HUMAN RIGHTS AND OFFSHORE PROCESSING

John von Doussa*

This paper examines offshore processing arrangements through the prism of Australia's international human rights obligations. It contends that the legislative framework known as the 'Pacific Solution' and the changes to this framework proposed by the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 provide inadequate protection of the human rights of asylum seekers under the *International Covenant of Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* and the *United Nations Convention Relating to the Status of Refugees* (*Refugee Convention*).

The offshore processing arrangements established by the Pacific Solution create a system for determining the refugee status of asylum seekers which lacks many of the legal protections available to asylum seekers processed within Australia. Asylum seekers who have their claims processed within Australia have access to independent merits reviews and legal advice; asylum seekers processed offshore do not. Immigration detention centres in Australia are subject to independent scrutiny; offshore processing centres are not. Underpinning these concerns is the fact that offshore processing, by its nature, requires Australia to rely, at least to some extent, on another sovereign state to fulfil its human rights obligations.

This paper explores the human rights concerns that are raised by the particular features of offshore processing arrangements and briefly considers some of the broader concerns about the human rights compatibility of Australia's treatment of asylum seekers within Australia. It concludes that, despite some improvements to the treatment asylum seekers, Australia needs to pay more attention to the letter and the spirit of its international human rights obligations, in its approach to asylum seekers.

The History of Offshore Processing

On 29 August 2001 HMV *Tampa* sailed into Australian territorial waters carrying 433 asylum seekers and raising the politically loaded question of how Australia should respond to asylum seekers who are intercepted in Australian waters. The Federal Government's answer was the introduction of a package of legislation that has established what is now known as the Pacific Solution.[1] Under the Pacific Solution persons arriving unauthorised by boat

* QC; President, Human Rights and Equal Opportunity Commission.

in an 'excised offshore place'[2] are defined as 'offshore entry persons' and removed to 'declared countries' where their asylum claims are processed.

A declared country is a country that the Minister has declared in writing will provide access, for persons seeking asylum, to effective procedures for assessing their need for protection; protect such persons pending determination of refugee status; protect persons who are given refugee status pending their voluntary repatriation or resettlement in another country; and meet relevant human rights standards in providing that protection.[3] There is no legislative requirement that a declared country be a signatory to the *Refugee Convention*. Since the introduction of the Pacific Solution, offshore processing centres have been established in Nauru, which is not a signatory to the *Refugee Convention,* and Manus Island, in Papua New Guinea, which is a signatory subject to significant reservations.[4]

Between 2001 and 2003 a total of 1,547 asylum seekers (including twenty three babies born in offshore processing centres) were removed to offshore processing centres in Nauru and Manus Island. Of this number, 976 were found to be refugees and 500 were found not to be refugees. Of the people found to be refugees, Australia accepted 587 for resettlement, New Zealand, 360, Sweden nineteen, Canada ten, Denmark six, and Norway four.[5] Some asylum seekers processed offshore under the 'Pacific Solution' were detained for up to five years.[6] In October 2005, the Australian Government announced that almost all remaining detainees held in offshore processing centres would be transferred to mainland Australia after an independent expert report warned that their mental health was deteriorating. The last member of what the Department of Immigration and Citizenship describes as 'the original caseload' of 1,547 people left Nauru for resettlement in a Scandinavian country in February 2007.[7]

In 2005, the majority of the High Court held that a rule enabling the High Court to hear appeals from the Supreme Court of Nauru was

1 *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth), *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

2 *Migration Act 1958* (Cth) s 5(1). Curently, the excised offshore places include: Ashmore and Cartier Islands in the Timor Sea (from 8 September 2001); Christmas Island in the Indian Ocean (from 8 September 2001); Cocos (Keeling) Islands in the Indian Ocean (from 8 September 2001); all islands that form part of Queensland and are north of latitude 21° south (from 22 July 2005); all islands that form part of the Northern Territory and are north of latitude 16° south (from 22 July 2005); all islands that form part of Western Australia and are north of latitude 23° south (from 22 July 2005); the Coral Sea Islands Territory (from 22 July 2005). See Australian Immigration Fact Sheet No. 76, *Offshore Processing*, available online <http://www.immi.gov.au/media/fact-sheets/76offshore.htm.>.

3 *Migration Act 1958* (Cth) s 198A(3).

