To deter, distance and dehumanise: mandatory immigration detention and offshore processing of asylum seekers under Australian law

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ADDENDUM

The parliamentary contortions of mid 2012 saw both the Gillard Government and Abbott Opposition shift their long-held positions on offshore processing by co-opting elements of each other’s policies to the point where their positions virtually converged. The Government had shifted to embrace a policy which they had castigated while in opposition. While the Opposition purportedly maintained its position on offshore processing since the Howard government’s introduction of the Pacific Strategy, one notable difference had emerged. The Coalition, which in government had regarded its international obligations as an unwarranted incursion into Australia’s sovereignty, was now insisting that it would only support the government’s efforts to reinstate offshore processing in nations which had ratified the Refugee Convention.

While political posturing, in large part based upon the Coalition’s sudden attachment to human rights, dominated the debate, the only parliamentary opposition to offshore processing was expressed by the Greens. Both major parties supported offshore processing and both proffered a humanitarian rationalisation in support of their policy position, characterising its cruel and harmful measures as necessary to prevent the loss of life at sea. The Coalition’s purported commitment to refugee rights saw then opposition leader, Tony Abbott, declare that he would ‘rule out anywhere that is not a signatory to the Refugee Convention’ and implore government members to ‘consult your consciences’ and accept a proposed amendment to that effect. Notwithstanding this purported commitment to refugee rights, the opposition maintained its support for intercepting boats at sea and turning them back to Indonesia, a policy it implemented when it gained power in 2013.

Having maintained their position in opposing offshore processing, Greens members were accused by the Government of being responsible for, indeed bearing ‘a share of the odium’, regarding loss of life at sea. They were also castigated by the mainstream media for their intransigent policy ‘purity’ in the face of deaths at sea. But the presupposition which underpinned the debate, that the harsh deterrence of offshore processing was necessary to save lives, could not be substantiated. Such measures may simply drive IMAs onto other perilous trajectories and do nothing to resolve the underlying problem; the root causes of displacement which drive desperate people from their homes. While purporting to be motivated by care and compassion for IMAs, government and coalition parliamentarians were relegating them to spheres of exception and denuding them of political capacity. Voices of the IMAs themselves were drowned in the cacophony of concern. It is notable that speeches by members of the Greens, who were labelled by one government Senator as a ‘protest movement’ which has ‘always preferred to vote for 100 per cent of nothing rather than 80 per cent of something’, were peppered with narratives of asylum seekers’ trajectories; thus humanising them and seeking to assert them into the political space.

1 See page 11 of this thesis and especially note 48.
2 Parliament of Australia, House Hansard, BILLS, Migration Legislation Amendment (The Bali Process) Bill 2012, Consideration in Detail, 27 June 2012. See also the speeches of Bronwyn Bishop and Joe Hockey for expressions of humanitarian concern.
4 Michelle Grattan, ‘Greens are as stubborn as Abbott’, The Age, 1 July 2012 at http://www.smh.com.au/federal-politics/political-opinion/greens-are-as-stubborn-as-abbott-20120630-21982.html Grattan said that the Greens ‘have to accept that this purity - which, as much as Abbott's stand, is determining Australian policy - extracts a price in terms of human life’, see also John Menadue, Australia paying a heavy price for Greens purity, 27 June 2012 at http://www.crikey.com.au/2012/06/27/australia-paying-a-heavy-price-for-greens-purity/?wpmp_switcher=mobile
5 Senator David Feeney, note 3 above .
6 See for example Senate Hansard, note 2 above, consideration in detail, speeches of Penny Wright and Richard Di Natale.
The debates which preceded the eventual re-establishment of offshore processing in August 2012 saw the humanitarian pretext become a mantle for the same harsh policies which have been built upon demonisation and dehumanisation in 2001 in the context of the Pacific Strategy. Use of the humanitarian pretext for the re-introduction of offshore processing is emblematic of a tendency, charted by Professor Susan Kneebone, for industrialised states’ responses to refugee flows which see ‘humanitarian considerations morph with state interests.’ Kneebone has observed that humanitarian protection granted to refugees tends to be associated with government ‘largesse’ or discretion, with the idea of extra-judicial remedies with the result that the Refugee Convention is de-coupled from its general humanitarian or human rights focus and ‘humanitarianism is politicised, with ‘humanitarian’ considerations diverging from their original meaning and becoming a basis for asserting sovereignty or border control measures. This trend is clearly manifest in the growing public acceptance of offshore resettlement as the legitimate path to protection in Australia and the castigation of IMAs as queue jumpers, which intensified after the quotas were linked in 1996, as detailed in Chapter 7 of this thesis. The re-introduction of offshore processing by the Gillard Government in 2012 exemplifies the pursuit of state interests cloaked in the mantle of humanitarianism.

