



THE UNIVERSITY OF  
NEW SOUTH WALES



FACULTY OF LAW

National Human Rights Consultation Secretariat  
Attorney-General's Department  
Central Office  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

10 June 2009

Dear Sir/Madam,

**Submission on Refugees and Asylum Seekers**

We send you the attached submission for consideration by the Consultation Committee, chaired by Father Frank Brennan AO, and also constituted by Mary Kostakidis, Mick Palmer AO APM and Tammy Williams.

This submission is made by Associate Professor Jane McAdam, Director of the International Refugee and Migration Law Project at the Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales, and her research assistant, Mr Tristan Garcia. We are solely responsible for its contents.

We acknowledge the main submission to the Committee from our colleague, Mr Edward Santow, Director of the Centre's Charter of Human Rights Project. Our submission offers supplementary arguments made in the specific context of refugees and asylum seekers.

If you have any questions relating to this submission, or if we can be of any assistance to the Consultation Committee, please do not hesitate to contact us.

Yours sincerely,

**Associate Professor Jane McAdam and Mr Tristan Garcia**  
International Refugee and Migration Law Project

## **Executive Summary**

### **Australia's human rights obligations**

- Australia has voluntarily assumed a range of human rights obligations through its ratification of international human rights instruments such as the ICCPR and the ICESCR. The failure to properly incorporate these rights into domestic law places Australia in continuing breach of its obligations under international law.
- A Human Rights Act (HRA) is important in ensuring that the rights of asylum seekers and refugees are properly protected and respected under Australian law.

### **Mandatory detention**

- The mandatory detention of asylum seekers breaches the right to freedom from arbitrary detention where there is no investigation into the individual circumstances of a person's detention. It is also essential that the treatment of detainees is consistent with Australia's human rights law obligations.
- Restricted rights of review entail that asylum seekers are unable to properly challenge the legality of their detention in court.
- The detention of children is also in breach of Australia's human rights obligations under the Convention on the Rights of the Child.

### **Temporary Protection Visas and Bridging Visa E**

- The TPV regime arguably breached the principle of non-discrimination and the right to family and freedom from arbitrary interference with family life.
- The BVE's restrictive conditions could render some asylum seekers destitute, in breach of Australia's obligation not to subject people to inhuman or degrading treatment.

### **Excision of territory from the migration zone and offshore processing**

- The excision of territory from the operation of the *Migration Act 1958* (Cth) does not relieve Australia of its obligations towards asylum seekers and refugees as a matter of international law.
- The differential treatment of asylum seekers on the basis of their mode of arrival breaches Australia's obligations under the Refugee Convention as well as the fundamental human rights principles of equality and non-discrimination.

### **Australia's complementary protection obligations**

- Until Australia codifies human rights-based *non-refoulement*, it is at risk of violating its international obligations not to return people to face the death penalty, torture, or cruel, inhuman or degrading treatment or punishment (among others).
- Reliance on ministerial discretion is inadequate to discharge Australia's protection obligations under international human rights law.

### **The right to an effective remedy for breaches of human rights**

- The failure to incorporate human rights into domestic law means that the breach of those rights is not actionable in Australian courts.
- The failure to provide an effective remedy for breaches of human rights is itself a further breach of Australia's human rights obligations.

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## Introduction

1. This submission to the National Human Rights Consultation Committee is intended as a supplement to that already provided by Mr Edward Santow on behalf of the Gilbert + Tobin Centre of Public Law. It focuses specifically on the potential benefits that a Human Rights Act (HRA) may have for asylum seekers and refugees in Australia.
2. Asylum seekers and refugees represent a particularly vulnerable and marginalized group in Australia. Strict border protection policies coupled with a serious lacuna of domestic human rights protections compound this status. This submission has two objectives. First, it details the way in which a HRA may have ameliorated the reception conditions, appeal processes and protection options in Australia in the past by examining several immigration policies that were inconsistent with Australia's international human rights obligations. Secondly, it seeks to indicate some of the areas in which a HRA may in future impact upon asylum policy in Australia. It is not suggested that a HRA alone is capable of remedying the disadvantages faced by asylum seekers and refugees.<sup>1</sup> However, as demonstrated below, it would provide a useful tool for measuring and ensuring Australia's compliance with its human rights obligations and may offer redress in circumstances where human rights are shown to have been breached. It would also facilitate the formulation of better laws and policies in relation to asylum seekers and refugees by requiring their human rights to be taken into account at the beginning of the legislative process.

## Structure of this submission

3. There are two parts to this submission. Part I provides brief background information and an overview of the human rights issues raised by asylum policy in Australia, both currently and in the past. It then demonstrates why a HRA could help to ensure that Australia meets its human rights obligations towards asylum seekers and refugees. It also provides guidance as to the scope of application that a HRA should have.
4. Part II looks at several specific areas of Australian asylum policy which have proved to be problematic from a human rights perspective. It highlights some of the gaps in the domestic incorporation of human rights which a HRA could assist in closing. Where relevant, it draws on the experience of other jurisdictions where a HRA (or similar instrument) has had a positive effect on the rights and entitlements of asylum seekers and refugees.
5. The areas covered in Part II are:
  - a. Australia's mandatory detention regime (including the detention of children);
  - b. Temporary Protection Visas (TPVs) and Bridging Visa E (BVE);

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<sup>1</sup> As to some of the other legislative changes that may be required, see Australian Human Rights Commission, *Human Rights Asylum Seekers and Refugees: Info Sheet* (February 2009), available at [http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA\\_asylum.pdf](http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA_asylum.pdf).

- c. The excision of parts of Australia's territory from the migration zone and the offshore processing regime;
- d. The absence of a complementary protection regime for people who do not meet the legal definition of 'refugee' but are entitled to protection under human rights law;
- e. The right to an effective remedy where human rights have been breached.

## Part I

### Background

6. Many of the examples used in this submission to highlight why a HRA would benefit asylum seekers and refugees are drawn from the policies of the former Howard Coalition government. It is important to note, however, that certain measures, such as mandatory detention, had been introduced by the previous Labor government.<sup>2</sup> What distinguished the years of the Howard government in relation to asylum seekers and refugees was the extent to which immigration policies were hardened, particularly in the wake of September 11 which was used to justify existing harsh measures and introduce even more draconian ones.<sup>3</sup> During this time, the government's approach to people in need of international protection was perhaps best exemplified by Prime Minister Howard's statement: 'We will decide who comes to this country and the circumstances in which they come.'<sup>4</sup>
7. The period between 1996 and mid-2001 saw the Howard government introduce a regime of temporary protection for recognized Convention refugees who had arrived 'unlawfully' (without a visa),<sup>5</sup> and the 'super' privative clause, intended to reduce the 'manipulation of Australia's judicial system by unlawful non-citizens seeking to delay their departure from Australia' by narrowing the scope of judicial review.<sup>6</sup> From late 2001 onwards, in response to the events of 11 September in the United States and the standoff with the *Tampa*, the Howard government pursued an even more hard-line approach to immigration law and policy.<sup>7</sup> This included 'Operation

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<sup>2</sup> See Jane McAdam and Kate Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum', (2008) 27 *The Australian Year Book of International Law*, 92–93.

<sup>3</sup> Ibid 93.

<sup>4</sup> Prime Minister John Howard, Address at the Federal Liberal Party Launch, Sydney, (28 October 2001).

<sup>5</sup> *Migration Amendment Regulations 1999* (Cth).

<sup>6</sup> *Migration Amendment (Judicial Review) Act 2001* (Cth), s 474; Philip Ruddock, 'The Broad Implications for Administrative Law under the Coalition Government with Particular Reference to Migration Matters' in John McMillan (ed), *Administrative Law under the Coalition Government* (Australian Institute of Administrative Law, Canberra, 1997) 18.

<sup>7</sup> McAdam and Purcell, above n 2, 93. This hardening of attitude towards refugees and asylum seekers is not specific to Australia and can be witnessed in a range of other liberal democracies. Janet Dench and François Crépeau have commented:

The events of September 11 2001 have provided the opportunity for besmirching their [refugees and asylum seekers] reputation even further. The refugee was a very sympathetic in the years that followed the Indochinese exodus. She is now regarded with suspicion. Is she bogus? Is she a criminal or a terrorist? If we can't know for sure, we now think that we are better to protect

Relax', the excision of areas from the Australian migration zone, and the 'Pacific Solution', later renamed the 'Pacific Strategy'.

8. While Australia has a sovereign right to determine who enters its territory, this right is not absolute. It is limited by the obligations that Australia has accepted voluntarily under international law. International refugee law, in combination with international human rights law, limits Australia's right to determine who can enter its territory—both in relation to the point of admission to the territory, and in subsequent State actions relating to the treatment of asylum seekers and refugees. It further mandates that individuals must not be subjected to—and also must not be sent back to another country to face—persecution, torture, or cruel, inhuman or degrading treatment or punishment. Because of Australia's dualist system, whereby rights deriving from international law can only be claimed domestically if they are contained in a domestic statute, individuals have had little recourse to Australian courts to secure respect for their basic human rights owing to the absence of a domestic human rights instrument on which to base such a claim.<sup>8</sup>

### Why is a HRA needed?

9. Despite the lack of human rights protections in domestic law, Australia's human rights record is generally regarded as being quite good. There are serious exceptions to this, however, and Australia's treatment of asylum seekers and refugees in particular has been extensively criticized both domestically and internationally for its failure to comply with human rights law.<sup>9</sup> The National Human Rights Consultation provides a unique opportunity for the Australian public to engage in constructive dialogue concerning how better to protect the human rights of people in Australia. A HRA provides an important opportunity for Australia to 'bring home' its international obligations by enacting legislation to fulfill the commitments it has already made to the international community through its ratification of human rights instruments. As might be expected, the deficiency of human rights protections in domestic law is most

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ourselves at the expense of the refugee. The benefit of the doubt has suddenly become a dangerous concept.

Janet Dench and François Crépeau, 'Interdiction at the Expense of Human Rights: A Long-Term Containment Strategy', (2003) 21(4) *Refugee* 1.

<sup>8</sup> This is why some individuals have brought claims against Australia before the UN Human Rights Committee and the UN Committee against Torture. While their 'views' may cause political embarrassment to States, they are not formally binding.

<sup>9</sup> See, for example, Human Rights Committee, *Concluding Observations on Reports Submitted by States Parties: Australia*, (7 May 2009), UN Doc CCPR/C/AUS/CO/5, [23]; *C v Australia*, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, (22 May 2008), UN Doc CAT/C/AUS/CO/3; UN Committee on Economic, Social and Cultural Rights, Forty-second session, *Concluding Observations*, (22 May 2009), UN Doc E/C.12/AUS/CO/4, [30]; Committee on the Rights of the Child, *Concluding Observations: Australia*, (2005), UN Doc CRC/C/15/add.268, [64]. Australian Human Rights Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, (2004) available at [http://www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/index.html](http://www.humanrights.gov.au/human_rights/children_detention_report/index.html); and Australian Human Rights Commission, *2008 Immigration Detention Report* (2009), available at [http://www.hreoc.gov.au/Human\\_Rights/immigration/ide2008.html](http://www.hreoc.gov.au/Human_Rights/immigration/ide2008.html).

acutely experienced by disadvantaged and vulnerable groups within Australian society, particularly those who are heavily dependent on the provision of government assistance and services, such as asylum seekers and refugees.

10. Australia's failure to incorporate the human rights commitments that it has voluntarily undertaken by signing and ratifying treaties places it in breach of its obligations under international law. This obligation is clearly set out in article 2(2) of the International Covenant on Civil and Political Rights<sup>10</sup> which states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

11. In addition, Australia must comply with its international human rights obligations in good faith, and cannot justify any failure to comply with them on the existence of contrary domestic law, or on arguments based on claims to sovereignty.<sup>11</sup> As Elizabeth Evatt noted on the occasion of the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights:

Unless human rights principles are given effective legal status, the Courts cannot assess whether laws and policies are compatible with rights, and neither the legislature nor the executive has a standard to guide it in the formation of those laws and policies. Without legally effective human rights, we cannot be sure that we are meeting our international obligations.<sup>12</sup>

12. The need for a HRA in Australia was made abundantly clear by the well-known case of *Al-Kateb*, where the High Court held by a majority that there was nothing in the Australian Constitution (or other laws) which prevented the Australian government from keeping an unlawful non-citizen in detention indefinitely, even though this is contrary to Australia's obligations under international human rights law.<sup>13</sup> As Justice McHugh stated:

As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by Parliament is not examinable in this Court or in any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether

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<sup>10</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

<sup>11</sup> Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 115 UNTS 331, arts 26 and 27.

<sup>12</sup> Speech by Elizabeth Evatt to mark the 60<sup>th</sup> Anniversary of the Universal Declaration of Human Rights, available at <http://www.dtp.unsw.edu.au/documents/EEvattaddress.pdf>, 5.

<sup>13</sup> See *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); ICCPR, art 9.

the law of the Parliament is within the powers conferred on it by the Constitution.<sup>14</sup>

13. A HRA would benefit asylum seekers and refugees by making the human rights obligations already accepted by Australia under international law enforceable in domestic law.<sup>15</sup> It would assist the government to ensure that the laws and policies it seeks to implement are consistent with such obligations, since human rights issues would likely be considered during the course of policy development and legislative drafting.<sup>16</sup> This is particularly important in the area of asylum where the fundamental rights of individuals are at stake. Similarly, a HRA could have benefits in relation to administrative decision-making (of which migration and refugee law is part), since decision-makers would be required to take an individual's human rights into account.<sup>17</sup> Concerns relating to administrative decision-making in the immigration context have been highlighted in successive reports.<sup>18</sup> For example, the Palmer Report into the deportation of Cornelia Rau found that:

- a. there were 'serious problems with the handling of immigration detention cases [that] stem from deep-seated cultural and attitudinal problems' within the Immigration Department's immigration compliance and detention areas;
- b. immigration officials were exercising extraordinary powers 'without adequate training, without proper management and oversight, with poor information systems, and with no genuine quality assurance and constraints on the exercise of these powers';
- c. many immigration officials received 'little or no relevant formal training and seem[ed] to have a poor understanding of the legislation they are responsible for enforcing, the powers they are authorised to exercise, and the implications of the exercise of those powers'; and
- d. officers responsible for detaining people suspected of being unlawful non-citizens 'often lack[ed] even basic investigative and management skills'.<sup>19</sup>

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<sup>14</sup> *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562, 595 [74].

<sup>15</sup> Precisely how would depend on the particular model chosen, for example through a declaration of incompatibility or similar mechanism. These issues are comprehensively addressed in Part 3 of the primary submission of the Gilbert + Tobin Centre, available at [http://www.gtcentre.unsw.edu.au/news/docs/NHRC\\_Submission.pdf](http://www.gtcentre.unsw.edu.au/news/docs/NHRC_Submission.pdf).

<sup>16</sup> For example, all EU legislative policy proposals are subject to a human rights impact assessment. See eg Helen Toner, 'Impact Assessments: A Useful Tool for Better Lawmaking in EU Immigration and Asylum Law', in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy* (Hart Publishing, Oxford and Portland, 2007); Helen Toner, 'Impact Assessments and Fundamental Rights Protection in EU Law' [2006] 3 *European Law Review* 316.

<sup>17</sup> These issues are dealt with at length in the primary submission of the Gilbert + Tobin Centre, above n 15, 39–49.

<sup>18</sup> See, for example, the *Palmer Report*: Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005), available at <http://www.immi.gov.au/media/publications/pdf/palmer-report.pdf> ('Palmer Report'); and Commonwealth Ombudsman, 'Ombudsman Releases Three Reports on Immigration Detention' (Press Release, 6 December 2006), available at [http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/mediarelease\\_2006\\_15](http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/mediarelease_2006_15).