4 Papua New Guinea has made reservations to articles 17(1), 21, 22(1), 26, 31, 32 and 34 of the *Refugee Convention*.

5 Australian Immigration Fact Sheet No. 76, *Offshore Processing*, available online <http://www.immi.gov.au/media/fact-sheets/76offshore.htm>.

6 Jewel Topsfield, Michael Gordon, 'Mentally Ill refugee may leave Nauru after 5 years', *The Age* (Melbourne) 17 August 2006.

7 Above n 6.

constitutionally valid.[8] When the appeal by Mr Ruhani, an asylum seeker who had been on board Tampa and was taken to Nauru as part of the Pacific Solution, was heard, the High Court held (Kirby J dissenting) that the special purpose visa issued to Mr Ruhani, which required him to stay in one of Nauru's detention centres, was lawful and Mr Ruhani had not been illegal detained.[9]

In 2006, the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 was introduced to extend the legislative framework established by the Pacific Solution, which applied to unauthorised arrivals who arrived in an excised offshore place, to apply to all unauthorised boat arrivals, including those who reached the Australian mainland. Under the Bill, the concept of 'offshore entry persons' introduced by the Pacific Solution was replaced by 'designated unauthorised arrivals'. The effect of Bill was simple: all asylum seekers who arrived in Australia by boat and without authorisation would be processed offshore.

Although the Bill was withdrawn after it became clear that did not have the support of the Senate majority, the offshore processing arrangements introduced as part of the Pacific Solution remain intact, as do concerns about the compatibility of offshore processing with Australia's human rights obligations.[10] On the day the Bill was withdrawn eight Burmese asylum seekers were located on Ashmore Reef. Because Ashmore Reef is an 'excised offshore place' these asylum seekers claims are now being processed in Nauru. In March 2007, eighty-two Sri Lankan nationals who were intercepted trying to enter Australia near Christmas Island were transferred to the offshore processing centres in Nauru.[11] In May 2007, *The Age* reported that seven of the Burmese asylum seekers detained in Nauru have lodged an appeal on the grounds that processing asylum seekers on Nauru, with no prospect of their being resettled in Australia, is not lawful under the *Migration Act*.[12] At the time of writing, the application for special leave had not been heard by the High Court.

The Human Rights Impact of Offshore Processing

Under international law, Australia continues to be responsible for any foreseeable breach of the human rights of people whom it forcibly relocates to third countries.[13] Therefore, Australia is responsible for any breaches

8 *Ruhani v Director of Police* (2005) 222 CLR 580.
9 Ibid.
10 Legal and Constitutional Committee, Report into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.
11 Above n 6.
12 Jewel Topsfield, 'Nauru seven aim for High Court', *The Age* (Melbourne) May 2007.
13 See the decisions of the Human Rights Committee (HRC) in *GT v Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996, 4 December 1997; *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002; *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991, 18 November 1993; *Ng v Canada*, Communication No. 469/1991,

of human rights that it can foresee will occur with respect to the people who are transferred to offshore processing centres. The view of the Human Rights and Equal Opportunity Commission is that offshore processing arrangements put in place by the Pacific Solution and the arrangements that were proposed by the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 do not provide adequate safeguards to protect the rights of asylum seekers and refugees under the *Convention on the Rights of the Child,* the *International Covenant of Civil and Political Rights* (ICCPR) and the Refugee Convention.[14]

In submissions to the Commission's National Inquiry into Children in Immigration Detention (the Inquiry) the then Department of Immigration and Multicultural Affairs acknowledged that Australia has continuing obligations to persons who arrive at excised offshore places.[15] However, the offshore refugee status determination process is significantly different to the refugee status determination process for asylum seekers within Australia. The offshore refugee status assessment process does not provide for access to independent merits decision by the Refugee Review Tribunal of a negative primary decision. Instead, an 'offshore entry person' can request an internal review of the decision by a Department officer who is more senior than the one who made the primary decision. There are no further avenues for review after the senior officer finds the person is not a refugee. In submissions to the Inquiry, the Department stated that it unnecessary to offer legal assistance to offshore entry persons or persons in a declared country because the assessment process has been designed to operate without the need for any professional or legal advice for the asylum seekers.'[16]

AUSTRALIA'S OBLIGATIONS UNDER THE ICCPR

The potential for an asylum seekers to be detained for an excessive time in an offshore processing centre raises serious concerns that the detention may, by its indeterminacy, breach article 9(1) of the ICCPR which provides that no one shall be subjected to arbitrary arrest or detention. Australia's offshore processing arrangements do not address the possibility of excessive or indefinite detention in offshore processing centres. In 2005, the *Migration Act* was amended to provide a ninety day time limit on the determination of a protection visa application for asylum seekers on the mainland.[17] However, there is no maximum period for offshore processing

UN Doc CCPR/C/49/D/469/1991, 7 January 1994; *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993, 9 December 1994.