This pursuit of state interests has seen the arrival of IMAs packaged as a problem which must be met with a simple policy solution. The 2012 parliamentary debate was peppered with the nomenclature of resolution; with the promise that ‘[s]topping this horror is within our grasp’, and parliamentarians expressing their determination to ‘fix this’, to ‘resolve this issue’, to obtain ‘a solution at the end of all of this’, to ‘save lives.’ This approach pays little attention to context or the reality that the flow of people seeking protection is not amenable to a quick fix. It has also fortified a political landscape dominated by 5 word promises and simplistic policy ‘solutions’. The Abbott Government’s 2013 election victory followed a campaign in which one its six key promises was that ‘we will stop the boats.’ Once in office, every week that passes without a boat arriving in Australian waters has been heralded as a policy victory for control of Australia’s borders, which is seen to demonstrate how well the coalition is governing Australia. In the meantime, IMAs are languishing in ‘regional processing countries’ with no hope for the future while concrete and durable solutions remain far from the government’s policy agenda. They are detained in these harsh and remote environments pursuant to policy which has been characterised by both major parties as humanitarian in character, born of compassionate care and concern. The humanitarian pretext has thus presented itself as a convenient mantle in which to cloak the interests of the state.

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8 Ibid, 216.
9 Ibid.
10 Ibid 216
11 House Hansard, note 2 above, Jason Clare.
12 Ibid, Steve Georganis.
13 Ibid, Immigration Minister Chris Bowen.
16 Kneebone, note 7 above.
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Introduction to the thesis

This thesis examines the law and practice concerning two key policies directed at asylum seekers who arrive or attempt to arrive in Australia by boat; immigration detention and offshore processing. It is comprised of four parts. Part I provides an overview of the thesis, consolidating the published material with reference to political theory. A summary of the chapters is provided in Part II. Part III considers the contribution made by my work to the literature on asylum seeker policy in Australia. The main body of the thesis is contained in Part IV, which is comprised of 11 papers published between 2004 and 2013.
Part I

Overview
Overview of Thesis

One of the surprising aspects of our experience...has been the fact that it seems easier to deprive a completely innocent person of legality than someone who has committed an offense....Jurists are so used to thinking of law in terms of punishment, which indeed always deprives us of certain rights, that they may find it even more difficult than the layman to recognize that the deprivation of legality, i.e., of all rights, no longer has a connection with specific crimes. 1

The spontaneous arrival of asylum seekers by boat has been at the forefront of public debate in Australia during the past two decades. Asylum seekers who arrive or seek to arrive in Australia by boat have become the focus of intense public hostility and fear and have been assigned various epithets; most of which are pejorative. They will be referred to in this thesis as irregular maritime arrivals (IMAs). 2 IMAs have been decried as law-breakers who have eschewed the legitimate path to refugee protection and sought nefarious means of breaching Australia's territorial sovereignty. They have been castigated as 'illegals' who represent a threat to the nation and managed pursuant to laws which have rendered them 'unlawful non-citizens' and ultimately negated their legal status.

The fear that the arrival of IMAs constitutes a threat to Australia has underpinned the introduction and maintenance of harsh policies. These policies have sought to deter them from entering Australia and, in the event of their entry, to distance and exclude them from Australian society and access to protections afforded under Australian law. Two key policies have pursued these objectives in the past two decades. The first is the immigration detention policy introduced by the Keating Government in 1992. The second is the regime of 'offshore processing' pursuant to which IMAs have been processed outside mainland Australia, usually in other nations pursuant to arrangements between Australia and the host nation. Offshore processing in Nauru and Papua New Guinea (PNG) was introduced by the Howard Government in 2001 as part of its Pacific Strategy, known more broadly as the 'Pacific

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2 This was the Federal Government's epithet of choice with respect to asylum seekers who arrive or attempt to arrive in Australia by boat until Immigration Minister Scott Morrison issued an instruction to departmental staff in October 2013 to refer to them as 'illegal maritime arrivals.' See Emma Griffiths, 'Immigration Minister Scott Morrison defends use of term 'illegal arrivals', plays down PNG police incident', *ABC News* (22 October 2013). The term 'illegal maritime arrival' has no statutory foundation. The term 'unauthorised maritime arrivals' is defined in section SAA(1) and considered below.
While immigration detention has been maintained since its introduction in 1992, offshore processing has had a more desultory history. After the purported abandonment of the Pacific Strategy by the Rudd Government (which nevertheless maintained processing outside mainland Australia in the excised offshore territory of Christmas Island), processing of asylum seekers in Nauru and PNG was re-instituted by the Gillard Government in August 2012.

