the immigration detention facilities have been criticised for further traumatising and alienating those fleeing persecution and poverty.

First, it must be recalled that people who arrive in Australia without a visa do not commit a crime and the vast majority do not represent a risk to community safety. Immigration detention, despite the way in which it is currently practised and perceived in Australia, is not a correctional service and does not have punitive character. Immigration detention centres are not prisons. The sole purpose of immigration detention is a purely administrative one: it seeks to accelerate the determination of the legal status of asylum seekers and the facilitation of their removal if visa applications fail. Accordingly, the accommodation and treatment of persons in detention must be as humane as possible and must not resemble that of correctional institutions. Detention centres should provide basic, humane support and accommodation to unauthorised immigrants, and offer detainees maximum personal freedom while recognising the security and safety issues that may arise.

103 See the analysis in Corlett D, 'Politics, Symbolism and the Asylum Seekers Issue' (2000) 23(3) UNSW LJ 13 at 17.
104 From the large body of cases see, for example, Chu Kheng Lim and others v The Minister for Immigration, Local Government and Ethnic Affairs and Another (1992) 176 CLR 1; Fang and Others v Minister for Immigration and Ethnic Affairs and Another (1996) 135 ALR 583; HREOC and Another v Secretary, DIMA (1996) 41 ALD 325.
106 See, for example, HREOC, n 56; id, Submission to the Senate Legal and Constitutional References Committee inquiry into Australia’s refugee and humanitarian program (2000); Australian National Audit Office, n 55 at 99–101; UN Human Rights Committee, A v Australia, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 Apr 1997); 'Woomera rioters reflect poor refugee policy' The Australian, 30 Aug 2000, 12.
107 See Piotrowicz R, n 105 at 417.
108 See the summary in Piotrowicz R, n 105 at 422–5; and Crock M & Mathew P, n 26 at 159.
109 See also the broader discussion in HREOC, n 56 at 6; Australian National Audit Office, n 55 at 29; Castillo M & Hathaway J, n 51 at 7–8; and Taylor S, n 56 at 47.
It has to be questioned whether immigration detention in general is lawful and necessary. Countries with similar legal systems to Australia which experience the same, if not greater, problems surrounding illegal immigration and refugee determination, such as the United States, New Zealand the United Kingdom and many Western European nations, do not have mandatory detention. Furthermore, there is serious concern that prolonged and unjustified detention of unauthorised immigrants can amount to ‘arbitrary arrest or detention’ as prohibited under article 9(1) of the ICCPR. Moreover, the detention of immigrants in remote areas and the lack of access to legal advice and human rights organisations interferes with the rights of accused individuals under international law. In particular, DIMIA’s practice of not informing detainees about their rights breaches principles 13 and 17(1) of the UN Standard Minimum Rules for the Treatment of Prisoners (which apply equally to people placed in administrative detention) and can amount to a violation of article 10(1) ICCPR. The incommunicado detention of leaving refugees uninformed about their rights also creates the risk that genuine refugees are being sent back to a country ‘where [their] lives or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion’, thus contravening article 33 of the Refugee Convention.

Also, the mandatory detention of unauthorised arrivals has repeatedly been utilised in Australian immigration policies as a method to deter further immigrants, which contravenes UNHCR guidelines that prohibit the detention of asylum seekers as part of a policy to deter future arrivals.

A further issue that has become a major focus of attention in the public debate of immigration detention is the costs created by Australia’s practice of mandatory detention. For example, the Federal budget for the 2001–02 financial year allocated $250 million for processing unauthorised boat arrivals plus an extra $147 million in the mid-year economic review and an extra $85 million for the Pacific Solution. The public’s view is naturally that the Australian taxpayer should not pay for the accommodation of illegal, unwanted immigrants. The Australian Government has in many instances fuelled the public’s hysteria about rising expenses for the reception, processing and removal of unlawful non-citizens, often by the use of unsubstantiated and one-sided statements. But the expenses that arise

110 HREOC, n 106 at 2-4.
113 See, for example, Australia, House of Representatives, Parliamentary Debates, 5 May 1992, 2371, G Hand, Minister for Immigration; McGregor R, ‘Minister warns of boatpeople flood’ The Australian, 16 Nov 1999, 1.
114 See, for example, Australia (Cth), House of Representatives, Parliamentary Debates, 5 May 1992, 2371, G Hand, Minister for Immigration; McGregor R, ‘Minister warns of boatpeople flood’ The Australian, 16 Nov 1999, 1.
115 See HREOC, n 56 at 42-6 with further examples; Piotrowicz R, n 105 at 419.
116 For estimates of the costs for detention and removal see, for example, Australian National Audit Office, n 55 at 39–40, 103–20. See also the comments made by Crock M, n 22 at 285–6.
are solely the result of Australia's mandatory detention policies. It is not the immigrants' choice to create the costs for detention and removal. Also, ss 209 and 210 Migration Act make illegal immigrants liable for the costs of their detention and removal if they are refused visas to remain in Australia.