14 HREOC, Submission to the Senate Legal and Constitutional Committee Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, available online <www.hreoc.gov.au/legal/index.html>.

15 HREOC, *A Last Resort? National Inquiry into Children Immigration Detention*, April 2004 [7.8.1].

16 Ibid.

17 *Migration and Ombudsman Legislation Amendment Act 2005* (Cth) s 65A.

of claims for asylum and no maximum time in which a person who is determined to be a refugee must be resettled in a third country.

Under section 494AA of the *Migration Act* legal proceedings can not be instituted or continued in relation to the lawfulness of the detention of an offshore entry person, although it is noted this provision does not affect the jurisdiction of the High Court under section 75 of the *Constitution.* Article 9(4) of the ICCPR provides that anyone who is deprived of his or her liberty should be able to challenge the lawfulness of that detention in court. However, asylum seekers in offshore processing centres can not access an effective remedy for unlawful arbitrary detention or any other breach of their rights under the ICCPR.

In *A v Australia* the United Nations Human Rights Committee emphasised that every detention decision should be open to periodic review so that the justifying grounds can be assessed.[18] The Committee has stated that 'in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.'[19] This involves 'establishing appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law'.[20] A failure by a State Party to investigate allegations of violations can in itself give rise to a separate breach of article 2(3) of the ICCPR.[21]

Offshore processing also sits uncomfortably with Australia's obligations under Article 26 of the ICCPR. Article 26 provides that all persons are equal before the law and entitled without any discrimination to the equal protection of the law. The problem with offshore processing is it results in a distinction between the procedural rights of asylum seekers based on their mode and place of arrival. The end result arguably penalises asylum seekers who are intercepted in an offshore place.

AUSTRALIA'S OBLIGATIONS UNDER THE *CONVENTION ON THE RIGHTS OF THE CHILD*

Article 37(b) of the *Convention on the Rights of the Child* provides that the detention of children must only occur as a measure of last resort and for the shortest appropriate period of time. In 2004, the Human Rights and Equal Employment Opportunity's National Inquiry into Children in Immigration Detention Inquiry observed that it was unaware of any instances where children who had been intercepted in an excised offshore place had been presented with any option other than detention on Christmas Island, Nauru, or Manus Island in Papua New Guinea. The Inquiry concluded

18 Human Rights Committee, *A v Australia*, Communication No. 560/1993 (3 April 1997).
19 Human Rights Committee, General Comment No. 31, para 15 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006).
20 Ibid.
21 Ibid.

that 'therefore there is no evidence of detention being anything other than the first resort.'[22] The Inquiry expressed concerns about the impact of the Pacific Solution on the rights of the child, observing that

> even after the [offshore] processing has finished and the children have been recognised as refugees, there is no automatic trigger for release from detention. They have no rights to a bridging visa, nor to transfer to an alternative place of detention. The children must therefore wait in detention until a country offers them resettlement.[23]

In submissions to the Senate Legal and Constitutional Committee the Department of Immigration and Multicultural Affairs asserted that people transferred to offshore processing centres are not detained under the *Migration Act* or any other Australian law.[24] However, the Committee on the Rights of the Child defines a deprivation of liberty as 'any form of detention or imprisonment or the placement of a person in another public or private custodial setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority'.[25] Asylum seekers in offshore processing centres are subject to a legal requirement (as part of their visa arrangements in Nauru) that they reside in offshore processing centres. They are confined there for certain periods every day and must always return. Asylum seekers in offshore processing centres have no control (in any meaningful sense) over their living accommodation, their conditions nor the circumstances of their detention. There is no public access to offshore processing centres and residents are subject to supervision and monitoring by security guards.