<sup>19</sup> *Palmer Report*, above n 18, [9], [14], [15], [17].



14. Finally, protecting human rights through the adoption of domestic legislation would not only bring Australia into line with most other western democracies, but would also help to counter Australia's intellectual isolation with respect to the development of international human rights law. As Justice Kirby observed in *QAAH*, if the High Court ignores international commentary on the Refugee Convention, it

reduces its own capacity for accurate decision-making. ... It risks adopting interpretations of the Convention that put it at odds with the courts of other State parties engaged in the interpretation of the treaty. And it reveals a degree of parochialism that, unless clearly warranted by the peculiarities of domestic law, is inappropriate to the legal task of interpreting, and giving effect to, the provisions of an international treaty which Australia has opted to ratify and which it has incorporated by reference into its federal law.<sup>20</sup>

15. While Australia will no doubt be able to borrow heavily from the development of human rights jurisprudence overseas (indeed, reference to such jurisprudence is entirely appropriate, as Kirby J's remarks above suggest), it is also important that Australia is actively involved in discussions about the interpretation of rights and the setting of international human rights standards. Adopting a HRA would send a clear signal that Australia is 'coming in from the cold' with respect to its relationship with the international human rights framework.<sup>21</sup>

### What rights need protecting?

16. It is now widely accepted that human rights are *universal, indivisible, interdependent and interrelated*.<sup>22</sup> Whether they are expressed as civil and political rights or as economic, cultural and social rights, the fundamental notion underpinning human rights is that they are derived from the inherent dignity of every human being.<sup>23</sup>
17. As set out in Recommendation 1 of the primary submission of the Gilbert + Tobin Centre, an Australian HRA should incorporate the rights contained in the ICCPR, as

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<sup>20</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53, (2006) 231 CLR 1, 30 [81].

<sup>21</sup> See the speech of Attorney-General Robert McClelland at the Australian Human Rights Commission entitled, 'Australia's International Human Rights Engagement: Coming in from the Cold?' available at [http://www.hreoc.gov.au/legal/seminars/speeches/robert\\_mcclelland\\_may08.html](http://www.hreoc.gov.au/legal/seminars/speeches/robert_mcclelland_may08.html). See also the speech by Gillian Triggs which discusses the notion of 'intellectual isolation': [http://www.hreoc.gov.au/legal/seminars/speeches/gillian\\_triggs\\_may08.html](http://www.hreoc.gov.au/legal/seminars/speeches/gillian_triggs_may08.html). This argument was also made in a speech by NSW Chief Justice Spigelman as long ago as 1999, available at [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman\\_221099](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_221099).

<sup>22</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14–25 June 1993, UN Doc A/CONF.157/23, [5] available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument).

<sup>23</sup> On the concept of dignity and human rights, see Christopher McCrudden, 'Human Dignity and Judicial Interpretations of Human Rights', (2008) 19 *European Journal of International Law* 655; and Paolo G Carroza, 'Human Dignity and Judicial Interpretations of Human Rights: A Reply', (2008) 19 *European Journal of International Law* 931.

well as the core ICESCR rights,<sup>24</sup> on the grounds that blanket prioritization of civil and political rights at the expense of economic, social and cultural rights is not in keeping with modern conceptions of rights.<sup>25</sup> Nor does such a distinction adequately respond to the needs of the Australian community.<sup>26</sup> Furthermore, as noted above at paragraph 10, this would bring Australia into line with its international obligation to incorporate these treaties in domestic law.

18. The inclusion of core economic, social and cultural rights is of particular importance for guaranteeing asylum seekers and refugees access to housing, health, work and education, rights that currently may be restricted depending on a person's visa status (see below in relation to Bridging Visa E).<sup>27</sup> Including such rights in a HRA would ensure that asylum seekers and refugees have access to a minimum level of services and reception conditions, and administrative decision-makers would have to take into account the potential impact of their decisions on an individual's human rights.<sup>28</sup>
19. Australia's treatment of asylum seekers and refugees raises many human rights issues, not all of which are considered in detail in this submission. Relevant rights contained in the ICCPR include:
  - a. the right to an effective remedy for breaches of human rights (article 2);
  - b. the right to life (article 6);
  - c. the right to freedom from torture and cruel, inhuman or degrading treatment or punishment (including the right not to be sent back to face such treatment) (article 7);
  - d. the right to be treated with humanity and respect for the inherent dignity of the human person when deprived of liberty (article 10);
  - e. the right to freedom from arbitrary detention (article 9);
  - f. the right to freedom of movement (article 12);
  - g. procedural rights against expulsion (article 13);
  - h. the right to recognition before the law (article 16);
  - i. the right not to be subject to arbitrary or unlawful interference with privacy or family (article 17);
  - j. the right to protection of the family (article 23);

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<sup>24</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

<sup>25</sup> As the primary submission also makes clear, mechanisms could be incorporated into the HRA to ensure that Courts do not overstep their role in the interpretation of economic, social and cultural rights. See the primary submission of the Gilbert + Tobin Centre of Public Law, above n 15, 18–19. In the context of refugee claims specifically, see Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge, 2007).

<sup>26</sup> Primary submission of the Gilbert + Tobin Centre, above n 15, Part I.

<sup>27</sup> While the government would still have the discretion to limit the degree of access, this would have to be justified in the particular circumstances and not amount to discrimination. See further Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007) 220–23; Joan Fitzpatrick, 'The Human Rights of Migrants', Conference on International Legal Norms and Migration (Geneva, 23–25 May 2002) 4, available at [http://heiwwww.unige.ch/conf/psio\\_230502/files/fitzpatrick.doc](http://heiwwww.unige.ch/conf/psio_230502/files/fitzpatrick.doc).

<sup>28</sup> See the primary submission of the Gilbert + Tobin Centre, above n 15, 45–49.

- k. the rights of children (article 24; see also the Convention on the Rights of the Child<sup>29</sup>); and
- l. the right to equal protection before the law and non-discrimination (article 26).

20. Relevant rights contained in the ICESCR include:

- a. the right to work, as well as the right to just and favourable conditions of work (articles 6 and 7);
- b. the right to social security (article 9);
- c. the right of the family to the 'widest possible protection and assistance' (article 10);
- d. the right to an adequate standard of living (including food, clothing and housing) (article 11);
- e. the right to the highest attainable standards of physical and mental health (article 12); and
- f. the right to education (article 13).

21. With some exceptions, most of these rights are not absolute. This means that they may be weighed against other competing 'legitimate' interests, such as national security, public order, public health or morals, and the rights and freedoms of others.<sup>30</sup> There is considerable jurisprudence from the European Court of Human Rights on how such rights ought to be balanced which could be instructive for the Australian context. Australia presently has no legal mechanism for balancing individual rights against State interests. For example, the courts are currently unable to balance an individual's right not to be subjected to arbitrary detention (ICCPR, article 9) against the State's 'legitimate' interest to control immigration. A HRA would provide a mechanism through which conflicting rights could be properly balanced and adjudicated. It is therefore wrong to view a HRA as simply conferring unfettered rights.

### **Scope of application of a HRA**

22. As stated in the primary submission of the Gilbert + Tobin Centre, a HRA should 'protect and promote the rights of all individuals who are subject to Australia's jurisdiction, irrespective of the individual's citizenship or other status, and irrespective of whether they are located outside Australia's territory (but remain subject to its jurisdiction)'.<sup>31</sup> This is because international human rights law applies to all people within a State's territory or jurisdiction, regardless of their status. It is also important that immigration is not 'carved out' of the sphere of operation of the HRA,

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<sup>29</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 ('CRC').

<sup>30</sup> See, for example, ICCPR, art 12(3).

<sup>31</sup> Above n 15, 54. See also Recommendation 2 of the Human Rights Law Resource Centre Submissions to the National Human Rights Consultation, available at <http://www.hrlrc.org.au/files/hrlrc-submission-a-human-rights-act-for-australia.pdf>, [265].

as to do so would undermine Australia's commitment to implementing human rights domestically.<sup>32</sup>

23. Making a HRA applicable to all individuals within Australia's jurisdiction is consistent with the principle of non-discrimination, which underpins human rights law as a whole. Such an approach is also in keeping in with the conception of human rights as universal. Article 2(1) of the ICCPR requires that the rights contained in that instrument be enjoyed by all people within a State's territory and subject to its jurisdiction *without distinction of any kind*. As discussed in Part II below, the excision of certain areas from the migration zone arguably breaches this obligation. While in limited circumstances human rights law permits distinctions to be made with respect to the content of particular rights (such as between citizens and non-citizens),<sup>33</sup> as a general principle the system of international human rights protections is premised on rights attaching to individuals by virtue of their inherent dignity as human beings, rather than their status or location.
24. Ensuring that a HRA is applicable to all persons within Australia's jurisdiction is also particularly important in the immigration context in light of Australia's close co-operation with regional neighbours, such as Indonesia,<sup>34</sup> and the on-going use of Christmas Island as an immigration detention facility. The importance of a HRA applying in the manner outlined above is also underscored by the *Tampa* incident in 2001. Had a HRA been in place at the time, it would have circumscribed the actions of Australian authorities once the ship was within Australian territorial waters (and, in particular, when members of the Australian Defence Force boarded the vessel).<sup>35</sup> As Brouwer and Kumin have noted:

Whether on land or at sea, the extension of state enforcement mechanisms beyond state territory carries with it an obligation to ensure international protection for those who require it, and must be exercised within the parameters of international law.<sup>36</sup>

25. Furthermore, even once the asylum seekers were removed to Nauru for processing, their treatment would have needed to be in accordance with the HRA insofar as they remained subject to Australia's jurisdiction. As the UN Human Rights Committee has stated:

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<sup>32</sup> It is noted that s 52 of the *Disability Discrimination Act 1992* (Cth) currently excludes that Act from applying to the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth). This has most recently been criticized by the Committee on Economic Social and Cultural Rights in its report card on Australia released on 22 May 2009, UN Doc E/C.12/AUS/CO/4, [16].

<sup>33</sup> Office of the United Nations High Commissioner for Human Rights, *The Rights of Non-Citizens* (2006), 7, available at <http://www.ohchr.org/Documents/Publications/noncitizensen.pdf>. See also [83]–[88] below.

<sup>34</sup> Indonesia is not currently a party to the Refugee Convention. See UNHCR, *Views on the effect of effective protection as it relates to Indonesia* (2 December 2004), available at <http://www.unhcr.org.au/UNHCR-protlegal-EPIndonesia.shtml>.

<sup>35</sup> See Andrew Brouwer and Judith Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide', (2003) 21(4) *Refuge* 6, 13–14, and the discussion therein concerning the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>36</sup> *Ibid*, 14.

it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant [ICCPR] as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.<sup>37</sup>

26. In order to safeguard the rights of asylum seekers and refugees, a HRA should also apply to private sector entities performing the functions of public authorities.<sup>38</sup> This would ensure that private companies contracted to perform services in immigration detention facilities are subject to the provisions of the HRA, thus avoiding the possibility of a government seeking to ‘contract out’ its obligations under the HRA.<sup>39</sup> The importance of this in the context of detention facilities is borne out by the range of complaints that have been made to the Australian Human Rights Commission concerning the provision of services in immigration detention by private companies.<sup>40</sup>

## Part II

### Mandatory Detention

27. The detention of individuals who have breached domestic immigration law is an intensely political issue in Australia and elsewhere.<sup>41</sup> Australia is, however, the only country to have a system of mandatory detention for people who are ‘unlawful’—that is, people who do not have a valid visa. International human rights law has an important role to play in establishing the limited circumstances in which a person may be detained and what constitutes acceptable standards of treatment during detention. The deprivation of liberty strikes at the very heart of human rights protections, since without liberty a person is unable to enjoy other rights. An explicit HRA provision concerning freedom from arbitrary detention would represent a considerable advance on the current situation in Australia, given that the High Court has repeatedly found that the government has the power to detain asylum seekers in contravention of their human rights.<sup>42</sup>

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<sup>37</sup> See the case of *Lopez v Uruguay* (29 July 1981) 68 ILR 29, [12.3]. State responsibility can be both joint and several.

<sup>38</sup> Gilbert + Tobin Centre primary submission, above n 15, 53–54.

<sup>39</sup> Note that under the Articles on State Responsibility, above n 35, a State can contract out the performance of an obligation, but not the obligation itself: arts 5–9.

<sup>40</sup> See, for example, HREOCA Report 39, *Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia (Department of Immigration and Citizenship, formerly the Department of Immigration and Multicultural and Indigenous Affairs) and GSL (Australia) Pty Ltd* (2007), available at [http://humanrights.gov.au/legal/HREOCA\\_reports/hrc\\_report\\_39.html](http://humanrights.gov.au/legal/HREOCA_reports/hrc_report_39.html); and HREOCA No 35, *Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention*, (2006) available at [http://humanrights.gov.au/legal/HREOCA\\_reports/hrc\\_report\\_35.html](http://humanrights.gov.au/legal/HREOCA_reports/hrc_report_35.html).

<sup>41</sup> See Nicholas Blake and Raza Husain, *Immigration, Asylum and Human Rights* (Oxford University Press, Oxford, 2003) [3.1].

<sup>42</sup> See *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562.

28. Australia's system of mandatory detention has been strongly criticized for many years, both domestically and internationally, for breaching the right to freedom from arbitrary detention contained in article 9(1) of the ICCPR.<sup>43</sup> Australia also has obligations under article 31 of the Refugee Convention not to impose 'penalties' on refugees for their illegal entry where they come directly from a territory where their life or freedom was threatened, provided they present themselves without delay and show good cause for their illegal entry or presence.<sup>44</sup> The term 'penalties' is not defined in the Refugee Convention, prompting the question whether it encompasses only criminal sanctions, or whether it also extends to administrative penalties (such as administrative detention). Following the UN Human Rights Committee's reasoning that the term 'penalty' in article 15(1) of the ICCPR must be interpreted in light of that provision's object and purpose,<sup>45</sup> article 31 warrants a broad interpretation reflective of its aim to proscribe sanctions on account of illegal entry or presence. An overly formal or restrictive approach is inappropriate, since it may circumvent the fundamental protection intended.<sup>46</sup> Thus, measures such as arbitrary detention<sup>47</sup> or

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<sup>43</sup> See the Report of the *UN Working Group on Arbitrary Detention: Visit to Australia*, UN Doc E/CN.4/2003/8/Add.2 (2002), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/6035497b015966fec1256cc200551f19/\\$FILE/G0215391.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/6035497b015966fec1256cc200551f19/$FILE/G0215391.pdf). See, for example, the views of the Human Rights Committee in the following cases: *D & E v Australia*, UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (6 August 2003); *Bakhtiyari v Australia*, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003); *C v Australia*, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); *Shams et al v Australia*, UN Doc CCPR/C/90/D/1255 (11 September 2007); *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006). See further the comments made by the UN Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, 22 May 2008, UN Doc CAT/C/AUS/CO/3. See also UN Committee on Economic, Social and Cultural Rights, Forty-second session, Concluding Observations, (22 May 2009), UN Doc E/C.12/AUS/CO/4, [30]. Committee on the Rights of the Child, *Concluding Observations: Australia*, (2005), UN Doc CRC/C/15/add.268, [64]. The Australian Human Rights Commission has also released numerous reports dealing with issues of detention, including the *2008 Immigration Detention Report*, above n 9; and *A Last Resort?* above n 9.

<sup>44</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150; and Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (collectively referred to as 'Refugee Convention'). For commentary on art 31, see Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press, Oxford, 2007) 264–67.

<sup>45</sup> *Van Duzen v Canada* Comm No 50/1979, UN Doc CCPR/C/15/D/50/1979 (7 April 1982) [10.2]; see also Torkel Opsahl and Alfred de Zayas, 'The Uncertain Scope of Article 15(1) of the International Covenant on Civil and Political Rights' (1983) *Canadian Human Rights Yearbook* 237.