Immigration detention and offshore processing remain cornerstones of Australian refugee policy. The chapters of this thesis examine the law, policy and practice of immigration detention and offshore processing from the time of their respective inception until the defeat of the (second) Rudd Government in September 2013. This overview will draw on political philosophy to consolidate the chapters of the thesis, and consider how the pursuit of protection by this most disenfranchised group has become a defining political issue of our time.

**Crisis and control**

The political capital gained from assertions of control has been demonstrated repeatedly in ‘law and order’ based commitments which are so readily made during election campaigns. The promise that threats to society will be controlled through various ‘tough’ measures is rarely absent from the political landscape. As Juliet Stumpf has observed, ‘[i]mposing increasingly harsh [criminal] sentences and using deportation as a means of expressing moral outrage is attractive from a political standpoint, regardless of its efficacy on controlling crime or unauthorised immigration.’

Like the threat of criminal activity, the arrival of IMAs has excited anxieties in the public imagination. These anxieties have been generated by a confluence of historical, legal and geographic influences (examined in Chapter 7 of this thesis) and have fuelled a sense of crisis which precipitated the introduction of mandatory immigration detention following a wave of

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boat arrivals from Cambodia, China and Vietnam which commenced in November 1989. Media reporting and statements by politicians from the then Labor Government and opposition reveal growing fears of impending catastrophe in the form of inundation by boat arrivals. The undetected arrival in January 1992 of a boat carrying 56 asylum seekers from China generated significant media attention and gave rise to a perception that the government had lost control over Australia’s borders.

The existing statutory regime, which conferred a discretionary power of arrest and detention, was considered deficient in the circumstances. Then Opposition leader Dr John Hewson declared that the system was ‘in crisis’. Immigration Minister Gerry Hand declared that ‘nothing short of swift action will remedy the perception that Australia is not in control of its borders.’ The Minister took the view that this perception was being exacerbated by immigration lawyers and a judiciary which was undermining the administration of refugee policy through its review jurisdiction. The exercise of judicial power in this context is unremarkable and a judiciary denuded of such power would be a true indicator of crisis. Nevertheless, members of the government and opposition shared the view that immigration lawyers were ‘campaigning to undermine the integrity of Australia’s refugee determination process.’ Then Shadow Immigration Minister Philip Ruddock declared the ‘the role of the courts collectively has brought about a significant problem’, namely that the government was ‘no longer adequately able to control and supervise entry’.

These compounded concerns around border control and the role of the courts saw legislation rushed through Parliament pursuant to which all non-citizens who arrived in Australia by

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7 Ibid, 85.
10 Ibid.
boat and were ‘designated’ by the Department of Immigration, Local Government and Ethnic Affairs would be detained for up to 273 days. The legislation further prohibited courts from ordering release from custody. This bar on judicial review was struck down as unconstitutional but the detention provisions survived constitutional challenge and laid the foundations for Australia’s longstanding mandatory immigration detention regime.  

A much deeper sense of crisis was associated with the efforts taken by the captain of the MV Tampa to enter Australian territorial waters and disembark the vessel on Christmas Island in September 2001. On board the vessel were 433 IMAs rescued from a stricken Indonesian ferry. A sense of calamity was engendered by political press releases and media reporting which eschewed any focus on the perilous circumstances that the rescuees might have fled or the dire conditions in which they had found themselves, but instead framed the attempted landing as an unwanted incursion into Australia’s sovereignty by putative refugees seeking to coerce their rescuers and the government into acceding to their demands. Prime Minister John Howard asserted that the rescuees ‘forced the captain to turn from his original course...under duress’ and ‘created a situation where we lose control of our capacity to determine who comes to this country.’ The threat of the Tampa’s disembarkation on Australian soil was averted through the adoption of extraordinary measures designed to prevent it from eventuating. These measures, which are detailed in Chapters 6 and 7 of the thesis, laid the foundations for the most extreme policy framework yet introduced to address the arrival of IMAs; the Pacific Strategy.