It is arguable that offshore processing centres are, in substance, places of detention, and that Australia's offshore processing arrangements breach the principle that children should only be detained as a last resort. In any event, it is difficult to see how the decision to process the claims of children seeking asylum offshore, in circumstances which lack the same safeguards as Australia's onshore processing arrangements, can ever have been in accordance with Australia's obligation under article 3(1) of the *Convention on the Rights of the Child* to protect the best interests of the child. Offshore processing may also undermine Australia's obligations to provide 'special protection and assistance to unaccompanied asylum seeker children'[26] and to make sure that 'children seeking refugee status are granted appropriate

22 HREOC, above n 16 [6.6.4].
23 HREOC, 'Mental Health of Children in Immigration Detention', in above n 16 [9.1-9.7].
24 DIMA, Submission to the Senate Legal and Constitutional Committee Inquiry into provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, available online <http://www.aph.gov.au/senate/committee/legcon_ctte/migration_unauthorised_arrivals/submissions/sublist.htm>.
25 Committee on the Rights of the Child, *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties*, adopted by the Committee on the Rights of the Child on 11 October 1996, pt V111B(2), UN Doc CRC/C/58, 20 November 1996 [138].
26 *Convention on the Rights of the Child*, article 20.

protection and humanitarian assistance in the enjoyment of their CRC rights and also other human rights and humanitarian instruments to which the State is a party'.[27]

AUSTRALIA'S OBLIGATIONS UNDER THE *REFUGEE CONVENTION*

The prohibition on the forced return of a refugee 'to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion' contained in article 33 of the *Refugee Convention* is one of the most fundamental principles in international refugee law. The principle of non-refoulement extends beyond the terms of article 33. The UN High Commission for Refugees has held that a state will contravene its obligations under the ICCPR if it removes a person to another country in circumstances where there is a real risk that the person's rights under the ICCPR—including the right not to be arbitrarily detained—will be violated.[28]

Offshore processing arrangements do not breach the right to non-refoulement. Under article 33(1) of the *Refugee Convention* a country will still be in accordance with its obligations under this article if it sends an asylum seeker to a 'third country' which is considered to be safe and he or she will receive 'effective protection'. While the prohibition on refoulement only applies to territories where the refugee or asylum seeker would be at risk, it is considered to 'require the State proposing to remove a refugee or asylum seeker to a third country to undertake a proper assessment as to whether the third country is actually safe'.[29] The Pacific Solution places Australia in reliance on Nauru and Papua New Guinea to comply with the non-refoulement obligations that are owed by Australia to asylum seekers; a situation that is particularly problematic in light of the fact that Nauru has not ratified the *Refugee Convention* and is not bound by the principle of non-refoulement.

The UN General Assembly and the UN High Commission for Refugees Executive Committee have affirmed that the duty of non-refoulement encompasses the obligation that all asylum seekers must be granted access to fair and effective procedures for determining their protection needs. However, when the procedure for processing asylum seekers

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27 Ibid, article 22.

28 *GT v Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706 (1996); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900 (1999); *Kindler v Canada*, Communication No. 470?1991, UN Doc CCPR/C/48/D/470 (1991); *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469 (1991); *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539 (1993).

29 E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in E Feller, V Turk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), p 122 [116].

offshore lacks basic safeguards available to asylum seekers processed within Australia the practical effect of offshore processing may be to increase the risk of refoulement as a result of wrong decision making. The existing offshore refugee status determination process is not subject to the same review mechanisms as the refugee status determination process on mainland Australia. The review mechanisms contained in the Australian refugee status determination process, including the opportunity to seek independent review on the merits by the Refugee Review Tribunal, provide a vital mechanism for checking that primary decisions about refugee status are correct and reducing the risk of refoulement as a result of a wrong primary assessment. The 2005–06 Refugee Review Tribunal annual report states that the Tribunal set aside the primary decision of Department of Immigration and Multicultural Affairs in almost one case in three.[30] This is a significant indicator of the importance of an effective review process, including independent merits review and judicial review, to ensure persons who should be accorded refugee status are not wrongfully returned or expelled from Australia.

ARTICLE 31 OF THE *REFUGEE CONVENTION*

The *Refugee Convention* recognises that where people fear for their life or freedom they may be forced to enter a country of refuge unlawfully. Article 31 expressly prohibits nations from penalising refugees on account of their illegal entry where they are 'coming directly from a territory where their life or freedom was threatened'.[31] There are significant differences between Australia's offshore processing arrangements and onshore processing arrangements. Asylum seekers processed offshore do not have access to independent merits review and there are insurmountable difficulties in obtaining legal advice or assistance. There are no maximum statutory time limits for processing claims or on detention in offshore processing centres. While asylum seekers processed in Australia can apply for a range of visas, asylum seekers processed offshore can not.[32] There appears to be no objective justification on administrative grounds for differences between offshore and onshore processing arrangements.