<sup>46</sup> See, for example, the Decision of the Social Security Commissioner (UK) in Case No CIS 4439/98 (25 November 1999) [16], where Commissioner Rowland found that *treatment* less favourable than that accorded to others, which is imposed on account of illegal entry, constitutes a penalty under art 31, unless it is objectively justifiable on administrative grounds.

<sup>47</sup> See Expert Roundtable, 'Summary Conclusions: Article 31 of the 1951 Convention' (8–9 November 2001), [11(a)], in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) 256: 'For the purposes of Article 31(2), there is no distinction between restrictions on movement ordered or applied *administratively*, and those ordered or applied *judicially*. The power of the State to impose a restriction must be related to a recognized object or purpose, and there must be a



procedural bars on applying for asylum may constitute ‘penalties’.<sup>48</sup> This is supported by UNHCR Executive Committee Conclusion No 22 (1981), which states that asylum seekers should ‘not be penalised or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful’. Detention is equivalent to a penal sanction wherever basic procedural safeguards are lacking (such as no rights to review, or where detention is of an excessive duration), and thus the distinction between a ‘penal’ and an ‘administrative’ sanction becomes irrelevant. The question to be asked is whether detention is, in the individual case, justified by law and reasonable and necessary in a democratic society, or whether it is arbitrary, unjust, or discriminatory.<sup>49</sup>

29. From a human rights perspective, the following features of mandatory immigration detention may give rise to the conclusion that it is arbitrary:

- a. It is a blanket policy and, as such, there is no consideration of the particular circumstances of each detainee’s case;
- b. It cannot be demonstrated that with regard to each individual, there were no less restrictive means of achieving the government’s desired outcome;
- c. The length of detention, particularly in circumstances where it could continue indefinitely, cannot necessarily be justified by reference to a detainee’s particular circumstances; and
- d. The opportunities for review of the lawfulness of the detention are either non-existent or inadequate.<sup>50</sup>

30. Since the change of government in November 2007, significant reforms have been announced which improve Australia’s treatment of asylum seekers and refugees from a human rights perspective.<sup>51</sup> Nevertheless, there remain several areas of considerable concern.<sup>52</sup> Despite issuing a policy on ‘New Directions in Detention’, much of the

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reasonable relationship of proportionality between the end and the means. Restrictions on movement must not be imposed unlawfully and arbitrarily.’ (*emphasis added*).

<sup>48</sup> Note Executive Committee Conclusion No 15 (1979) [(i)]: ‘While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration’.

<sup>49</sup> Goodwin-Gill and McAdam, above n 44, 463.

<sup>50</sup> See also the Report of the UN Working Group on Arbitrary Detention following its visit to Australia: UN Doc E/CN.4/2003/8.Add 2 (2002) available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/6035497b015966fec1256cc200551f19/\\$FILE/G0215391.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/6035497b015966fec1256cc200551f19/$FILE/G0215391.pdf); *A v Australia* (560/1993) 30 March 1997, UN Doc. CCPR/C/59/D/560/1993. See further HRLRC, *Freedom Respect Equality Dignity: Action, NGO Submission to the Human Right Committee: Australia’s Compliance with the International Covenant on Civil and Political Rights*, September 2008, available at <http://www.hrlrc.org.au/files/5DNA04XRH/NGO%20Report%20on%20Australia%20to%20HRC%20-%20Final.pdf>, 125 and the references cited therein.

<sup>51</sup> See eg ‘New Directions in Detention, Restoring Integrity to Australia’s Immigration System’, speech by Minister Chris Evans, available at <http://www.chrisevans.alp.org.au/news/0708/immispeeches29-01.php>; Immigration Minister Chris Evans, ‘Budget 2009–10—Humanitarian Program’, *Media Release*, (12 May 2009), available at <http://www.alp.org.au/media/0509/msimmc123.php>.

<sup>52</sup> The Rudd government has also taken the positive step of introducing a Bill aimed at abolishing the detention debt regime. In November 2008 the Minister introduced the *Migration Amendment (Abolishing*

law itself remains unchanged. For example, there is no reason in law why children may not once again be detained in immigration detention facilities, since the *Migration Act* provides only that it should be a matter of ‘last resort’.<sup>53</sup>

31. The Australian Labor Party has committed itself to reforming immigration detention in accordance with international human rights obligations. This is evidenced in its *National Platform and Constitution* which states: ‘Labor will adhere to Australia’s international human rights obligations and will seek to have them incorporated into the domestic law of Australia’.<sup>54</sup> In announcing policy changes in July 2008, Immigration Minister Chris Evans noted:

Enormous damage has been done to our international reputation. On 14 occasions over the last decade, the United Nations Human Rights Committee made adverse findings against Australia in immigration detention cases, finding that the detention in those cases violated the prohibition on arbitrary detention in article 9(1) of the International Covenant on Civil and Political Rights.<sup>55</sup>

32. The Minister went on to set out the government’s ‘seven key immigration values’:

- a. Mandatory detention is an essential component of strong border control.
- b. To support the integrity of Australia’s immigration program, three groups will be subject to mandatory detention:
  - i. All unauthorized arrivals, for management of health, identity and security risks to the community;
  - ii. Unlawful non-citizens who present unacceptable risks to the community; and
  - iii. Unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
- c. Children, including juvenile foreign fishers, and, where possible, their families, will not be detained in an immigration detention centre.
- d. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.
- e. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
- f. People in detention will be treated fairly and reasonably within the law.

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*Detention Debt*) Bill 2009. See the Press Release of the Immigration Minister, Chris Evans, available at <http://www.minister.immi.gov.au/media/media-releases/2009/ce09031.htm>.

<sup>53</sup> See s 4AA *Migration Act 1958* (Cth) and below at [33]–[35]. See further, Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Themis Press, Sydney, 2006).

<sup>54</sup> Australian Labor Party, *2007 National Platform and Constitution*, adopted by the 44th National Conference in Sydney on 27–29 April 2007, available at <http://www.alp.org.au/platform/index.php>, 206–26.

<sup>55</sup> ‘New Directions in Detention, Restoring Integrity to Australia’s Immigration System’, speech by Minister Chris Evans, available at <http://www.chrisevans.alp.org.au/news/0708/immispeeches29-01.php>.



- g. Conditions of detention will ensure the inherent dignity of the human person.<sup>56</sup>
33. As is apparent from this list of ‘values’, the government is seeking to reserve considerable flexibility in the application of its detention policy. This is very different from legislative entrenchment of ‘rights’, which is necessary if Australia is to demonstrate compliance with its international obligations. To take one example, the values only stipulate that children will not be held in immigration detention centres ‘where possible’—a position which essentially mirrors the current situation under section 4AA of the *Migration Act*.<sup>57</sup> According to Immigration Department statistics, as at 15 May 2009, 82 children remained in immigration detention, including 27 detained under residence determinations (not technically ‘detention’ under the Act), 50 in alternative temporary detention in the community,<sup>58</sup> four in immigration residential housing, and one in immigration transit accommodation.<sup>59</sup> In total, some 789 people were in immigration detention as at 15 May 2009, 334 of them at the Christmas Island facility.<sup>60</sup>
34. The issue of children in detention has been particularly heated in Australia. The adverse effects of children being kept in immigration detention centres, in some cases for up to five years, have been well-documented. In 2004 the Australian Human Rights Commission released a comprehensive report examining Australia’s compliance with the CRC, finding that the system of mandatory detention breached children’s human rights. The report detailed countless disturbing stories of the impact that prolonged detention had on children’s physical and mental well-being.<sup>61</sup> It found that children in immigration detention suffered from anxiety, distress, bed-wetting, suicidal ideation, and self-destructive behaviour, including attempted and actual self-harm (through hunger strikes, attempted hanging, slashing, swallowing shampoo or

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<sup>56</sup> Ibid.

<sup>57</sup> Section 4AA(1) states: ‘The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort’. Subsection 2 stipulates that ‘For the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination’.

<sup>58</sup> This includes detention in the community with a designated person in private houses/correctional facilities/watch houses/ hotels/ apartments/foster care/hospitals, although the Department of Immigration statistics do not specify in which of these alternatives the 52 children are currently being held.

<sup>59</sup> The Department of Immigration undertakes to supply weekly updates on the statistics of those held in detention. At the time of writing the most recent are those for 15 May 2009, available at <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/>.

<sup>60</sup> *The Australian* reported on 24 May 2009 that a boat carrying 77 suspected asylum seekers was intercepted by the Australian navy and transported to Christmas Island so that all those on board could undergo health and security checks: ‘Suspected asylum seekers moved to Christmas Island’, *The Australian* (24 May 2009) available at <http://www.theaustralian.news.com.au/story/0,25197,25530302-2702,00.html>; see also ‘900 boatpeople seized en route in Indonesia’, *The Australian* (27 May 2009) available at <http://www.theaustralian.news.com.au/story/0,25197,25544176-25837,00.html>. The Australian Human Rights Commission recommended in its 2008 *Immigration Detention Report* that Christmas Island should not be used to hold people in immigration detention: above n 9.

<sup>61</sup> See, *A Last Resort?*, above n 9, Chapter 9 and the case studies set out therein.

detergents, and lip-sewing). Furthermore, some children were also diagnosed with psychological illnesses, such as depression and post-traumatic stress disorder.<sup>62</sup>

35. The Australian Human Rights Commission has also recently reported on the adverse psychological effects that detaining children in immigration residential housing and immigration transit accommodation can have.<sup>63</sup> Professor Mary Crock of the University of Sydney has compiled a comprehensive report on unaccompanied children seeking asylum in Australia, which provides additional evidence of ill-treatment.<sup>64</sup>

### **Preventing detention that is arbitrary: rights of review**

36. The rights of review for people held in immigration detention, and particularly those processed offshore (see below), have been severely restricted in the past. In the second reading speech before the Senate in relation to the *Migration Legislation Amendment (Judicial Review) Bill 1998* (Cth), the Parliamentary Secretary for the former Immigration Minister noted that the purpose of the Bill was ‘to give legislative effect to the government’s election commitment to reintroduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances’.<sup>65</sup>
37. Section 189(1) of the *Migration Act* requires an Immigration Department officer or a police officer to detain any person he or she knows or reasonably suspects to be an unlawful non-citizen. Section 196(1) provides that an unlawful non-citizen detained under section 189(1) must be kept in immigration detention until removed from Australia, deported, or granted a visa. The detention of unlawful non-citizens is therefore prescribed by the operation of law and not by an order of a court or administrative authority. Article 9(4) of the ICCPR requires that a person be able to challenge the legality of his or her detention before a court, and in *A v Australia* the UN Human Rights Committee noted that ‘every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.’<sup>66</sup>
38. As the Australian Human Rights Commission noted in its submission to the Joint Standing Committee on Migration:

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<sup>62</sup> Ibid. See also Derrick Silove, Philippa McIntosh, and Rise Becker, ‘Risk of Retraumatization of Asylum-Seekers in Australia’ (1993) 27 *Australian & New Zealand Journal of Psychiatry* 606; Zachary Steel and Derrick Silove, ‘The Mental Health Implications of Detaining Asylum Seekers’ (2001) 175 *Medical Journal of Australia* 596; Zachary Steel and others, ‘Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees’ (2006) 188 *British Journal of Psychiatry* 58; Louise Newman, Michael Dudley and Zachary Steel, ‘Asylum, Detention and Mental Health in Australia’ (2008) 27 *Refugee Survey Quarterly* 110.

<sup>63</sup> Australian Human Rights Commission, *2008 Immigration Detention Report*, above n 9, 63, 82.

<sup>64</sup> Crock, above n 53.

<sup>65</sup> Commonwealth, *Parliamentary Debates*, Senate, 2 December 1998, 1025 (Senator Kay Paterson).

<sup>66</sup> UN Doc CCPR/C/59/D/560/1993 (3 April 1997), [9.4] (*emphasis added*).

30. Judicial oversight of all forms of detention is a fundamental guarantee of freedom and liberty from arbitrariness (ICCPR, article 9(4)). However, this right is not guaranteed under the Migration Act in respect of the right to judicial review of decisions to detain unlawful non-citizens under s 189.
31. The courts are precluded from authorising the release from detention of unlawful non-citizens detained under ss 189 and 196 of the Migration Act, unless their detention under these provisions contravenes domestic law.
32. The courts have no authority to order that a person be released from immigration detention on the grounds that the person's continued detention is arbitrary, in breach of article 9(1) of the ICCPR. This is because under Australian law it is not unlawful to detain a person (or refuse to release a person) in breach of article 9(1) of the ICCPR.<sup>67</sup>
39. As this submission makes clear, Australian courts currently do not have the power to consider whether a person's detention is arbitrary, unreasonable or unnecessary, nor to order the government to release any particular individual. In the absence of such rights of review, detainees can only raise alleged breaches of their human rights with the Commonwealth Ombudsman or the Australian Human Rights Commission. In the case of the latter, if the Commission determines that a breach of human rights has occurred, it has the power to issue recommendations, including that compensation be paid. However, there remains no means of enforcing these recommendations.
40. Holding asylum seekers in immigration detention is not, of itself, an impermissible breach of asylum seekers' rights. However, the circumstances and length of detention may be such that the detention cannot be justified in the particular case. In order for the detention to be consistent with international human rights law, it must be necessary in the individual case (rather than the result of a mandatory, blanket policy); subject to periodic review by the judiciary or another authority, with the power to release detainees if detention cannot be objectively justified; be reasonably proportionate to the reason for the restriction (eg national security); and be for the shortest time possible.
41. UNHCR's Guidelines on Detention suggest that detention ought only to be used:
- on grounds prescribed by law to verify identity;
  - to determine the elements on which the claim to refugee status or asylum is based;

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<sup>67</sup> Joint Standing Committee on Migration, Submission of the Human Rights and Equal Opportunity Commission, available at <http://www.aph.gov.au/house/committee/mig/detention/subs/sub099.pdf> 13. As to the permissible length of time before bringing a person before the Court, see Human Rights Committee, *General Comment No.8: Right to liberty and security of persons (Art.9)*, 30/6/82, [2]. See further, Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning— Criteria for release from detention*, (1 December 2008), Dissenting Report: Mr Petro Georgiou MP, Senator Dr Alan Eggleston and Senator Sarah Hanson-Young, available at <http://www.aph.gov.au/house/committee/mig/detention/report/dissent.pdf>.

- to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents; or
- to protect national security or public order (and justified in the individual case).<sup>68</sup>

42. The lack of judicial oversight of Australia's detention regime, and in particular the inability of detainees to challenge the legality of their detention, also breaches the right to an effective remedy under the ICCPR (discussed further below).

### **How a HRA may assist**

43. Australia's asylum policy remains a highly controversial and political topic, as the recent increase in boat arrivals has demonstrated. By domestically entrenching (and making justiciable) international human rights standards that Australia has voluntarily agreed to at the international level, a HRA could restrict any future government's attempt to re-introduce harsh immigration and detention policies.<sup>69</sup>

44. A HRA containing an express provision concerning the liberty of the individual and freedom from arbitrary detention would constitute a significant step forward in the domestic protection of human rights in Australia. It would allow people deprived of their liberty to challenge their detention, which they are currently unable to do. Any such detention would therefore need to be justified in accordance with well-established human rights principles relating to arbitrary detention.<sup>70</sup> This would not necessarily mean that no asylum seekers or refugees could be detained, but rather it would help to delineate the circumstances in which such detention would be permissible in accordance with human rights law.<sup>71</sup>

45. A HRA would also provide a means of balancing the State's legitimate interests in controlling immigration with the rights of individuals seeking protection. The Immigration Department already accepts that international human rights law is

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<sup>68</sup> UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, (February 1999) Guideline 3.