Matthew Gibney has observed that in Western states with which Australia may be compared, the issue of refugee protection has tended to place governments on the defensive, with opposition parties attacking their perceived policy failures, chiding their lack of control and capitalising on perceptions of crisis. The Howard Government’s strong assertions of border control manifested a new ‘government-led offensive politics of asylum’. Rather than acting to remove the management of spontaneous arrivals from the political agenda, the government brought the issue to the forefront of national debate. Seizing upon and feeding public anxieties, the government was able to persuade voters that it could assert control and avert the

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18 ibid, 193.
suppositional crisis which would flow from a further wave of boat arrivals. The measures adopted to maintain a spectre of control and the harms that have ensued are examined in this thesis.

Queue jumpers and the deviant ‘other’

The political efficacy of the government’s assertions of control has rested upon the articulation and communication of a sense of threat presented by IMAs seeking to impose themselves upon Australians. While perceptions of IMAs as a threat intensified during the 1990's, the sense of threat was always founded upon the unauthorised mode of their arrival. The abovementioned undetected boat arrival in January 1992 was seen to expose a deficiency in border surveillance and control and gave rise to security concerns which rapidly escalated. IMAs were widely depicted as ‘bogus’ or ‘so-called refugees’ seeking to exploit the Australian system. Immigration Minister Gerry Hand declared in a television interview that Australia had fallen victim to ‘rorters’ who had ‘duped’ his government into adopting a compassionate stance. Fears arose that IMAs would threaten Australia’s ecology, public health and standard of living. Graeme Campbell MP is reported to have said that ‘illegal arrivals would arrive in their tens of thousands and reduce the standard of living to that of a Bangladeshi village.’ Campbell’s recommended solution to this imagined threat was to utilise the air force to prevent further arrivals.

When the detention regime was strengthened in 1994 and the temporal limit removed, detention of all undocumented arrivals for the duration of the status determination period was rationalized by the fact that IMAs had bypassed the ‘proper application and entry process offshore.’ The offshore resettlement component of Australia’s humanitarian program was thus characterised as the proper trajectory for protection. This characterisation was built into Australia’s humanitarian program in July 1996 when the quotas for offshore resettlement and

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19 Watson, note 6 above, 85.
20 Glascott, note 13 above; cited in Watson, note 6 above, 86.
21 Austin, note 9 above.
22 See Watson, note 6 above, 85. Watson has noted that fears were expressed that these boat arrivals may be carriers of diseases such as tuberculosis and may bring rabies or foot and mouth disease into Australia.
23 Brad Crouch, ‘White Australia was Right’ Daily Telegraph (26 January 1992) cited in Watson, note 6 above, 85.
24 This reform is examined in Chapters 3A and 7 of this thesis.
onshore arrivals were amalgamated. This amalgamation spawned the chimera of the ‘queue jumper’, with visas granted to IMAs effecting a commensurate reduction in humanitarian visas granted under the offshore program. IMAs were thus seen to bypass the proper process and usurp places from refugees in camps overseas. This latter group became widely understood to comprise ‘genuine’ refugees who displayed the appropriate forbearance by waiting in line for resettlement.

The ‘queue jumper’ label received wide usage by senior politicians and gained a foothold in the Australian vernacular and popular imagination. IMAs began to converge with criminals within political and public discourse, with members of parliament invoking strong imagery and playing on public fear. The unlawful conduct of the ‘smugglers’ who facilitated their passage was imputed to IMAs themselves. The ideas and language of deviancy permeated media representations of asylum seekers at that time. In a study of newspaper reports concerning asylum seekers which was published in 2001, Sharon Pickering observed that IMAs were frequently depicted as a threat to the integrity of the nation state, as the ‘racialized deviant’ or as a threat to the security or health of the nation, ‘corrupting and contaminating the fabric of society’.

Since 2001, the nomenclature of illegality has permeated Australia’s political debates, media coverage and vernacular with respect to IMAs. Asylum seekers have been described as ‘illegals’, ‘illegal immigrants’ and even ‘illegal asylum seekers’. As examined in Chapter 7, the dangers of imputing criminality and serious misbehaviour to IMAs through the use of such terminology have been the subject of a series of rulings by the Australian Press Council. While this thesis is concerned with legislation and policies introduced prior to the election of the Abbott Government in September 2013, an early directive to government officials by the new government’s Immigration Minister to refer to IMAs as illegal maritime