Professor Guy Goodwin-Gill observes it has been held that 'any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty with article 31 unless objectively justifiable on administrative grounds.'[33] In April 2006, the office of the United Nations High Commissioner for Refugees, which

30 Refugee Review Tribunal (RRT), *Annual Report 2005–2006* <http://www.rrt.gov.au/>.

31 The UNHCR have stated the phrase 'coming directly' in article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, 'or from another country where his protection, safety and security could not be assured'. See UNHCR *Guidelines and Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* [4].

32 *Migration Act 1958* (Cth) ss 46, 46A.

33 Social Security Commission in Case No. CIS 4439/98, 25 November 1999.

provides guidance on the correct interpretation of the *Refugee Convention*, stated that if the offshore processing arrangements proposed by the Designated Unauthorised Arrivals Amendment Bill was 'not one that meets the same high standards Australia sets for its own processes, this could be tantamount to penalising for illegal entry'.[34] It is also arguable that if people are subject to excessively long detention as a result of the particular features of offshore processing arrangements this may constitute a penalty in breach of article 31(1).[35]

SCRUTINY OF OFFSHORE PROCESSING CENTRES

Immigration detention in Australia is subject to scrutiny from independent statutory agencies including the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman. Section 11(1)(f) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) empowers the Commission to inquire into acts or practices of the Commonwealth that may be inconsistent with or contrary to the rights set out in the human rights instruments scheduled to or declared under the Act. When conciliation is not successful or not appropriate and the Commission is of the opinion that an act or practice constitutes a breach of human rights, the Commission presents a report of its findings to the Attorney-General and the Attorney-General must table the report in Parliament. Pursuant to s 11(1)(f) the Commission has reported on a number of breaches of human rights arising from the treatment of asylum seekers in immigration detention centres in Australia.[36]

The Commonwealth Ombudsman has the power to investigate 'action relating to matters of administration' undertaken by a department of a prescribed authority.[37] This means that in the immigration and immigration detention area, the Ombudsman can investigate 'action relating to matters of administration' undertaken by Department of Immigration and Citizenship. The actions of detention service providers and the subcontractors of those service providers would be deemed to be acts of the Department . Following the introduction of the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) the Ombudsman also has the function of reviewing the cases of people who have been in immigration detention for more than two years. Under the new provisions, where a person is detained for two years, the Secretary of the Department

34 Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2004 [25].

35 G Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalisation, detention, and protection' in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 219.

36 Reports to the Minister under the HREOCA are available online at <http://www.hreoc.gov.au/legal/reports_hreoca.html.>

37 *Ombudsman Act 1976* (Cth) s 5(1).

is required to provide the Ombudsman with a 'report relating to the circumstances of the person's detention'[38] within twenty one days of the end of the two year period and on a six monthly basis thereafter.[39] The Human Rights and Equal Opportunity Commission may also consider allegations of violations of human rights made by long term immigration detainees (particularly under article 9(1) of the ICCPR) under s11(1)(f) of the *Human Rights and Equal Opportunity Commission Act*.

Independent scrutiny of immigration detention is an essential measure to guard against human rights abuses and to help ensure accountability and transparency in the immigration detention process. However, in practice offshore processing centres are not subject to the same level of independent scrutiny as immigration detention centres on the Australian mainland.

On 11 July 2002, the Commission requested that the Department of Immigration and Multicultural Affairs facilitate a visit by the Commission to the offshore processing centres on Nauru and Manus Island for the purpose of gathering evidence for the National Inquiry into Immigration Detention.[40] This request was refused by the Department on the grounds that because the *Human Rights and Equal Opportunity Commission Act* 'does not have extra-territorial effect, the Commission's Inquiry function does not extend to those facilities'.[41] The Commission's view is that its jurisdiction over acts or practices done by or on behalf of the Commonwealth is not limited to acts or practices done in the geographical area of Australia. However due to practical difficulties of conducting a visit without the support of the Department, the Commission did not proceed to visit Nauru in 2004.[42] Yet in evidence to the Legal and Constitutional Committee Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, the Department expressed its view that while the Commonwealth Ombudsman's jurisdiction does extend to the offshore processing on Nauru, the specific requirement that the Commonwealth provide reports on persons held in detention for more than two years does not apply to persons held in offshore processing centres.[43]

Irrespective of legal arguments about the Commission's extra-territorial jurisdiction, the practical reality is that offshore processing centres have not been subject to external scrutiny by the Commission or the Ombudsman. This means there has been insufficient independent analysis of the conditions in the centres. What is known does give cause for concern.