<sup>69</sup> Note the comments of the current federal opposition claiming that the government has gone 'soft' on asylum seekers and this has resulted in increased numbers of people trying to reach Australia by boat. The topic was also discussed at length on SBS's Insight program on 19 May 2009—transcript and video available at <http://news.sbs.com.au/insight/episode/index/id/66>. See also Dr Sharman Stone MP, '20th boat and 782 arrivals testimony to Government failure', *Press Release*, (26 May 2009) available at <http://www.sharmanstone.com.au/Pages/Article.aspx?ID=891>.

<sup>70</sup> See the jurisprudence on ICCPR, art 9 and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) ('ECHR'), art 5.

<sup>71</sup> See, for example, *Executive Committee Conclusion on Detention of Refugees and Asylum-Seekers*, No 44 (XXXVII) (1986) which expressed the opinion that detention should 'normally avoided', but if necessary it may be resorted to *only on grounds prescribed by law* to:

- Verify identity, including where asylum seekers have destroyed their travel documents or used fraudulent documents in an attempt to mislead authorities;
- Determine the elements on which the claim is based; or
- To protect national security or public order.

Available at <http://www.unhcr.org/excom/EXCOM/3ae68c43c0.html>.

applicable to detention in Australia,<sup>72</sup> but because these obligations are not expressly included in domestic legislation, breaches of human rights are not actionable in the Australian courts and no enforceable remedies are available.

46. It should also be noted that article 9(5) of the ICCPR requires that '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. This must be read in conjunction with article 2(3), which requires enforceable and effective remedies where ICCPR rights have been breached. At present, individuals are not able to challenge the legality of their detention in the Australian courts and are therefore precluded from a remedy of any sort, let alone compensation. Instead, people who have been detained may complain to the Australian Human Rights Commission, which in turn has the power to order compensation (which has been used in numerous cases), however the government is free to ignore such recommendations. There is a serious question, therefore, whether such a process constitutes an enforceable right to compensation or an effective remedy.<sup>73</sup> This is another instance in which a HRA may assist in fulfilling the international obligations Australia has already assumed through its ratification of human rights treaties.
47. At present there are also no legislated standards of treatment for people deprived of their liberty.<sup>74</sup> Article 10 of the ICCPR stipulates that all those deprived of their liberty are to be treated with humanity and respect for the inherent dignity of the human being.<sup>75</sup> There are numerous examples where this right has been breached in relation to immigration detainees. For example, the Australian Human Rights Commission's report, *A Last Resort?*, documented detention centre staff's use of identification numbers rather than names for detainees, which had a particularly detrimental effect on children.<sup>76</sup> Further, in its most recent report into breaches of human rights in detention, the Commission found that the Immigration Department breached article 10 of the ICCPR in relation to interviews conducted by officials from the Chinese Ministry of Security. The report states:

I find that DIMIA's failure to take adequate steps to prevent or at least minimise the risk of the complainants disclosing or being asked questions about their protection visa applications amounted to a failure to treat them with humanity and respect for their inherent dignity as human beings. This amounted to a breach of

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<sup>72</sup> See the Department of Immigration and Citizenship, *Laws and international conventions affecting immigration detention*, available at <http://www.immi.gov.au/managing-australias-borders/detention/regulations/legislation-conventions.htm>.

<sup>73</sup> In certain cases the Department of Immigration has agreed to pay the compensation recommended by the Commission: see for instance the most recent HREOCA Report No 40, *Complaints by immigration detainees against the Commonwealth of Australia (Department of Immigration and Citizenship, formerly the Department of Immigration and Multicultural and Indigenous Affairs) and GSL (Australia) Pty Ltd*, available at [http://humanrights.gov.au/legal/HREOCA\\_reports/hrc\\_report\\_40.html](http://humanrights.gov.au/legal/HREOCA_reports/hrc_report_40.html).

<sup>74</sup> See the Australia Human Rights Commission, *2008 Immigration Detention Report*, above n 9, which recommended that this occur.

<sup>75</sup> ICCPR, art 10.

<sup>76</sup> *A Last Resort?*, above n 9, 14.

article 10(1) because DIMIA knew there was a risk of such a disclosure and should have known that if such information was disclosed the complainants may be at risk of persecution if they were returned to the PRC and were at risk of becoming distressed as a result of a fear of such persecution. To proceed with the interviews in those circumstances, without taking adequate steps to prevent or minimise that risk, shows a disregard for the rights and interests of the complainants that amounts to a failure to treat them with humanity and dignity.

I also find that DIMIA's failure to inform the complainants about the documents it had given to the MPS officials, and its failure to provide the complainants with an adequate explanation of the purpose of the interviews and the identity of the interviewers, demonstrates a disregard for the interests of the complainants that amounts to a failure to treat them with humanity and dignity.<sup>77</sup>

48. In this particular case the Immigration Department acknowledged and accepted the findings set out in the report and agreed to pay compensation to each of the detainees whose rights had been breached.
49. The conditions of detention and the treatment experienced by detainees has been well-documented in the literature, international and national reports, the media and film. The case studies below highlight some of the acts or deprivations that, either separately or cumulatively, may amount to breaches of international human rights law, and which may have been prevented, or at least remedied, by the existence of a HRA.

#### **Case study A: Shayan Badraie**

Five-year-old Shayan Badraie arrived in Australia in March 2000 and was taken to the Woomera detention centre along with the other members of his family. During his time in detention, Shayan witnessed hunger strikes and riots, saw authorities responding with tear gas and water cannons, and watched as adult detainees harmed themselves. By December that year, the detention centre's medical records revealed that Shayan was experiencing nightmares, sleep disturbance, bed-wetting and anxiety. He would wake in the night, gripping his chest and saying, 'They are going to kill us.' He also drew pictures of fences containing himself and his family. Despite repeated recommendations that he be removed from detention, several months passed before he was relocated with his family to Villawood. Shayan was diagnosed with post-traumatic stress disorder and over the next months he was admitted to hospital eight times for acute trauma and, because he refused to drink, dehydration. Again, despite repeated recommendations from medical personnel that he be released, it was only in August 2001 that he was transferred into foster care. He was therefore separated from his family until their release in 2002.<sup>78</sup>

<sup>77</sup> HREOCA Report No 40, above n 73, [14]–[15].

<sup>78</sup> See *A Last Resort?*, above n 9, 343–47.

Shayan's father also lodged a complaint with the Human Rights and Equal Opportunity Commission concerning his son's treatment in detention. The Commission found that the human rights of Shayan had been breached by the actions of the Commonwealth (Immigration Department). The government rejected that this was the case and ignored the recommendations made by the Commission.<sup>79</sup>

#### **Case study B: Ahmed Al-Kateb**

Ahmed Al-Kateb arrived in Australia by boat in December 2000 without a passport or visa. He was detained and subsequently refused refugee status. In June 2002, Mr Al-Kateb indicated that he wanted to leave Australia for Kuwait or Gaza. Although born with in Kuwait with Palestinian parents, he did not possess Kuwaiti citizenship. The government also sought unsuccessfully to remove him to Egypt, Jordan, Kuwait and Syria as well as to the Palestinian territories. Faced with no foreseeable solution to his situation, Mr Al-Kateb applied for his release from immigration detention. In the High Court, however, a 4:3 majority ruled that the *Migration Act* and the Constitution permitted the indefinite detention of people such as Mr Al-Kateb.

This case clearly demonstrates the way in which Australia's failure to incorporate its human rights obligations into domestic law can lead to the situation where an individual who has committed no 'crime' can be left in detention indefinitely.<sup>80</sup>

#### **Case Study C: Mr A**

Mr A, a Cambodian national, was detained for over four years in Port Hedland detention facility while waiting for the determination of his asylum application. He lodged a complaint with the UN Human Rights Committee alleging that this constituted arbitrary detention in contravention of article 9(1) of the ICCPR, and that he had also been denied the right to judicial review of his detention in violation of article 9(4).

The Human Rights Committee agreed. It held that his detention for the period of four years was arbitrary as the decision to keep a person in detention should be open to periodic review to consider whether on-going detention can be justified. The Committee also found that there had been a violation of Mr A's right to have the lawfulness of his

<sup>79</sup> Human Rights and Equal Opportunity Commission, *Report of an inquiry into a complaint by Mr Mohammed Badraie on behalf of his son Shayan regarding acts or practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)*, HREOC Report No 25, available at [http://humanrights.gov.au/legal/HREOCA\\_reports/hrc\\_25.html](http://humanrights.gov.au/legal/HREOCA_reports/hrc_25.html).

<sup>80</sup> See also Mr Ahmed Al-Kateb's submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Administration and Operation of the Migration Act 1958 (Cth)*, (2 March 2006) where he describes his situation as 'hell': available at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/migration/submissions/sub86.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/migration/submissions/sub86.pdf). In response to the outcry generated by this case, the government introduced the Return Pending Bridging Visa to enable such people to be released into the community until their removal is possible. Since some people might never be able to be removed, it is important from a human rights perspective that their legal status in Australia is ultimately resolved, especially in light of the restrictive conditions of this visa.



detention reviewed by a court under article 9(4), because the court had only reviewed the lawfulness of detention according to domestic law, not according to the principles of the ICCPR.<sup>81</sup> The previous Australian government formally rejected these findings.<sup>82</sup>

### Temporary Protection Visas and Bridging Visa E

50. Along with the mandatory detention regime discussed above, Temporary Protection Visas (TPVs) and Bridging Visas E (BVEs) have been the subject of sustained criticism for their detrimental impact on the human rights of asylum seekers and refugees. The Rudd Labor government abolished the system of TPVs on 9 August 2008. This now means that people to whom Australia owes protection obligations (in other words, Convention refugees—see section 36 of the Migration Act) are entitled to a permanent protection visa, regardless of their mode of entry into Australia.<sup>83</sup> While this move is welcomed and brings Australia into line with State practice generally, it is worthwhile reflecting on the system of TPVs and their non-compliance with human rights principles, lest a future government seeks to revive the TPV regime or something similar to it.<sup>84</sup> The BVE system remains in place and is discussed separately below.

51. On 20 October 1999, the *Migration Regulations 1994* were amended to create a new class of visa known as the TPV.<sup>85</sup> Under the new system, eligibility for a permanent protection visa became dependent on a person's mode of entry into Australia. A person who arrived with a visa and subsequently claimed asylum continued to be eligible for a permanent protection visa. By contrast, an 'unauthorised arrival'—someone who arrived without a visa—was only eligible for a TPV. The TPV was valid for three years, after which time the person had to re-apply to ensure that he or she still met the relevant criteria.<sup>86</sup> At this point in time, most TPV holders could apply for a permanent protection visa. However, in 2001 the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* introduced an exception, known as the 'seven day rule', which provided that asylum seekers who, en route to Australia, had resided for at least seven days in a country where they

<sup>81</sup> *A v Australia* (560/1993) 30 March 1997, UN Doc. CCPR/C/59/D/560/1993.

<sup>82</sup> *Official Records of the General Assembly*, 53rd session, UN Doc. CCPR/A/53/40, vol 1 (1998).

<sup>83</sup> See Department of Immigration and Citizenship, *Fact Sheet 68—Abolition of Temporary Protection visas (TPVs) and Temporary Humanitarian visa (THVs), and the Resolution of Status (subclass 851) visa*, available at [http://www.immi.gov.au/media/fact-sheets/68tpv\\_further.htm](http://www.immi.gov.au/media/fact-sheets/68tpv_further.htm). For a comparison of the entitlements under TPVs, Bridging Visa E and permanent protection visas, see Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (The Federation Press, Sydney, 2006) 139.

<sup>84</sup> Above n 69.

<sup>85</sup> In 1990, the Labor government introduced 'temporary protection' subject to four year periods of renewal for students from the PRC in Australia following the events in Tiananmen Square, however this was of a very different nature from the TPV regime introduced by the Howard government in 1999, since it provided access to Special Benefit, Family Allowance, Family Allowance Supplement, Medicare, labour market programs, English language training and education: see Barry York, 'Australia and Refugees, 1901–2002: An Annotated Chronology Based on Official Sources' (last updated 16 June 2003; accessed 10 June 2009).

<sup>86</sup> *Migration Regulations 1994* (Cth), Schedule 2, Visa subclass 785—Temporary Protection.



could have sought and obtained effective protection were unable to access a permanent protection visa and would only be eligible for a further TPV.<sup>87</sup> Therefore, in theory, a person could remain on a TPV indefinitely.

52. Applying for permanent protection or a further TPV was held to warrant full reassessment *de novo* of the individual's claim for protection under the Refugee Convention and relevant domestic provisions.<sup>88</sup> This exposed people already recognized as Convention refugees to the possibility of a negative assessment. As Human Rights Watch pointed out, 'Australia is the only country to require refugees who have already been recognized as genuine refugees, as a result of rigorous and demanding determination procedures, to re-prove their claim in light of new circumstances, several years later'.<sup>89</sup> Mental health experts also documented the traumatizing effect that temporary protection had on individuals stuck in legal limbo, unable to rebuild their lives in Australia because of the fear that they might be removed after three years to the country in which they feared persecution.<sup>90</sup>
53. According to the Immigration Department, the intention of the TPV regime was to 'remove the additional benefits that had been encouraging misuse of the protection process by unauthorised arrivals, which included the use of people smugglers to assist people to travel unlawfully to Australia, and the abandoning or bypassing of protection in other countries while travelling to Australia'.<sup>91</sup> TPV holders were entitled to a limited range of benefits, including:
- a. temporary residence for the three year period;
  - b. access to public health services, including Medicare and the Pharmaceutical Benefits Scheme;
  - c. permission to work;
  - d. access to limited welfare benefits; and
  - e. access to limited settlement services.<sup>92</sup>
54. However, TPV holders were denied a range of other services available to refugees on permanent protection visas. These included:
- a. initial information and orientation assistance providing case management services that link individuals with essential services such as income support, education and health;

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<sup>87</sup> See *Migration Regulations 1994* (Cth), Schedule 2, Clause 866.215

<sup>88</sup> See *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53, (2006) 231 CLR 1.

<sup>89</sup> Human Rights Watch, 'Commentary on Australia's Temporary Protection Visas for Refugees' (May 2003), available at <http://www.hrw.org/en/reports/2003/05/13/human-rights-watch-commentary-australias-temporary-protection-visas-refugees>.

<sup>90</sup> See eg Steel and others, above n 62.

<sup>91</sup> Department of Immigration and Citizenship, *Fact Sheet 64 'Temporary Protection Visas'*, available at <http://www.dimia.gov.au/media/fact-sheets/64protection.htm>

<sup>92</sup> See Senate Legal and Constitutional Affairs Committee, *Inquiry into the Administration and Operation of the Migration Act 1958*, above n 80, Chapter 8.

- b. accommodation support and household formation support, including basic household items;
  - c. English language tuition; and
  - d. community support programs.<sup>93</sup>
55. Furthermore, and significantly from a human rights perspective, the TPV regime did not allow the visa holder to sponsor family members to come to Australia, or to re-enter Australia if he or she left the country for any reason. Therefore, for those with no prospect of obtaining a permanent protection visa, there was no foreseeable hope of obtaining either family reunion or travel rights. The 2006 Senate Legal and Constitutional Affairs Committee Report into the Administration and Operation of the Migration Act found that:
- Although there is little real evidence of its deterrent value, the TPV regime may have acted as a deterrent to some. But there is no doubt that its operation has had a considerable cost in terms of human suffering.<sup>94</sup>
56. The key human rights issues raised by the TPV regime included:
- a. The right to family and freedom from arbitrary interference with family life (ICCPR, articles 17 and 23; CRC, articles 8, 9 and 16); and
  - b. The right to non-discrimination (ICCPR, article 26), discussed at paragraphs 83 to 88 below.
57. The Australian Human Rights Commission documented the particular impact of the TPV regime on the human rights of children in its 2004 report. It highlighted two significant barriers for children released from detention on TPVs as they attempted to integrate into the Australian community, noting that these breached Australia's obligations under the CRC:
- a. The temporary nature of the visa created deep uncertainty and anxiety which not only had the potential to exacerbate existing mental health problems, but also affected children's capacity to fully participate in educational opportunities.
  - b. The restrictions on family reunion, and the ban on overseas travel, had the combined effect for some children that they were separated from their parents/family for a long, potentially indefinite, period of time.<sup>95</sup>

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<sup>93</sup> See Janet Phillips, 'Temporary Protection Visas', Research Note no. 51 2003-04, Australian Parliamentary Library, (2004), available at <http://www.aph.gov.au/library/pubs/RN/2003-04/04rn51.htm>.