Calls for a change of its rigid detention policy led the Government to release a very limited number of women and children from the Woomera detention centre in May 2001, to be housed on a trial basis in private homes in Woomera. There is, however, no indication that this trial demonstrates a change of Australia's detention policy. At the time this study was completed, no information was available as to whether or not this programme will be further expanded in the future.

V. Conclusion

Australia's response to growing numbers of onshore asylum seekers has been characterised by a rigid policy of deterrence, detention and denial. With the growing number of people who land at Australia's shores 'uninvited', who attempt to arrive clandestinely, or who are found trying to enter with false identity documents, the Australian public has become more hostile and government authorities more aggressive in fighting and preventing illegal entry. Higher penalties, tighter border controls, mandatory detention and speedy removal, limited review of asylum claims, and most recently the introduction of temporary protection visas, are just some of the measures which have been implemented to deter further arrivals.

There are, however, a number of limitations to the Australian deterrence strategy. Law enforcement and deterrence alone can never control or even reduce a phenomenon as complex and multifaceted as irregular migration flows, including refugee exodi. The deterrence policy cannot take away the incentives to flee from places where persecution, famine, unemployment and environmental degradation are the rule rather than the exception. It cannot disguise the fact that Australia is a very wealthy, politically stable and multicultural nation. The deterrence policy that has characterised Australia's onshore refugee programme for the past 12 years has failed to take into account the political, social and economic realities that have caused the enormous growth of illegal migration and organised crime.

Despite differing Government statements, the great majority of people being trafficked to and arriving unlawfully in Australia are found to be refugees and are granted protection visas. The exodi that have occurred following the Persian Gulf War, the rule of the Taliban regime, and the recent 'War on Terrorism' have led to the arrival of large numbers of Middle Eastern asylum seekers in Australia. The response to growing levels of asylum seekers however has been dominated by short-term measures of deterrence, rather than by sustainable long-term solutions for refugees and for the causes of these exodi.

While it is recognised that all nations have a sovereign interest in protecting their borders, the control and surveillance mechanisms in place must not interfere with international obligations and must not put the physical safety and human rights of asylum seekers at risk. The same must apply to deterrent strategies for unauthorised arrivals and the recent Australian initiative of turning around vessels suspected of carrying illegal immigrants. Moreover, to prevent refoulement and the maltreatment of migrants, law enforcement and immigration officials need to be trained in dealing with asylum seekers and need to be made aware of the basic principles of refugee protection.

In the light of recent refugee flows, many people have called for an overhaul of international refugee law. While government officials from Western nations, including Australia, have argued that the protection regime of the Convention relating to the Status

of Refugees is too generous,121 many academics and human rights organisations have suggested that the scope of international refugee law is too narrow, leaving many persons in need of asylum unprotected. Action is necessary to improve the international refugee and asylum system. The inadequacies of the Refugee Convention are obvious: Under the current international system persons fleeing famine, armed conflict or severe environmental disasters do not qualify as refugees although they are in desperate need of protection.

Calls are growing for new international instruments which protect different kinds of asylum seekers, establish separate systems for persons migrating primarily for socioeconomic reasons, and allow a more equitable sharing of the refugee burden.122 However, in the current climate of anti-immigrant sentiments and heightened security alerts in most Western countries, particularly following the September 11th attacks, it is unlikely that the international community will agree on any framework that facilitates the free movement of people and shows greater compassion towards those fleeing repressive regimes, political turmoil, poverty and persecution.

At present it appears more urgent to promote the principles of the existing protection regime more widely and recognise the Refugee Convention as the best available to tool to protect the most needy. The Convention and Protocol offer invaluable mechanisms to many people who would otherwise remain unprotected. Furthermore, particularly in an Australian context, it is desirable to incorporate the protection clauses under other human rights instruments such as the ICCPR, the Convention against Torture, the Convention relative to the Protection of Civilians in Time of War, and the Convention of the Rights of the Child into the existing refugee determination process. This would reduce the delay and uncertainty of the current arrangements for those fleeing from torture and war.

It is not yet clear how effective the measures that have been implemented in Australia in 2001 will be in the long-term. However, with growing migration pressures in the Asia Pacific region and around the world it is most likely that the number of people willing to migrate irregularly will continue to rise, as long as Australia, along with other countries in the region, fails to address the root causes of illegal migration. Collectively and individually countries must not lose sight of the reality of migration flows. Governments need to understand that ‘international migration is inevitable. It can be managed by states but not controlled by them.’123