38 *Migration Act 1958* (Cth) s 486N.
39 *Migration Act 1958* (Cth) ss 486M-N.
40 In order to gather evidence for this Inquiry in 2002 HREOC visited every immigration detention centre within Australia. See above n 16, [2.1.2].
41 Ibid.
42 Committee Hansard, Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, 26 May 2006, 32–33.
43 Legal and Constitutional Committee, Report into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (June 2006) [3.61].

The UN Human Rights Committee has been highly critical of offshore processing arrangements on Nauru, observing that asylum seekers were kept 'in detention like conditions for a long period of time with no timely solutions for the refugees, who suffered considerable mental hardship'.[44] The Parliamentary Library observes that

> People in offshore processing receive no professional application assistance, and may receive limited or no access to legal advisors, media, visitors and charitable or religious assistance. In the past, Nauru did not allow visas for lawyers or journalists to access the detainees. One journalist was allowed to visit Nauru in April 2005.[45]

The report of the Legal and Constitutional Committee Inquiry concluded that

> the reporting requirements contained in the Bill are inadequate since they do not provide for any independent oversight of offshore processing arrangements. The committee believes that independent scrutiny of offshore arrangements should take place to ensure that such arrangements are subject to the same level of oversight as exists in relation to onshore processing arrangements.[46]

The Committee recommended that the Ombudsman be provided with specific powers to scrutinise offshore processing arrangements. However, the Committee observed that, no matter what oversight mechanisms were put in place, 'it would still be a matter for the Government of Nauru as to whether the Commonwealth Ombudsman would be granted a visa to travel to Nauru.'[47]

Following the Committee's report the Bill was amended to include specific provision for oversight by the Ombudsman.

The Bill provoked vigorous discussion about what safeguards should apply to offshore processing of asylum seekers. Implicit in this debate was the idea that human rights concerns about offshore processing could be alleviated by stronger safeguards. But while better safeguards can help alleviate human rights concerns, they can not cure the problem. Ultimately the problem with processing asylum seekers offshore is Australia's inability to guarantee safeguards for the fundamental reason that asylum seekers are in the territory of another sovereign state. Offshore processing creates a system in which Australia's non-refoulement obligations are not being specifically fulfilled by Australia. Instead, Australia must rely on sovereign countries to comply with its non refoulement obligation. This problem was tacitly acknowledged by the Prime Minister when he observed that

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44 United Nations News Services, 'UN Agency Will Ask Australia to Change Offshore Refuge Processing Legislation', 12 May 2006 <http://www.un.org/apps/news/story.asp?NewsID=18450&Cr=australia&Cr1=>.

45 Sue Harris Rimmer, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Department of Parliamentary Services, 22 May 2006, No.138.

46 Above n 11 [3.203].

47 Above n 11.

legislating access for the Commonwealth Ombudsman in order to provide independent oversight of offshore processing centres is not possible because it would infringe on the sovereignty of the host country.[48]

GAPS IN AUSTRALIA'S HUMAN RIGHTS PROTECTION

The debate about offshore processing arrangements occurs in the broader context of the human rights compatibility of Australia's treatment of asylum seekers. Prior to 1992, Australian law permitted the detention of certain persons who were in Australia without a valid visa but did not require it.[49] In 1992, legislation was introduced requiring mandatory detention of certain 'designated persons'. Under this legislation the detention could not exceed 273 days;[50] a time limit that was removed in 1994 when legislation was introduced stating that an unlawful non-citizen could only be released from detention on the grant of a visa, removal or deportation from Australia. The system of mandatory detention has been subject to sustained criticism, including on the grounds that prolonged detention breaches the right not to be arbitrarily detained and that mandatory detention of children breaches the rights of the child.[51]