<sup>94</sup> Senate Legal and Constitutional Affairs Committee, *Inquiry into the Administration and Operation of the Migration Act 1958*, above n 80, [8.33]. The Committee went on to recommend a review of the TPV regime and more specifically the possible abolition of the 7 day rule such that all TPV holders would be able to apply for a permanent protection visa after a designated time: see Recommendation 52.

<sup>95</sup> For a summary of HREOC's findings in relation to TPVs and children, see [http://www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/summaryguide/text/index.html#tpv](http://www.humanrights.gov.au/human_rights/children_detention_report/summaryguide/text/index.html#tpv). See further Crock, above n 53, 94-96, 201-19; Fethi Mansouri, 'The legacy of Australia's treatment of onshore asylum seekers', (2002) 21 *Mots Pluriel*, available at

58. Had there been a HRA in place, Parliament would have had to ensure that the conditions attached to the grant of a TPV were consistent with that instrument, and that any curtailment of rights could be justified in accordance with law as the least restrictive means of achieving the desired policy outcome. In particular, any differences between the rights granted to Convention refugees who had arrived ‘lawfully’ (and were eligible for a permanent protection visa) and the rights granted to Convention refugees who had arrived ‘unlawfully’ (and were thus eligible for a TPV) would have had to be clearly justified as non-discriminatory.<sup>96</sup>
59. In 2003, the government attempted to extend the TPV arrangements to all asylum seekers arriving in Australia found to have a protection need—including those who entered Australia lawfully.<sup>97</sup> The amendments were subsequently disallowed.
60. In relation to the right to family life, it should be noted that even once a person has been granted permanent protection as a Convention refugee, the *Migration Regulations* impose very strict health criteria that must be met by all members of a family unit, otherwise the entire claim fails.<sup>98</sup> These requirements do not contravene the *Disability Discrimination Act 1992* (Cth) by virtue of section 52 of that Act, which provides that the *Disability Discrimination Act* does not apply to the *Migration Act* or *Migration Regulations*.<sup>99</sup> This section is seemingly in breach of Australia’s obligations under article 5(2) of the Convention on the Rights of Persons with Disabilities, which requires States parties to ‘prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds’.<sup>100</sup>

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<http://motspluriels.arts.uwa.edu.au/MP2102fm.html>; Pearl Fernandes, ‘Trauma strikes the soul: an attempt to explore and understand the impact of the temporary protection visa on clients in New South Wales’, (2002) 21 *Mots Pluriel*, available at <http://motspluriels.arts.uwa.edu.au/MP2102pf.html>.

<sup>96</sup> On the benefits a HRA may have on the formulation of Regulations, see the primary submission of the Gilbert + Tobin Centre, above n 15, 42–44.

<sup>97</sup> *Migration Amendment Regulations No. 6 (2003)* (Cth).

<sup>98</sup> While there is a discretion to waive this requirement, if it is not waived international human rights law may be breached.

<sup>99</sup> This issue was raised in the Senate Legal and Constitutional Affairs Committee Report into the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, (2009) available at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/disability\\_discrimination/report/c03.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/disability_discrimination/report/c03.htm), [3.68]–[3.73]. The proposed Bill sought to slightly narrow the scope of the exemption, however the Committee made no recommendation in relation to it.

<sup>100</sup> Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008) 993 UNTS 3.

### **Case study: Shahraz**

Shahraz was recognized as a refugee in 1996. He attempted to sponsor his family members to Australia several times over a period of four-and-a-half years. The Immigration Department refused to exercise its discretion to waive the health requirement in respect of his disabled child who, together with his wife and two daughters, was seeking to join him.

Shahraz lost all hope of ever being reunited with his wife and children and died as a result of self-inflicted injuries sustained when he set fire to himself outside Parliament House. As a result of an investigation, the Commonwealth Ombudsman stated that ‘the history of this case is one of administrative ineptitude and of broken promises’ and recommended that the health requirements for immediate family members be no different from those for their proposers. To date, this recommendation has not been implemented.<sup>101</sup>

### **Bridging Visa E**

61. Asylum seekers who arrive in Australia on a valid visa, such as a visitor’s visa or a student visa, and who subsequently apply for asylum are granted a bridging visa which enables them to continue living in the community rather than being placed in immigration detention.<sup>102</sup> Asylum seekers who arrive without a valid visa and who are then detained may be released into the community on a bridging visa in certain circumstances.<sup>103</sup>
62. BVEs are typically granted to non-citizens who have not yet been granted a substantive visa, or persons who have sought review or ministerial intervention in relation to their visa applications. They have been widely criticized on account of the conditions attached to them, which make it very difficult for people to survive without considerable support from charity. Such conditions include:
  - a. limited income assistance (89 per cent of Centrelink Special Benefit);
  - b. no work rights, including voluntary work, unless a ‘compelling need’ to work can be demonstrated<sup>104</sup>;

<sup>101</sup> Case study taken from NGO Report to Human Rights Committee, above n 50, 208. See further Commonwealth Ombudsman, *Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application* (2001) 1–2.

<sup>102</sup> See Department of Immigration and Citizenship, *Fact Sheet 61*, available at <http://www.immi.gov.au/media/fact-sheets/61asylum.htm>. See also, Department of Parliamentary Services, ‘Asylum seekers on Bridging Visa E’, Research Brief No 13, (13 June 2007), available at <http://www.aph.gov.au/library/pubs/RB/2006-07/07rb13.pdf>.

<sup>103</sup> For a table of all bridging visas and their conditions/entitlements, see Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia: Report 2*, Appendix F, available at <http://www.aph.gov.au/house/committee/mig/detention/report2/appendixF.pdf>.

<sup>104</sup> This is satisfied where: (a) a person is severe financial hardship, or (b) been nominated or sponsored by an employer for a substantive visa on skills grounds and appear to meet the requirements of the visa: see

- c. limited health care (general health care and pharmaceutical assistance);<sup>105</sup>
  - d. limited housing assistance;
  - e. limited access to legal advice;
  - f. limited access to study.
63. As the Australian Human Rights Commission has stated, these restrictions result in many asylum seekers and refugees facing poverty and homelessness. The Commission notes that ‘without the ability to support themselves through work or social security, asylum seekers are entirely dependent on community services for their basic subsistence.’<sup>106</sup> Under the BVE system, the ability to access Medicare is dependent on a person holding work rights, which until recently were very difficult to obtain.
64. Until recent policy changes, work rights could be lost where a person sought to appeal a negative protection application decision either within the Australian court system or directly to the Minister (under section 417 of the *Migration Act*). This had the effect of penalizing asylum seekers from pursuing legitimate avenues of appeal. The ability to seek merits and judicial review of administrative decisions is an accepted and integral part of refugee determination proceedings, as well as a central feature of procedural fairness. The hardship that a BVE holder would be forced to endure if those rights were exercised further hampered his or her ability to participate in the legal process and undermined the integrity of the refugee status determination procedure.<sup>107</sup>
65. In 2006, the Senate Legal and Constitutional Affairs Committee, in its inquiry into the administration and operation of the *Migration Act*, stated that its primary concern in relation to BVEs was the financial hardship faced by asylum seekers, ‘particularly those with families and children, who are granted a BVE with no work rights and inadequate access to basic services’.<sup>108</sup> The Committee went on to state that: ‘A

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Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia: Report 2*, Appendix F, available at <http://www.aph.gov.au/house/committee/mig/detention/report2/appendixF.pdf>. Present policy, however, is to grant work rights to people who apply for a protection visa while on a current visa, or who can show good cause why they delayed their application. These rights will remain during primary and all review stages, including ministerial intervention: A Just Australia, ‘Asylum Seeker Policy Reform: 2008 Progress Report’, available at <http://www.ajustaustralia.com/resource.php?act=attache&id=354>.

<sup>105</sup> BVE holders with work rights can access Medicare.

<sup>106</sup> Australian Human Rights Commissions, *Factsheet: The impact of bridging visa restrictions on human rights* (June 2008) available at [http://www.hreoc.gov.au/Human\\_Rights/immigration/bridging\\_visas\\_factsheet.html](http://www.hreoc.gov.au/Human_Rights/immigration/bridging_visas_factsheet.html). See also Department of Immigration and Citizenship, *Fact Sheet 62—Assistance for Asylum Seekers in Australia* (2008) available at <http://www.immi.gov.au/media/fact-sheets/62assistance.htm>.

<sup>107</sup> For a comprehensive report into work rights and BVEs, see Anne McNevin, *Seeking Safety, Not Charity: A report in support of work-rights for asylum seekers living in the community on Bridging Visa E* (2005), available at <http://www.ajustaustralia.com/resource.php?act=attache&id=158>.

<sup>108</sup> Senate Legal and Constitutional Affairs Committee, *Inquiry into the Administration and Operation of the Migration Act 1958*, above n 80, [8.62].

policy which renders a person destitute is morally indefensible and an abrogation of responsibility by the Commonwealth.’<sup>109</sup>

66. The Committee took note of the *Limbuela* decision of the Court of Appeal of England and Wales.<sup>110</sup> In that case, the court held that the removal of subsistence support from asylum seekers resulting in their destitution was a breach of their right not to be subjected to inhuman or degrading treatment under article 3 of the European Convention on Human Rights.<sup>111</sup> The Committee contrasted this with the position in Australia, where no such challenge could be brought before the courts. It noted:

In the absence of a constitutional or statutory bill of rights, such issues cannot be tested in the courts. Primary responsibility for ensuring that minimum standards essential to the survival and wellbeing of all people in Australia rests with the Government and the Parliament.<sup>112</sup>

67. Following *Limbuela*, the House of Lords in *Adam* said that treatment is inhuman or degrading ‘if, to a seriously detrimental extent, it denies the most basic needs of any human being’.<sup>113</sup> While the court noted that there is no general public duty to house the homeless or provide for the destitute, it said that the State would have such a duty if an asylum seeker ‘with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life’.<sup>114</sup> Relevant factors to be considered include the asylum seeker’s ‘age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation’.<sup>115</sup> In that case, the threshold was met by asylum seekers who, denied State support and the right to work, were forced to sleep outdoors. Factors that contributed to this finding were ‘the physical discomfort of sleeping rough, with a gradual but inexorable deterioration in their cleanliness, their appearance and their health’, ‘the prospect of that state of affairs continuing indefinitely’, their ‘[g]rowing despair and a loss of self-respect’, and the fact that they had ‘no money of their own, no ability to seek state support and [were] barred from providing for themselves by their own labour’.<sup>116</sup> Based on this analysis, treatment under Australia’s BVE regime could also meet this threshold in particular cases.

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<sup>109</sup> Ibid.

<sup>110</sup> *Secretary of State for the Home Department v Limbuela* [2004] EWCA Civ 540. See also the subsequent decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66.

<sup>111</sup> As to the scope of protection afforded by art 3 of the ECHR, see the section below on Complementary Protection.

<sup>112</sup> Senate Legal and Constitutional Affairs Committee, *Inquiry into the Administration and Operation of the Migration Act 1958*, above n 80, [8.64].

<sup>113</sup> *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66, [7] (Lord Bingham).

<sup>114</sup> Ibid.

<sup>115</sup> Ibid [8] (Lord Bingham).

<sup>116</sup> Ibid [71] (Lord Scott).

68. In the United Kingdom, the right to respect for private life contained in article 8 of the ECHR has been invoked to alter practices that unduly impacted on the human rights of asylum seekers. The *Changing Lives* report documented how UK Home Office staff began conducting unannounced early morning visits at an accommodation facility for newly arrived asylum seekers. The visits took place at dawn and no interpreters were present. Asylum seekers were woken and made to answer questions. Often those being interviewed had had only a few hours sleep after arriving at the facility very late at night. A voluntary sector organization, having received human rights training from the British Institute of Human Rights and legal advice from Liberty, challenged this practice on the basis that it interfered with the asylum seekers' right to respect for private life. They argued that there were other, more dignified ways to verify who was staying at the facility and for how long. The arguments were successful and the Home Office ceased the practice of these unannounced dawn visits.<sup>117</sup>
69. Australia, too, has an obligation not to subject people to cruel, inhuman or degrading treatment (pursuant to article 7 of the ICCPR). However, because this right is not contained in domestic law, there is no human rights basis on which the conditions of the BVE can be challenged. Arguably, in some cases people living on a BVE could be facing treatment that would breach Australia's obligations under the ICCPR, and which could be regulated and redressed were a HRA in place.
70. The cases of *Limbuela* and *Adam* provide clear examples of the way in which a HRA can help to ensure that the basic rights of asylum seekers are respected and protected.<sup>118</sup> This is not to suggest that a HRA alone can remedy the problems faced by asylum seekers,<sup>119</sup> but it does at least provide a benchmark for assessing whether law and policy comply with human rights standards, and may also provide a basis on which challenges to such law or policy can be launched.
71. In its report of 25 May 2009, the Joint Standing Committee on Migration made several pertinent recommendations in relation to the bridging visa regime.<sup>120</sup>

<sup>117</sup> See British Institute for Human Rights, *Changing Lives* (2<sup>nd</sup> ed, 2008) available at [www.bihr.org.uk/documents/policy/changing-lives-second-edition](http://www.bihr.org.uk/documents/policy/changing-lives-second-edition) for this and other similar examples.

<sup>118</sup> Note also the recent decision of the English Court of Appeal, which held that failed asylum seekers do not have the right to access the National Health Service for free: *R (on the application of YA) v Secretary of State for Health* [2009] EWCA Civ 225.

<sup>119</sup> See, for example, recent news reports, BBC News, 'Asylum seeker rules "not working"', 14 May 2009, available at [http://news.bbc.co.uk/2/hi/uk\\_news/8047910.stm](http://news.bbc.co.uk/2/hi/uk_news/8047910.stm); BBC News, 'Asylum seekers "living off hand-outs"', 14 May 2009, available at [http://news.bbc.co.uk/2/hi/uk\\_news/8049300.stm](http://news.bbc.co.uk/2/hi/uk_news/8049300.stm); and BBC News 'Asylum Seekers living in poverty', 14 May 2009, available at [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/8048637.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/8048637.stm). See also *Asylum Support Partnership Policy Report: The Second Destitution Tally*, May 2009, available at [http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/policy\\_responses/Second\\_Destitution\\_Tally.pdf](http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/policy_responses/Second_Destitution_Tally.pdf)

<sup>120</sup> Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia: Report 2*, above n 103, xxiii–xxiv. See also the Minority Report of Shadow Immigration Minister Sharman Stone MP, available at [http://www.aph.gov.au/house/committee/mig/detention/report2/MinorityReport\\_DrStone.pdf](http://www.aph.gov.au/house/committee/mig/detention/report2/MinorityReport_DrStone.pdf).



Importantly, these recommendations go some way towards creating a more humane visa system that seeks to address many of the problems outlined above, especially in relation to the BVE.