26 For background information on the development of Australia’s Refugee and Humanitarian Program, see Barry York, Australia and Refugees, 1901-2002: Annotated Chronology Based on Official Sources: Summary, Department of the Parliamentary Library, June 2003.
30 Ibid, 182.
32 For a detailed account of Australian Press Council rulings, see Chapter 7, note 44.
arrivals illustrates the reality that the nomenclature of criminality will remain critically important in informing public perceptions in this heavily politicised area. 33

The experience of closed detention has further rationalised portrayals of IMAs as transgressive. Detention insinuates criminal guilt, constructing the detainee as ‘somehow suspect, potentially criminal, or associated with criminality.’ 34 The United Nations (UN) Working Group on Arbitrary Detention considered that immigration detention itself creates a presumption that each unlawful non-citizen presents a danger to the community. 35 Chapter 7 examines conditions of unrest and rioting which have arisen in immigration detention facilities and the resulting perception that the transgressive acts of some may be imputed to IMAs in general. IMAs are thus imagined as cunning, ungrateful and willing to place the government under duress in order to advance their own position. This belief has strengthened public condemnation and entrenched the view that they should be excluded from membership in Australian society. After rioting at the Villawood detention facility in April 2011, Andrew Bolt, whose byline styles him as ‘Australia’s most read columnist’, demanded ‘[w]hat kind of people are behind such mayhem, and why on earth should we let them in?’ 36

As the deviant other, IMAs have been presented as a threat to national security. Some of the reports considered by Pickering resemble depictions of invading enemy forces descending upon Australia’s coastline. 37 Noting that the war metaphor is routinely invoked in criminology and criminal justice policy, Pickering observes that it effectively erases identity and the possibility of individual narratives. 38 The militaristic language of protection and defence was invoked by Prime Minister Howard during the Tampa crisis and this in part explains the government’s determination to stop the vessel from disembarking in Australian territory. The Prime Minister’s rhetoric framed the attempted entry and disembarkation as a

33 See Griffiths, note 2 above. It is also worth noting that under the Abbott Government, the Department of Immigration and Citizenship has been re-named the Department of Immigration and Border Protection.
37 Pickering, note 28 above, 173; see especially the article entitled ‘Record Arrest of Boat People-Swoop Nets 350 Illegal Boat People’.
38 Ibid, 173.
battle which had to be faced. In a further representation of IMAs as a threat to security, defence Minister Peter Reith observed in an interview with Derryn Hinch following the first instance ‘Tampa judgment’ of North J, that unauthorised boat arrivals may create ‘a pipeline for terrorists to come in and use your country as a staging post for terrorist activities.

Weeks after the Tampa stand-off, the most egregious and devastating act of vilification of IMAs played out around the rescue of 223 passengers from a sinking vessel known as SIEV 4. Defence personnel had been instructed to ensure that ‘no personalising or humanising images’ were taken of the IMAs. Photographs were taken of the sinking SIEV 4 and released publicly to support the assertion by then Immigration Minister Phillip Ruddock that disturbingly, a number of children have been thrown overboard, again, with the intention of putting us under duress. I regard these as some of the most disturbing practices that I have come across in the time that I have been involved in public life – clearly planned and premeditated.

It is difficult to contemplate a more devastating accusation. IMAs were portrayed as less than human, as those who were prepared to drown their own children in order to coerce naval officers into acceding to their demands for transfer to Australia.

Prime Minister John Howard responded to the accusation by asserting that these were people who did not deserve our protection but from whom Australians should in fact be protected: ‘I don’t want, in Australia, people who would throw their own children into the sea. I don’t. And I don’t think any Australian does.’ Pickering’s analysis of media coverage of IMAs prior to the SIEV 4 incident notes the use of oppositional terms ‘in a system of value which routinely renders one normal and the other strange/other.’ This device was used to great effect by the Prime Minister to highlight the fundamental human differences between

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39 See generally Watson, note 6 above, 100-101.
42 Statement by Brian Humphreys, director-general of communication strategies for the Defence Department, quoted in Linda Briskman, Susie Latham and Chris Goddard, Human Rights Overboard: Seeking Asylum in Australia (Scribe, Melbourne, 2008) 38.
43 ABC Four Corners, ‘Too Good to be False: The Children Overboard affair - who knew what, who told whom, and when’ (4 March 2002).
45 Pickering, note 28 above, 172.
Australians and those seeking admission into Australia as IMAs. By speaking for Australians, the Prime Minister was observing that such people were not like us; they were a particularly nefarious and inhuman version of the ‘other’. They were seen to present a serious challenge to our territorial sovereignty, our values, identity and way of life.