Since the introduction of the Pacific Solution there have been significant improvements to the legislative framework which provides for the treatment of asylum seekers onshore. Amendments to the *Migration Act* introduced a ninety day limit on the determination of a protection visa application for asylum seekers on the mainland.[52] The principle that children should only be detained as a matter of last resort was introduced in the *Migration Act 1958* (Cth) and children where taken out of immigration detention centres. The Ombudsman was given greater oversight powers including the power to provide reports on people who have been held in detention more than two years.[53]

However, Australia's treatment of asylum seekers and refugees could still be improved. Australia's obligations under the *Refugee Convention* provide that Australia must 'as far as possible, facilitate the assimilation and naturalisation of refugees'. The temporary nature of the Temporary Protection Visa system is anathema to this objective. In the Commission's National Inquiry into Children in Immigration Detention one child said that being on a Temporary Protection Visa was like having a brain tumour ... 'you know you are going to die after three years.'[54] The vulnerability of refugees who flee circumstances of trauma and torture and face months,

48 Prime Minister John Howard, 'Offshore Processing' (21 June 2006) <http://www.pm.gov.au/News/media_releases/media_Release1988.html>.
49 Above n 16 [6.2].
50 *Migration Amendment Act 1992* (Cth), s 54Q(2)(b).
51 HREOC, 'Mental health of children in Immigration Detention', in above n 16, 357–454.
52 *Migration Amendment (Detention Arrangements) Act 2005*.
53 *Migration and Ombudsman Legislation Amendment Act 2005*.
54 Above n 16.

and sometimes years of uncertainty, while their claims for refugee status are assessed is obvious.

The decisions of the High Court in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH*[55] *and NBGM v Minister for Immigration and Multicultural Affairs*[56] confirm the uncertainty facing refugees holding temporary protection visas. QAAH, an Afghani national, was originally granted a temporary protection visa on the grounds that he had a well founded fear of persecution by the Taliban. After the fall of the Taliban government, the Minister's delegate refused his application for a permanent protection visa. This decision was upheld by the Refugee Review Tribunal, before being set aside by the Full Court of the Federal Court. The Federal Court held that the Minister (or the Minister's delegate or the Tribunal) must establish that the changes in the applicant's country of origin were 'substantial, effective and durable' and 'incompatible with a real chance of future Taliban persecution' before refusing to grant a permanent protection visa.

On appeal, the majority of the High Court (Gummow ACJ, Callinan, Heydon and Crennan JJ; Kirby J dissenting) held there is no burden of proof on the Minister to establish that the basis for a well founded fear no longer exists when a Temporary Protection Visa holder seeks further protection. Specifically, the Act does not require that the Minister establish that changes in the applicant's country 'substantial, effective and durable', before refusing to grant a further protection visa. In NBGM's case the majority of the High Court applied the QAAH decision. In a statement after the High Court's judgements in the QAAH and NGBM cases, the UN Human Rights Commission said that while the judgements asserted the primacy of domestic legislation, they failed to 'reflect the spirit of the legal framework for refugee protection envisaged in the 1951 Convention relating to the Status of Refugees'.[57]

In 2006, the Human Rights Committee found that the detention of an Iranian family in Curtin Immigration detention centre for over three years was in breach of one of the most fundamental of all human rights obligations—article 9(1) of the ICCPR—the right to be protected from arbitrary imprisonment.[58] This was the fifth time since 1997 that the Human Rights Committee has found that Australia's immigration detention regime does not comply with this basic standard.[59] In concluding

55 [2006] HCA 53 (Unreported, 15 November 2006).
56 [2006] HCA 54 (Unreported, 15 November 2006).
57 See UNHCR, 'UNHCR concerned about confirmation of TPV system by High Court' (Press release, 20 November 2006) <http://www.unhcr.org.au/newsreleases.shtml>.
58 *D & E v Australia*, Communication No. 1050/2002 UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006).
59 *D & E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003); *Bakhtiyari v Australia*, Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003); *C v Australia*,

that the family's detention was in breach article 9(1) the UN Human Rights Committee found that 'whatever justification there may have been for an initial detention' Australia had failed to demonstrate:

- 'that their that their detention was justified for such an extended period' or
- that compliance with Australia's immigration policies could not have been achieved by less intrusive measures.