72. The Recommendations of the Committee included:

**Recommendation 8**

The Committee recommends that the Australian Government reform the bridging visa framework to ensure that people are provided with the following where needed:

- basic income assistance that is means-tested;
- access to necessary health care;
- assistance in sourcing appropriate temporary accommodation and basic furnishing needs, and provision of information about tenancy rights and responsibilities and Australian household management, where applicable; and
- community orientation information, translated into appropriate languages, providing practical and appropriate information for living in the Australian community, such as the banking system, public transport and police and emergency contact numbers.

**Recommendation 9**

The Committee recommends that the Australian Government commit to ensuring that children living in the Australian community, while their or their guardian's immigration status is being resolved, have access to:

- safe and appropriate accommodation with their parent(s) or guardian(s);
- the provision of basic necessities such as adequate food;
- necessary health care; and
- primary and secondary schooling.

**Recommendation 10**

The Committee recommends that the Australian Government reform the bridging visa framework to grant all adults on bridging visas permission to work, conditional on compliance with reporting requirements and attendance at review and court hearings.

**Recommendation 11**

The Committee recommends that the Australian Government provide that, where permission to work on a bridging visa is granted, this permission should continue irrespective of whether a person has applied for a merits, judicial or ministerial review.

**Recommendation 12**

The Committee recommends that the Australian Government have access to a stock of furnished community-based immigration housing which:



- should consist of open hostel-style accommodation complexes and co-located housing units;
- should be available to people and families on bridging visas who do not have the means to independently organise for their housing needs in the community; and
- where rent should be determined on a means-tested basis.<sup>121</sup>

73. The UN Committee on Economic, Social and Cultural Rights in its recent report card on Australia also drew attention to the difficulties faced by asylum seekers who are not able to enjoy the right to work. It recommended that ‘special programmes and measures be designed to address the significant barriers to the enjoyment of the right to work’ faced by asylum seekers and other marginalized groups. The Committee further expressed concern at the non-universality of social security payments, making specific mention of asylum seekers.<sup>122</sup> It also noted the high rates of poverty experienced by asylum seekers in Australia.<sup>123</sup>

74. As noted in relation to the UK above, a HRA provides a framework against which visa conditions can be assessed and formulated. Taking human rights into account at the time of policy formation can help prevent the need for litigation at a later stage when individuals complain that the policy breaches their human rights. Without a HRA, the rights of asylum seekers living in the community on BVEs remain at the whim of the government. A HRA would implement the human rights to which Australia has already committed itself under international human rights law, provide a means for balancing government policy objectives against individuals’ human rights, and provide an objective standard against which future law and policy could be developed.

### **Excision of Australian territory from the operation of the *Migration Act* and the offshore processing regime**

75. Following the *Tampa* incident in 2001, the Australian Parliament passed legislation to ‘excise’ islands and coastal ports from the migration zone.<sup>124</sup> A bill to excise the whole of the Australian mainland from the migration zone was withdrawn once it became clear that it would not pass.<sup>125</sup> The effect of excision was that ‘unauthorised

<sup>121</sup> Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia: Report 2*, above n 103, xxiii–xxiv.

<sup>122</sup> (22 May 2009) UN Doc E/C.12/AUS/CO/4, available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>, [20]. For a Report on the potential loss to the Australian economy of not allowing BVE holders to work, see Gwilym Croucher, *A Chance to Contribute: Forgone Gains to the Australian Economy of Disallowing Asylum Seekers the Right to Work*, Network of Asylum Seeker Agencies Victoria, February 2006, available at <http://blogs.victas.uca.org.au/safetynotcharity/downloads/ACHanceToContribute-Feb06.pdf>

<sup>123</sup> UN Doc E/C.12/AUS/CO/4, [24].

<sup>124</sup> *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone (Consequential Provisions)) Act 2001* (Cth); *Migration Amendment Regulations 2005 (No 6)* (Cth) (which excised territories previously disallowed in the proposed *Migration Amendment Regulations 2003 (No 8)* (Cth)).

<sup>125</sup> *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (Cth).

arrivals' who landed at 'designated areas' to the north of the Australian mainland<sup>126</sup> were prohibited 'from making certain applications under the [Migration] act, particularly for a protection visa, unless the minister exercise[d] a non-compellable, non-delegable power to allow that application to occur'.<sup>127</sup> The excision of territory from the migration zone went further than Australia's practice of interdiction because it actually enabled the authorities to remove asylum seekers from Australian territory and beyond the operation of the general law.<sup>128</sup>

76. The domestic legal effect of excision, therefore, was to render certain Australian islands 'outside' Australia for the purposes of lodging visa applications. Under section 198A of the *Migration Act*, an 'unlawful non-citizen' entering an 'excised' area was to be detained and taken to a 'declared country' (with reasonable force if necessary). Both Papua New Guinea and Nauru were designated by the Immigration Minister as 'declared countries' that could provide asylum seekers with 'access to effective procedures for assessing their claims'.<sup>129</sup> Under section 198A, a 'declared country' must meet specified standards of protection, including access for asylum seekers to effective procedures for assessing their need for protection; protection for asylum seekers, pending determination of their refugee status; and protection to people granted refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country. The 'declared country' must also meet relevant human rights standards in providing that protection.<sup>130</sup>

<sup>126</sup> *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), Schedule 1, s 9; see also *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth), s 198A: 'designated areas' include Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands, and Australian sea and resources installations, as well as any other external territories, or state or territory islands, prescribed by regulations.

<sup>127</sup> See Senate Standing Committee on Legal and Constitutional Affairs, 'Estimates (Additional Budget Estimates)', *Hansard* (19 February 2008) 113, Andrew Metcalfe (Departmental Secretary).

<sup>128</sup> See Crock, Saul and Dastyari, above n 83, 118.

<sup>129</sup> *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth), s 198A.

<sup>130</sup> *Migration Act 1958* (Cth), s 198A. Agreements with these two countries to establish processing centres also resulted in significant financial assistance from the Australian government. The Australian government paid the Nauru government \$A30 million to host asylum seekers following the *Tampa* incident. From its inception in September 2001 until 31 December 2007, the total number of asylum seekers processed on Nauru and Manus Island was 1367 people, and on average most were there for one year. The cost of this offshore processing amounted to \$305 million; around \$2500 per asylum seeker per week: Additional Budget Estimates Hearing, 19 February 2008 (Question 29 taken on Notice) [http://www.aph.gov.au/SENATE/committee/legcon\\_ctte/estimates/add\\_0708/diac/29.pdf](http://www.aph.gov.au/SENATE/committee/legcon_ctte/estimates/add_0708/diac/29.pdf). The Refugee Council of Australia estimated that the cost of offshore processing was \$250,000 per claim, compared to \$50,000 for onshore processing (ie five times the cost), while Oxfam Australia and A Just Australia estimated that the daily offshore cost per person was \$1830 per person, compared to \$238 onshore (ie around seven-and-a-half times the cost): see, respectively, Refugee Council of Australia, 'Submission of the Refugee Council of Australia to the 2002–2003 Refugee and Humanitarian Program Size and Composition Review: Current Issues and Future Directions (2002)'; Andrew Hewett and Kate Gauthier, 'Counting the Cost of Unaccountable Pacific Solution', Oxfam Australia and A Just Australia, 3 September 2007 (originally published in the *The Canberra Times*, 31 August 2007) available at <http://www.oxfam.org.au/media/article.php?id=389>; see also Kazimierz Bem et al, *A Price Too High: The Cost of Australia's Approach to Asylum Seekers* (A Just Australia and Oxfam, 2007), available at <http://www.oxfam.org.au/media/files/APriceTooHigh.pdf>.

77. It is questionable whether the procedure with regard to status and protection, and the designation of Nauru and Papua New Guinea as safe third countries capable of providing ‘effective protection’, were consistent with Australia’s obligations under international law.<sup>131</sup> Importantly, the Australian legislation authorizing these actions did not, and could not, relieve Australia of its obligations under international law.<sup>132</sup>
78. The key human rights concerns raised by the excision and offshore processing regime include:
- a. the requirement in article 33(1) of the Refugee Convention that a State is not to expel or return a refugee to the frontiers of a territory where the refugee’s life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion (that is, the principle of *non-refoulement*);
  - b. obligations under article 31 of the Refugee Convention that asylum seekers should not be penalized for arriving in a manner contrary to domestic immigration law, and article 16 relating to the requirement of signatory States to provide refugees with access to courts of law in their territory;
  - c. obligations under the ICCPR, including the principle of non-discrimination (article 26), ensuring effective remedies for current and potential breaches of ICCPR rights (article 2(3)), and the entitlement to take court proceedings if deprived of liberty by arrest or detention (article 9); and
  - d. obligations under the CRC, including the obligation to act in the best interests of the child (article 3(1)), and the principle that children should only be detained as a measure of last resort (article 37(b)).<sup>133</sup>

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<sup>131</sup> See McAdam and Purcell, above n 2, 101–13. On the issue of ‘effective protection’ in the context of transfers to ‘safe third countries’, see Lisbon Expert Roundtable, ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum Seekers’ (9–10 December 2002), [15(b)], available at <http://www.unhcr.org/protect/PROTECTION/3e5f323d7.pdf>. There is also a substantial quantity of academic commentary dealing with these issues. See further, Michelle Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’, (2007) 28 *Michigan Journal of International Law* 223; Savitri Taylor, ‘Protection Elsewhere/Nowhere’, (2006) 18(2) *International Journal of Refugee Law* 283; Susan Kneebone, ‘The Pacific Plan: The Provision of “Effective Protection”?’ (2006) 18 *International Journal of Refugee Law* 698; Jessica Howard, ‘To Deter and Deny: Australia and the Interdiction of Asylum Seekers’, (2003) 21(4) *Refuge* 35; Alice Edwards, ‘Tampering with Refugee Protection: The Case of Australia’ (2003) 15 *International Journal of Refugee Law* 192; and Brouwer and Kumin, above n 35.

<sup>132</sup> See Human Rights Committee, *General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13. See also Executive Committee Conclusion No. 97, § (a) (i): ‘The state within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons’.

<sup>133</sup> See Senate Legal and Constitutional Affairs Committee, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, (2006), available at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/migration\\_unauthorised\\_arrivals/report/c03.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/migration_unauthorised_arrivals/report/c03.htm), [3.624].

79. The system of offshore processing also raised questions about whether Australia was implementing its international treaty obligations in ‘good faith’.<sup>134</sup> This duty requires States ‘not only [to] observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty’.<sup>135</sup> This duty is breached if a combination of acts or omissions has the overall effect of rendering the fulfilment of treaty obligations obsolete, or if it defeats the object and purpose of a treaty. A State lacks good faith ‘when it seeks to avoid or to “divert” the obligation which it has accepted, or to do indirectly what it is not permitted to do directly.’<sup>136</sup>
80. In the context of the right to seek asylum, measures which have the effect of blocking access to procedures or territory may not only breach express obligations under international human rights and refugee law, but may also constitute a breach of the principle of good faith. Although States do not have a duty to facilitate travel to their territories by asylum seekers, the options available to States wishing to frustrate the movement of asylum seekers are limited by specific rules of international law and by States’ obligations to fulfil their international commitments in good faith. Even though immigration control per se may be a legitimate exercise of State sovereignty, it must nevertheless be pursued within the boundaries of international law.
81. Although there is no provision that expressly mandates States to process asylum seekers within their borders, a combination of provisions in the Refugee Convention (such as no penalties for illegal entry, non-discrimination, *non-refoulement*, and access to courts) reinforce the object and purpose of the Refugee Convention as assuring to refugees ‘the widest possible exercise of ... fundamental rights and freedoms’.<sup>137</sup> States are responsible for refugees in their territory, as well as those whom they subject to enforcement action beyond their territorial jurisdiction. This responsibility entails ensuring that refugees are not returned in any manner to territories in which they face—or risk return to—persecution, torture, or other cruel, inhuman or degrading treatment or punishment, *and*, if they are sent elsewhere, that they have access to protection and durable solutions.
82. Although asylum seekers are no longer processed on Nauru or Papua New Guinea, many areas remain excised from the migration zone under the Act and Regulations, including Christmas Island.<sup>138</sup>

<sup>134</sup> See Vienna Convention on the Law of Treaties, above n 11, art 27.

<sup>135</sup> Yearbook of the International Law Commission, 1964, Vol 1 (Summary Records of 16<sup>th</sup> Session), 727<sup>th</sup> Meeting (20 May 1964), 70.

<sup>136</sup> UNHCR Skeleton Argument for the Court of Appeal, [18] presented by UNHCR as intervener in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2003] EWCA Civ 666, [2004] QB 811; UNHCR Written Case for the House of Lords, [32] presented by UNHCR as intervener in *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees Intervening)* [2004] UKHL 55, [2005] 2 AC 1.

<sup>137</sup> Refugee Convention, Preamble.

<sup>138</sup> See *Migration Act 1958* (Cth), s 5; and Reg 5.15C *Migration Regulations 1994* (Cth). As to some of the social problems faced by detainees still on Christmas Island, including those in community detention, see Michelle Dimasi, ‘Back to the Mainland’, *Inside Story*, 19 March 2009, available at <http://inside.org.au/back-to-the-mainland/>.

## Human rights implications of Australia's offshore processing regime

83. As the list above makes clear, the system of offshore processing raises many serious human rights concerns, some of which remain relevant due to the on-going use of the Christmas Island immigration detention facility. In particular, asylum seekers who arrive at excised places, including Christmas Island, are unable to submit a valid visa application under the *Migration Act* unless the Immigration Minister exercises his or her discretion to allow it.<sup>139</sup> This discretion is non-compellable and is only to be exercised where the Minister believes it is in the 'public interest' to do so. Furthermore, the Australian Human Rights Commission has raised serious questions concerning the suitability of the immigration detention facility on Christmas Island, primarily on account of its extreme remoteness and the difficulty experienced in accessing services.<sup>140</sup>
84. The remainder of this section, however, focuses on the lesser appeal and review rights for offshore detainees, and the unavailability of effective remedies for breaches of their human rights.<sup>141</sup> This is on account of the fact that these are areas in which a HRA could provide much needed assistance to asylum seekers held in offshore centres.
85. Under the Howard government, individuals who were found to be refugees through the offshore process were not guaranteed a visa in the same way as those found to be refugees on the mainland. Even now, the ability to lodge a protection visa application when arriving in an excised area is not guaranteed as a matter of law, but is up to the Immigration Minister to determine in each case. Individuals whose protection claims are assessed offshore do not have access to the same procedural protections that are available to those whose asylum claims are lodged on the Australian mainland. They do not have recourse to the Refugee Review Tribunal or the Australian courts for review of negative refugee status determinations, although the government has said that independent merits review will be available.<sup>142</sup> Furthermore, access by lawyers, NGOs and others to asylum seekers held on Christmas Island is severely impeded owing to its remote location.
86. International law permits distinctions between aliens who are in materially different circumstances, but prohibits unequal treatment of those similarly placed.<sup>143</sup> In general, differential treatment between non-citizens is allowed where the distinction

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<sup>139</sup> *Migration Act 1958* (Cth), s 46A. See further the Australian Human Rights Commission, 2008 *Immigration Detention Report*, above n 9, Chapter 13.

<sup>140</sup> Australian Human Rights Commission, 2008 *Immigration Detention Report*, above n 9, Chapter 13.

<sup>141</sup> In July 2008, the Immigration Minister Chris Evans indicated that changes would be made to improve the rights of access to lawyers for persons detained on Christmas Island, including access to publicly funded advice through IAAAS: see the speech by Minister Chris Evans, above n 55.

<sup>142</sup> 'New Directions in Detention, Restoring Integrity to Australia's Immigration System', speech by Minister Chris Evans, available at <http://www.chrisevans.alp.org.au/news/0708/immispeeches29-01.php>.