In submissions to the Human Rights Committee, the Australian Government challenged the Committee's jurisdiction to hear the complaint arguing that the family had not exhausted domestic avenues. However the Human Rights Committee found that, because Australia's High Court had held the policy of mandatory detention was constitutional, this remedy was not effective.

While Australia's Constitution does establish a couple of important rights, other rights—like the right not to be arbitrarily detained—are notably absent. Instead, human rights 'have been granted statutory protection in a piecemeal and incomplete fashion'.[60] The decision in *Al-Kateb v Goodwin*[61] where the majority of the High Court held that the *Migration Act* permitted the indefinite detention of a failed asylum seeker who wanted to leave Australia but could not find another country to accept him, highlighted what former High Court Justice McHugh has described as the 'inability of Australian judges to prevent unjust human rights outcomes in the face of federal legislation that is unambiguous in its intent and that falls within a constitutional head of power'.[62]

MAKING RIGHTS MATTER IN THE PARLIAMENTARY PROCESS

The passage of federal legislation which has authorised the mandatory detention of children, the indefinite detention of failed asylum seekers, and the establishment of the Pacific Solution raise serious questions about whether the federal law and policy-making process pays adequate attention to Australia's international human rights obligations. While no one can question the value of federal parliamentary committees scrutinising new bills, this process is subject to fundamental limitations. The parliamentary committee process occurs after the legislation has been drafted, the policy objectives formulated and, more often than not, after politicians have publicly committed to the implementation of the bill. There is no 'human rights yardstick' which measures whether a law disproportionately infringes upon human rights. Perhaps most importantly, the government

Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

60 McHugh J, 'The Need for Agitators—The Risk of Stagnation' (speech delivered at the Sydney University Law Society Public Forum, 12 October 2005).

61 (2004) 219 CLR 652.

62 Above n 62.

is under no obligation to implement—or even respond to—a committee's recommendations.

In contrast, under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) the Victorian Government must pay attention to the human rights impact of new laws and policies: submissions to cabinet about new laws or policies must be accompanied by a Human Rights Impact Statement; new bills must be accompanied by a human rights compatibility statement; a parliamentary scrutiny committee must independently assess the human rights compatibility of new bills; and parliament must justify its actions if it decides to pass laws which are inconsistent with human rights principles.

One of the key functions of a statutory charter of rights is to integrate human rights principles into the daily decision making of the legislature and the executive and, by so doing, promote better human rights outcomes. At a Federal level, the absence of statutory requirements for the legislature and the executive to consider the human rights impacts of new laws and policies has meant that legislation which concerns the rights of asylum seekers—including legislation authorising mandatory detention of children and introducing the Pacific Solution—has not been subject to the human rights litmus test.

THE LETTER AND THE SPIRIT OF HUMAN RIGHTS PROTECTION

Australia's international reputation is judged in significant measure on whether it meets international human rights obligations. Good human rights outcomes depend on more than technical compliance with specific terms of human rights conventions and much more than hiding behind domestic legislation that does not fully reflect the scope of Australia's international obligations. Good human rights outcomes depend on the willingness of government to act in a way that is consistent with the overall scheme and objectives of those conventions.

One of the fundamental problems of offshore processing is that it undermines a global response to refugee protection. The Pacific Solution not only creates an inequitable distinction between asylum seekers who land on the Australian mainland and asylum seekers who land in an excised offshore place; it undermines the very institution of asylum. Signatories to the *Refugee Convention* are required to interpret the Convention in good faith.[63] The preamble to the *Refugee Convention* focuses on the notion of international responsibility and 'burden sharing', emphasising that international cooperation between states and with the UN Human Rights Commission is vital to deal with the problem of refugees and to prevent the resolution of the refugee problem being borne unduly by particular states.

63 Article 26 of the *Vienna Convention on the Law of Treaties* provides, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

Outsourcing refugees to safe third countries has a corrosive effect on the principle of burden sharing and international cooperation.[64] While offshore processing does not, of itself, displace Australia's non-refoulement obligation, it does make Australia's ability to meet these obligations dependent on the behaviour of other sovereign states. In the final analysis, the Pacific Solution diminishes Australia's international reputation and sets a precedent that, if it were widely adopted by other states, would undermine the international system of refugee protection.

64 UNHCR, 'The State of the World's Refugees 2006—Chapter 8, Looking to the Future: Need for Greater Responsibility-Sharing' available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.htm?tbl=PUBL&page=home&id=4444d3cf2>.