<sup>143</sup> Blake and Husain, above n 41, [6.16]; see also *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, [29]–[34] (Gaudron J); *Lithgow v UK* (1986) 8 EHRR 329.



pursues a legitimate aim, has an objective justification,<sup>144</sup> and there is reasonable proportionality between the means used and the aims sought to be realized.<sup>145</sup> While immigration control may be considered a legitimate aim, the means by which it is sought to be achieved do not satisfy the proportionality requirement—namely, that the means by which that aim is sought to be realized are proportionate to the aim itself. In this instance, asylum seekers, whether arriving onshore or offshore, are in materially identical circumstances in that they are seeking Australia’s protection from persecution and other serious harm elsewhere. As the Refugee Convention itself provides in article 31, asylum seekers should not be penalized for arriving without passports or visas, since the very nature of persecution and flight may make it impossible for them to obtain such documents. Indeed, in some cases arrival without documentation may underscore the compelling nature of the refugee claim and add to, rather than detract from, the credibility of that claim. From the perspective of international law, justifying differential treatment solely on the mode or place of arrival is an arbitrary distinction and breaches the principle of non-discrimination.

87. The restriction of merits and judicial review for offshore asylum seekers itself contravenes Australia’s human rights obligations. Those subject to the offshore processing regime were precluded by section 494AA of the *Migration Act* from pursuing legal proceedings against the Commonwealth relating to their status as an ‘unlawful non-citizen’, the lawfulness of their detention, or their transfer to an offshore processing centre.<sup>146</sup> Furthermore, as asylum seekers processed offshore were unable to access judicial and merits review available to those on mainland Australia, they were also precluded from requesting ministerial intervention under section 417 of the *Migration Act*. In order to apply to the Minister, a person must have received a negative determination by the Refugee Review Tribunal (RRT). However, as offshore asylum seekers were denied access to merits and judicial review, there could be no negative RRT decision and hence the Minister’s ability to intervene and substitute a more favourable decision was not enlivened.
88. To further compound their vulnerability and isolation, the remote locations in which offshore asylum seekers were processed severely impeded the ability of lawyers, advocacy groups and community organizations to provide support.<sup>147</sup> This remains the case with those detained on Christmas Island, and the Australian Human Rights Commission has recently recommended in its 2008 Immigration Detention Report

<sup>144</sup> Committee on the Elimination of Racial Discrimination, ‘General Recommendation XIV: Definition of Discrimination’ (22 March 1993) [2]; Human Rights Committee, *General Comment 18: Non-Discrimination* (10 November 1989) [13]; *Abdulaziz v UK* (1985) 7 EHRR 471 [78].

<sup>145</sup> Joan Fitzpatrick ‘The Human Rights of Migrants’ Conference on International Legal Norms and Migration (Geneva 23–25 May 2002) available at [http://heiwwww.unige.ch/conf/psio\\_230502/files/fitzpatrick.doc](http://heiwwww.unige.ch/conf/psio_230502/files/fitzpatrick.doc), 4; Human Rights Committee, *General Comment 18: Non-Discrimination* (10 November 1989) [13]; ECOSOC Commission on Human Rights ‘Prevention of Discrimination: The Rights of Non-Citizens’ (26 May 2003) E/CN.4/Sub.2/2003/23 [24]; *Belilos v Switzerland* (1988) 10 EHRR 466.

<sup>146</sup> The section does not exclude claims brought under the original jurisdiction of the High Court of Australia (Australian Constitution, s 75): *Migration Act*, s 494AA(3).

<sup>147</sup> See Senate Legal and Constitutional Affairs Committee, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, above n 133, Chapter 3.

that the government repeal the provisions in the *Migration Act* excising offshore places from the migration zone. It further recommends that all unauthorized arrivals be processed on the Australian mainland.<sup>148</sup>

89. Although the Refugee Convention itself does not stipulate how refugee status determination should take place, UNHCR's Executive Committee (comprised predominantly of States parties to that treaty) has set out minimum standards that States should observe. For example, Executive Committee Conclusion No 93 (2002) requires *inter alia* that asylum seekers have access to assistance for basic support needs, such as food, clothing, accommodation, medical care and respect for privacy; that reception arrangements are sensitive to gender and age, in particular the educational, psychological, recreational and other special needs of children, and the specific needs of victims of sexual abuse and exploitation, of trauma and torture; and that family groups be housed together. Executive Committee Conclusion No 8 (1977) stipulates *inter alia* that recognized refugees be issued with documentation certifying that status, and that those not recognized as refugees have a reasonable time to appeal. Numerous conclusions emphasize that UNHCR should be given access to asylum seekers, and asylum seekers should be entitled to have access to UNHCR.<sup>149</sup> Above all, treatment must not be inhuman or degrading.<sup>150</sup>
90. As demonstrated above in relation to mandatory detention, the fundamental importance of individual liberty entails that the right to challenge the lawfulness of one's detention is itself an essential human right. The restrictions on appeal right contained in section 494AA of the *Migration Act* remain in force. The provision also is intended to apply 'despite anything else in this Act or any other law'. By enacting a HRA, Australia would implement its obligation to provide effective remedies to individuals whose human rights may have been breached. A HRA would assist offshore asylum seekers to challenge the lawfulness of their detention against human rights standards, and provide remedies in circumstances where such standards have been breached. Furthermore, it would remain to be seen how a court would approach the interpretation of section 494AA of the *Migration Act* if a HRA were to be introduced, and, in particular, whether it would be possible to construe the section in a manner consistent with human rights.<sup>151</sup>

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<sup>148</sup> Australian Human Rights Commission, 2008 *Immigration Detention Report*, above n 9.

<sup>149</sup> Executive Committee Conclusions Nos 33 (1984), 44 (1986), 48 (1987), 75 (1994), 82 (1997), 93 (2002), 101 (2004).

<sup>150</sup> ICCPR, art 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85 ('CAT'), art 3.

<sup>151</sup> On the interpretation of legislation under a HRA see the primary submission of the Gilbert + Tobin Centre, above n 15, 63–66.

## Australia's complementary protection obligations

91. At present, Australia is the only western State without a codified system of complementary protection,<sup>152</sup> although this is set to change, with the May 2009 Federal Budget announcing that a system of complementary protection will be introduced in Australia.<sup>153</sup> Introducing such a system will help to ensure that Australia meets its broader *non-refoulement* obligations under human rights law, which at a minimum require States not to send people to any place where they face a substantial risk of torture or cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life. Currently, people cannot apply for a protection visa on these grounds in Australia, and Australia risks violating its obligations under international law by returning people to these forms of harm.<sup>154</sup> Complementary protection may also extend to people fleeing situations of armed conflict and other human rights abuses,<sup>155</sup> but does not cover requests to remain on purely compassionate grounds such as age, health or family ties, since these do not stem from an international protection need.
92. The complementary protection model proposed by the Immigration Department in late 2008 sought to extend protection visas to people who feared ill-treatment on the basis of the following three treaty provisions:
- a. ICCPR, article 6: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life';
  - b. ICCPR, article 7: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment';<sup>156</sup> and
  - c. CAT, article 3: 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

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<sup>152</sup> The United States, Canada and Europe have codified their extended *non-refoulement* obligations in some form: see respectively 8 CFR §208.16 –§208.18; Immigration and Refugee Protection Act 2001, c 27, ss 95 –97; Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12, art 15. In New Zealand, the Immigration Bill introduced in 2008 proposed the introduction of codified complementary protection (implementing international law obligations acknowledged by the New Zealand government in *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (NZSC)). Note that 'complementary protection' is sometimes also referred to as 'subsidiary protection', 'de facto refugee status', 'exceptional leave to remain', 'B status' and 'humanitarian protection'. For a detailed study of the concept, see McAdam, above n 27.

<sup>153</sup> Immigration Minister Chris Evans, 'Budget 2009–10—Humanitarian Program', *Media Release*, (12 May 2009), available at <http://www.alp.org.au/media/0509/msimmc123.php>. See also the draft model proposed in late 2008: [http://www.aph.gov.au/senate/committee/legcon\\_ctte/estimates/sup\\_0809/diac\\_qon/46\\_qon\\_21\\_oct\\_08\\_att.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/sup_0809/diac_qon/46_qon_21_oct_08_att.pdf).

<sup>154</sup> See, for example, Human Rights Committee, *Concluding Observations on Reports Submitted by States Parties: Australia*, (7 May 2009), UN Doc CCPR/C/AUS/CO/5, [19].

<sup>155</sup> See Qualification Directive, above n 152, art 15(c); see also *Ullah v Secretary of State for the Home Department* [2004] UKHL 26.

<sup>156</sup> In Europe, see also ECHR, art 3.



93. Under the model, asylum seekers' protection needs would be assessed firstly against the refugee definition, and only if that definition were not met would the complementary grounds be considered. This means that decision-makers would continue to rigorously test and develop the bounds of the refugee definition in accordance with evolving international human rights norms and comparative jurisprudence, but would also have additional grounds on which they could grant protection in accordance with Australia's international obligations. This would also reduce the number of section 417 applications going to the Minister, although that avenue would remain open for compassionate and humanitarian cases falling outside the refugee or complementary protection criteria.
94. Under the human rights provisions listed above, the obligation not to return a person to a situation where they are at risk of such treatment is absolute.<sup>157</sup> In other words, whereas the Refugee Convention contains exclusion clauses precluding the grant of a protection visa to people who have committed serious international crimes,<sup>158</sup> there are no exceptions in relation to removal to the harms listed above. This is because the right not to be subjected to serious ill-treatment is 'one of the most fundamental values of a democratic society'.<sup>159</sup> In addition to the views of the UN Human Rights Committee, there is a wealth of case law from the European Court of Human Rights examining the meaning and scope of terms such as 'torture' and 'inhuman and degrading treatment'.<sup>160</sup> The court's detailed reasoning would provide useful guidance for Australian courts. In particular, it is important to note that while terms like 'inhuman treatment' may at first blush seem very broad, their legal meaning has been carefully circumscribed. Furthermore, an applicant must not only convince a decision-maker that the type of harm feared is encompassed by the term, but also that there are substantial grounds for believing that he or she would be exposed to such treatment if removed.
95. Article 3 of the ECHR, which parallels article 7 of the ICCPR, was successfully invoked by a failed asylum seeker from St Kitts in the advanced stages of HIV/AIDS on the grounds that the medical facilities in his home State were such that to return him to die in such conditions would amount to inhuman or degrading treatment.<sup>161</sup>

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<sup>157</sup> See *Soering v United Kingdom* (1989) 11 EHRR 439; *Chahal v United Kingdom* (1996) 23 EHRR 413; *Saadi v Italy* [2008] EHRR 179.

<sup>158</sup> Article 1F of the Refugee Convention states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

There are also other exclusions under arts 1D and 1E for people whose protection needs are, in effect, already being addressed.

<sup>159</sup> *Chahal v United Kingdom* (1997) 23 EHRR 413, [80].

<sup>160</sup> See, for example, *Pretty v United Kingdom* (2002) 35 EHRR 1, [52].

<sup>161</sup> *D v United Kingdom* (1997) 24 EHRR 423.

The European Court of Human Rights found that were he to be returned, he would not have access to medical treatment, his life expectancy would be shortened, he would suffer severe pain and mental suffering, and he would be homeless and without any form of moral, social or family support.<sup>162</sup> It was therefore a combination of factors which led the court to conclude that the man's removal would breach article 3 of the ECHR. In subsequent cases, however, the European Court of Human Rights has consistently held that, in principle, aliens subject to expulsion cannot claim entitlement to medical or other benefits, and it will only be in an 'exceptional' case that expelling the person would breach article 3.<sup>163</sup> Importantly, from the perspective of asylum seekers and refugees, the House of Lords has left open the possibility that other human rights, aside from those in article 3, may give rise to an obligation not to expel or extradite an individual to a place where his or her human rights would be breached.<sup>164</sup> However, whereas the protection afforded by article 3 is absolute, many other ECHR provisions permit a balancing test between the interests of the individual and the State. The effect of this seems to place protection from *non-refoulement* based on these other articles out of reach in all but the most exceptional circumstances.<sup>165</sup>

96. Aside from increased protection against expulsion, human rights provisions may also have procedural benefits for asylum seekers and refugees. For instance, in *Jabari v Turkey*, the applicant had failed to lodge her asylum claim within the five day time limit stipulated by domestic law. She was therefore issued with a deportation order, which she successfully challenged in the European Court of Human Rights. The court held that owing to the irreversible nature of the harm constituting article 3 treatment, the State had an obligation to conduct a meaningful assessment of her claim, regardless of the domestic law stipulating a five day time limit. The court stated that 'the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention'.<sup>166</sup> It also went on to find that there had been a violation of the applicant's right to an effective remedy.<sup>167</sup>
97. The absence of a HRA or complementary protection regime in Australia means that asylum seekers have no formal legal basis on which they can articulate a claim based on Australia's *non-refoulement* obligations under international human rights law. The only avenue available is to apply to the Immigration Minister to request that he or she exercise his or her discretion under section 417 of the *Migration Act* to grant a visa on public interest grounds. This is a cumbersome process that does not ensure Australia's compliance with its international protection obligations. Additional criticisms of the procedure include:

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<sup>162</sup> Ibid [49].

<sup>163</sup> See, for example, *BB v France* [1998] EHRR 84; *Bensaid v United Kingdom* [2001] EHRR 82; and most recently *N v United Kingdom* [2008] EHRR 453.

<sup>164</sup> See *Ullah v Secretary of State for the Home Department* [2004] UKHL 26. On the scope of protection under the ECHR and ICCPR in this context, see McAdam, above n 27, Chapter 4.

<sup>165</sup> See McAdam, above n 27, 144–45.

<sup>166</sup> *Jabari v Turkey* [2000] EHRR 369, [40].

<sup>167</sup> Ibid [49]–[50].

- a. It requires the Minister to ‘play God’ with the fate of individuals, rather than acknowledging that they have a legal right to protection under international law.<sup>168</sup>
  - b. In order to be able to apply to for ministerial intervention, an applicant for protection must first file an application for refugee status even where it is clear from the outset that it will fail. The application is assessed only against the Refugee Convention and not the CAT, ICCPR or other relevant human rights instruments. Applicants must also appeal the decision to the RRT and obtain a negative decision there before the power of the Minister to intervene is enlivened.<sup>169</sup>
  - c. The Minister’s discretion remains non-compellable, non-reviewable and non-delegable, which is inconsistent with the absolute prohibition on *refoulement* contained in article 3 of the CAT and articles 6 and 7 of the ICCPR.<sup>170</sup> Furthermore, the Minister need only exercise his or her discretion in circumstances where he or she believes that it is in the ‘public interest’ to do so.<sup>171</sup>
98. The Immigration Minister has released Guidelines which set out the ‘unique or exceptional circumstances’ in which the discretionary power may be exercised. As the Guidelines make clear, however, there is no guarantee that a person who falls within one of the categories will automatically be afforded protection. This further emphasizes the subjective nature of the decision being made, rather than identifying a concrete legal obligation that Australia has undertaken to provide protection for certain people. The Guidelines list the following as potentially constituting ‘unique or exceptional circumstances’ which *may* result in ministerial intervention:

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<sup>168</sup> See the Senate Committee on Ministerial Discretion in Migration Matters, (2004), available at [http://www.aph.gov.au/senate\\_minmig/report/index.htm](http://www.aph.gov.au/senate_minmig/report/index.htm). The Minister for Immigration, Chris Evans, expressed his disquiet at ‘playing God’ with people’s lives in relation to the use of the ministerial discretion and commissioned a review into its appropriate usage. This Report is available at <http://www.minister.immi.gov.au/media/media-releases/2008/proust-report.pdf>.

<sup>169</sup> Although review by the Minister is generally available following a negative finding by a review tribunal (RRT, MRT or AAT), there are a number of instances in which the Minister’s intervention power is not exercisable, *even* after a decision by a review tribunal. These include where:

- the decision of the Immigration Department not to grant a visa is not a decision that can be reviewed by the relevant review tribunal;
- the review tribunal has sent the case back to the Department for further consideration and a departmental decision-maker has made a subsequent decision on the visa;
- the review tribunal decision was made before 1 September 1994;
- the tribunal has found that the department’s decision is not reviewable by it;
- the tribunal has found that the application made to it was invalid as it was not made within the required timeframe; and
- an AAT decision is NOT in respect of an MRT reviewable decision or a protection visa decision.

See further [http://www.immi.gov.au/refugee/ministerial\\_intervention.htm](http://www.immi.gov.au/refugee/ministerial_intervention.htm).

<sup>170</sup> Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia’s Refugee and Humanitarian Determination Processes* (June 2000) [2.77]. Chapter 11 of the Report deals with the issue of following up on the treatment of persons expelled from Australia, and recommended that the government look into discussing the further the possibility of an informal monitoring mechanism/system.

<sup>171</sup> *Migration Act 1958* (Cth), s 417.

- a. There is a real risk that you will be arbitrarily deprived of your life or will suffer torture, cruel or inhuman or degrading treatment or punishment as a necessary and foreseeable consequence of return to your country or origin.
  - b. There is a significant threat to your personal security, human rights or human dignity should you return to your country of origin.
  - c. Circumstances that may bring Australia's obligations as a party to the Convention on the Rights of the Child (CROC) into consideration. Under CROC, the best interests of a child will be considered as a primary consideration. This includes you, if aged under 18, or a child with whom you have a close relationship. **Example:** Your child, stepchild.
  - d. Strong compassionate circumstances such that failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or permanent resident should you leave the country.
  - e. Exceptional economic, scientific, cultural or other benefit to Australia.
  - f. Compassionate circumstances regarding your age and/or health and/or psychological state such that failure to recognise them would result in irreparable harm and continuing hardship to you.
  - g. Length of time you have been present in Australia and your level of integration into the Australian community.
  - h. Circumstances that the legislation does not anticipate or clearly unintended consequences of legislation or the application of relevant legislation leads to unfair or unreasonable results.
  - i. You are unable, through circumstances outside your control, to return to your country/countries of citizenship or usual residence.<sup>172</sup>
99. Although the Ministerial Guidelines make reference to the obligations contained in CAT and the ICCPR, this does not constitute incorporation of those treaties in Australian law and therefore does not create enforceable rights and obligations.<sup>173</sup> The failure to properly incorporate these treaty obligations into domestic law means that any breach of the principle of *non-refoulement* is not illegal under Australian law, although would of course place Australia in breach of its obligations as a matter of international law. Accordingly, '[t]here is no mechanism that is subject to rule of law, which provides a safeguard against people being returned to countries in circumstances which are contrary to Australia's obligations under treaties other than the Refugee Convention'.<sup>174</sup>
100. Furthermore, given the absence of formal, reasoned decisions by the Minister under section 417, it is difficult to ascertain how the Guidelines inform decision-making. This means that the Minister's decision cannot be subjected to external scrutiny for consistency with the relevant legal standards, and any form of review is impossible. This is especially concerning given that the Minister's consideration of

<sup>172</sup> The Guidelines are available at <http://www.immi.gov.au/refugee/circumstances.htm>.

<sup>173</sup> Note ICCPR, art 2 which requires such incorporation.

<sup>174</sup> Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, above n 170, [2.64].

the claim is likely to be the first time that it has been assessed against relevant criteria.<sup>175</sup> This lack of openness makes it easy for the government to deny that decisions are based on international protection needs but rather on purely compassionate grounds. The net effect of such a system is to shift the obligation from a legal one, with legal requirements, to a compassionate one based on the government's 'generosity'.

101. In 2000, a Senate Legal and Constitutional References Committee tabled its report on Australia's refugee and humanitarian determination processes. The Committee recommended that Australia 'explicitly incorporate' the *non-refoulement* obligations of the CAT and the ICCPR into domestic law.<sup>176</sup> Subsequently, in 2004, the Senate Select Committee on Ministerial Discretion in Migration Matters tabled its report, *Inquiry into Ministerial Discretion in Migration Matters*, Recommendation 19 of which was:

that the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR.<sup>177</sup>

102. The Australian Human Rights Commission has also expressed its support for a legislative complementary protection regime, along with a wide range of advocacy groups, academics and NGOs.<sup>178</sup>
103. One very positive element of the Australian draft model on complementary protection is that those found to be owed protection obligations outside the Refugee Convention are entitled to the same benefits as those found to be refugees. This follows the Canadian approach and is superior to the position in the European Union, which permits differential treatment depending on whether a person has refugee or subsidiary protection status.<sup>179</sup> Equality of status is important because it sits most comfortably with international human rights law norms, in particular the principle of non-discrimination. It is also procedurally more efficient, avoiding appeals to 'upgrade' status, and it provides a principled and humane policy response to people who have experienced serious harm and are looking to re-build their lives in a safe environment.<sup>180</sup>

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<sup>175</sup> Refugee Council of Australia, 'Position on Complementary Protection' (May 2002) available at [http://www.refugeecouncil.org.au/html/position\\_papers/complementaryprot02.html](http://www.refugeecouncil.org.au/html/position_papers/complementaryprot02.html).

<sup>176</sup> Senate Legal and Constitutional References Committee, Parliament of Australia, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, above n 170, Recommendation [2.2].

<sup>177</sup> Senate Select Committee on Ministerial Discretion in Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters*, (2004) available at [http://www.aph.gov.au/senate\\_minmig/report/b01.htm](http://www.aph.gov.au/senate_minmig/report/b01.htm).

<sup>178</sup> The full list of submissions made to the Senate Committee are available at [http://www.aph.gov.au/senate\\_minmig/submissions/sublist.htm](http://www.aph.gov.au/senate_minmig/submissions/sublist.htm).

<sup>179</sup> See, for example, arts 26 (access to employment), 28 (social welfare) and 29 (health care).

<sup>180</sup> See Jane McAdam, 'What Standard of Protection Is Owed by New Zealand to Those Who Must Be Allowed to Stay?: A Comparative Analysis of What Rights Should Attach to Those Who Are Not

## Case examples

Australia does not follow-up on the status of individuals who have been denied protection. It is therefore difficult to know exactly how many people have faced ill-treatment upon their return. A Senate Committee recommendation in 2000 suggested that the feasibility of an informal follow-up system ought to be investigated.<sup>181</sup> This has not occurred to date. The following case studies are therefore some of the more well-known examples where people denied protection in Australia have been returned to face ill-treatment and even death.

### Case study A: Mohammed Hussain

In September 2008 Mohammed Hussain, an Afghan man, was kidnapped, tortured and beheaded in a province south of Kabul by gunmen believed to be the Taliban. Witnesses say he was thrown down a well in front of family members; a hand grenade, thrown in behind him, decapitated him. A few years earlier, Mr Hussain had sought asylum in Australia but was found not to be a refugee and was returned home. Although he had articulated his fears about what would happen to him if he were returned to Afghanistan, it was said that he did not meet the legal definition of ‘refugee’, and was therefore not a person to whom Australia owed protection obligations.

Without being privy to all the details of Mohammed Hussain’s case, it is not possible to say with certainty whether or not he would have been granted protection in Australia under a complementary protection scheme. What is clear, however, is that had he been able to produce sufficiently credible evidence that he was at risk of torture or cruel, inhuman or degrading treatment in Afghanistan, he would have been granted protection in Australia under the proposed complementary scheme. He would not have had to show that such treatment was ‘on account of’ his race, religion, nationality, political opinion, or membership of a particular social group, or characterize that ill-treatment as ‘persecution’. In other words, he would have had the opportunity to present his claim based on his specific fear of torture and to have it determined in accordance with international human rights law standards.<sup>182</sup>

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Convention Refugees’, conference paper presented at ‘Human Rights at the Frontier: New Zealand’s Immigration Legislation—An International Human Rights Law Perspective’ (Auckland, 12 September 2008), forthcoming as an article in [2009] 2 *New Zealand Law Review*.

<sup>181</sup> Senate Legal and Constitutional References Committee *A Sanctuary under Review: An Examination of Australia’s Refugee and Humanitarian Determination Processes*, above n 170, Chapter 11.

<sup>182</sup> Example taken from Jane McAdam, ‘Complementary Protection: Labor’s Point of Departure’, *Inside Story*, 2008, available at <http://inside.org.au/complementary-protection/>. The story of Tour Gul, another Afghani, bears disturbing similarities to that of Mohammed Hussain: see *Brisbane Times*, ‘The asylum seeker we sent home to his death’, 2 April 2009, available at <http://www.brisbanetimes.com.au/national/the-asylum-seeker-we-sent-home-to-his-death-20090402-9157.html>.

### **Case study B: Mr Sadiq Shek Elmi**

Mr Elmi was a Somali national from the non-ruling Shikal clan who had sought asylum in Australia but was found not to be a refugee. He claimed that if he were returned to Somalia he would be at risk of being detained, tortured, and possibly executed. As a member of the Shikal clan, and the son of a Shikal elder, Mr Elmi and his family had been targeted in the past by the ruling Hawiye clan. His father and brother had been executed, his sister raped and the rest of the family forced to flee and constantly move from one part of the country to another in order to hide. Mr Elmi also feared that because he had been overseas the Hawiye clan would think he had money, which they would try to extort through torture. Evidence was produced that Somalia had a pattern of massive human rights violations and that torture was frequently used.

Neither the Immigration Department nor the RRT had accepted that Mr Elmi was a refugee because, in their view, he did not face persecution on a Refugee Convention ground. There was no legislative basis on which he could seek protection on the grounds of torture, and despite a request for ministerial intervention under section 417 of the *Migration Act*, the Minister refused to consider exercising his discretion.

The Committee against Torture examined the evidence in Mr Elmi's case and concluded that he would be in danger of being tortured if Australia were to send him back to Somalia. It said that Australia had an obligation, in accordance with article 3 of the CAT, to refrain from forcibly returning Mr Elmi to Somalia or to any other country where he would be at risk of being expelled or returned to Somalia.<sup>183</sup>

The Committee's decisions do not legally bind governments, however. Generally, political pressure and international embarrassment are sufficient to encourage governments to adhere to the Committee's views. In Mr Elmi's case, however, the Australian government's response was to permit him to reapply for protection as a refugee in Australia. In other words, it instigated the refugee determination process all over again, despite the fact that the Immigration Department and the RRT had previously held that Mr Elmi was not eligible for refugee protection. Mr Elmi was ultimately removed from Australia. Had Australia had a system of complementary protection in place, Mr Elmi could have had his claim considered on the ground of torture from the outset.<sup>184</sup>

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<sup>183</sup> *Communication No 120/1998*, (25 May 1999), UN Doc CAT/C/22/D/120/1998.

<sup>184</sup> Example taken from McAdam, above n 182.

### Case study C: Mr Zhang

In 2007 a Chinese man, known as Mr Zhang, was deported from Australia after having argued his case for asylum for 10 years. Immediately prior to his deportation, Mr Zhang unsuccessfully attempted to end his life by embedding a razor blade in his oesophagus due to his fear of returning to China. After being returned to China, he claimed that he was immediately subjected to interrogation and torture by Chinese government officials.<sup>185</sup> In June 2008, Mr Zhang committed suicide, reportedly to avoid further persecution and torture.<sup>186</sup>

### Case study D: Akram al Masri

A Palestinian asylum seeker, Mr Akram al Masri, arrived in Australia by boat in June 2001, suffering a bullet wound to the leg. He claimed asylum alleging that Palestinian officials believed he was an Israeli spy. He was detained at the Woomera Immigration Detention Centre for eight months after his claim for asylum was rejected. Mr al Masri was removed to Gaza in September 2002. At the time, he said that he feared for his life if forced to return to Israel, but that he would rather be returned home than be held in a detention centre. On 31 July 2008, Mr al Masri was shot a number of times in the head at close range in Gaza. An Immigration Department spokesperson said that 'we emphasise the fact that even if the person has spent some time in Australia, this does not mean that Australia is responsible for all events that may befall them in the future'.<sup>187</sup>

<sup>185</sup> ABC Radio, 'Chinese Deportee Claims Torture', *AM*, 29 June 2007, available at <http://www.abc.net.au/am/content/2007/s1965335.htm>

<sup>186</sup> Asylum Seeker Resource Centre, 'Chinese Man Still at Risk of Being Deported and Facing Torture' (12 September 2007), available at <http://www.asrc.org.au/humanrights/2007/09/12/chinese-man-still-at-riskof-being-deported-and-facing-torture>; AAP, 'Deported Chinese Man "Interrogated"', *The Epoch Times*, 29 June 2007, available at <http://en.epochtimes.com/news/7-6-29/57048.html>; ABC, 'China Dissident Commits Suicide after Forcible Deportation', *ABC News*, 16 June 2008, available at <http://www.abc.net.au/news/stories/2008/06/16/2275279.htm>. See further the NGO Submission to the Human Rights Committee, above n 50.

<sup>187</sup> See 'Asylum Seeker Shot Dead in Gaza', *The Age* (Melbourne), 2 August 2008, available at <http://news.theage.com.au/national/asylum-seeker-shot-dead-in-gaza-20080801-3ood.html>; and 'Investigation into Deportee's Death', *The Sydney Morning Herald*, 2 August 2008, available at <http://www.smh.com.au/news/national/investigation-into-deportees-death/2008/08/02/1217097596349.html>.



## The right to an effective remedy

104. The right to an effective remedy is crucial to the proper realization and implementation of human rights.<sup>188</sup> Australia has already accepted the obligation to provide effective remedies for breaches of human rights through its ratification of the ICCPR, and, in particular, article 2(3) of that treaty. Australia does not presently have a system in place under its domestic law that satisfies the obligations set out in article 2(3), as evidenced by the range of individual complaints to UN human rights bodies and the Australian Human Rights Commission,<sup>189</sup> many of which have related to immigration detention.<sup>190</sup> In order for a complaint to be admissible and therefore considered by the UN Human Rights Committee, an individual must have exhausted 'all domestic remedies' or show that they would be futile if pursued. In Australia, this could involve fruitless appeals to the High Court. As discussed in relation to mandatory detention above, detainees have no means of challenging in court the lawfulness of their detention against the human rights standards contained in the ICCPR. As recommended in the primary submission of the Gilbert + Tobin Centre, a HRA should provide for the provision of compensation in appropriate cases.<sup>191</sup> The UN Human Rights Committee has also stated:

Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy ... is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.<sup>192</sup>

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<sup>188</sup> See ICCPR, art 2; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III), art 8; ECHR, art 13; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 (1969), art 25; CAT, art 14; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 6.

<sup>189</sup> See above n 9.

<sup>190</sup> Of the 40 HREOCA Reports completed by the Australian Human Rights Commission, 19 concern issues of immigration and detention. The full list of reports is available at [http://humanrights.gov.au/legal/HREOCA\\_reports/index.html](http://humanrights.gov.au/legal/HREOCA_reports/index.html).

<sup>191</sup> See the primary submission of the Gilbert + Tobin Centre, above n 15, 67–69.

<sup>192</sup> Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

## **Conclusion**

105. This submission has sought to demonstrate the way in which a HRA in Australia would benefit asylum seekers and refugees by implementing the obligations that Australia has already voluntarily assumed under international human rights law. It has sought to do this by highlighting how the policies of past and present governments have impacted on the human rights of asylum seekers and refugees, and the limited legal avenues that exist in Australia to redress human rights breaches. While a HRA has great potential to benefit Australia overall, it has a particularly important role to play in ensuring that the rights of asylum seekers and refugees are properly respected and protected.