Their imagined inhumanity and callousness was juxtaposed against the morality and decency of Australians; with the value of family and protection of children at the core of our humanity. In an interview with Alan Jones, the Prime Minister declared that the rescues’ conduct ‘offends the natural instinct of protection and delivering security and safety to your children.’ In vilifying IMAs as the deviant other, he was flattering Australians and validating their values; affirming our humanity through highlighting their deviance. He was furthermore offering comfort to Australians that he would employ a tough stance to protect us from the threat posed by these uninvited outsiders’ attempts to coerce our government into permitting their entry into our country. The Prime Minister thereby promised to protect our Australian home from the frightening ‘constitutive outside...against which the home is defined’.

The electorate responded to the government’s assertions with overwhelming support. By the time Minister Ruddock’s assertions were revealed to be a scandalous fiction, the government had won the 2001 election. Vilification of this magnitude is not readily erased. The ‘Children Overboard’ scandal generated a crescendo of hysteria directed at asylum seekers and the correction of the public record with respect to the veracity of the government’s accusations was insufficient to erase the stigma brought upon desperate people in the most perilous circumstances. These IMAs were rendered voiceless and depoliticised, unable to articulate their struggle in the face of the government’s willingness to make the most scurrilous yet unsubstantiated assertions for political ends.

Unlawfulness under the law

The broad perception that IMAs present a threat to Australia and Australians’ way of life facilitated the introduction of the harsh laws and policies which breach Australia’s human rights obligations. Calls for compliance with human rights became increasingly viewed as an

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irritating distraction from the pressing task of protecting Australia’s borders. Indeed, under the Howard Government, scrutiny of Australia’s human rights implementation was dismissed as an unwarranted imposition from outside; not unlike the arrival of IMAs. The images and rhetoric which characterised the very presence of IMAs as illegal had the effect of legitimising harsh government action. The perceived threat presented by the deviant ‘other’ to Australians’ security and way of life created a sense of moral panic which rationalised the introduction of extreme measures, even those which resemble military responses as exemplified by Operation Relex (which is examined in Chapters 6 and 7 of the thesis). This process may be described as the securitization of mobility, namely the process of ‘constructing an object as an existential threat through a “securitizing move” involving “speech acts” and the reception of this process by an audience who accepts it as such.’

Securitization has been described as a ‘governmentality based on mistrust and fear of the uninvited other’. It has been seen to facilitate the introduction of extraordinary measures by invoking national security concerns and has increased with respect to irregular migration following the terrorist attacks of September 11, 2001. With reference to comparable developments in US law, Pope and Garrett observe that immigration policy has become a ‘security policy to protect the citizen from the invasion of the non-citizen.” Mandatory immigration detention may be seen as a function of this phenomenon but the introduction of the Pacific Strategy in 2001 stands as an emblematic case of securitisation.

Due in large part to the Howard Government’s changes to native title legislation in 1998, Australia’s human rights record came under scrutiny pursuant to an emergency mechanism which had not previously been invoked with respect to Australia. The conclusions reached by the UN Committee on the Elimination of all forms of Racial Discrimination generated a hostile reaction from the government. In the context of comments made by the committee, Prime Minister John Howard told Kerry O’Brien that “[t]he question of whether the current state of native title law in Australia is fair to all Australian people, that’s a matter that I think should be resolved in Australia by the representatives of the Australian people, democratically elected, and that is what has happened... It’s not really the business of a UN committee to come along and say “We think that’s wrong, even though your parliament has agreed to it and we think you ought to change it.”’ 

Foreign Affairs Minister Alexander Downer put the point rather less delicately and declared that “[i]f a United Nations committee wants to play domestic politics here in Australia, then it will end up with a bloody nose”:


Hyndman and Mountz, note 47 above, 254.

Rygiel, note 34 above, 216.

The portrayal of IMAs as unlawful has scaffolded laws which were built upon the understanding of IMAs as a threat to Australia. Catherine Dauvergne has observed that '[m]igration law is being used to make people “illegal” and this rhetoric is resonating as never before.' The Migration Act 1958 (Cth) (Migration Act) ‘constructs illegality’ by creating a distinction between non-citizens who are ‘lawful’ and those deemed to be ‘unlawful’. A lawful non-citizen is defined in section 13 as a non-citizen ‘who holds a visa that is in effect.’ Section 14 provides that a non-citizen who does not hold a valid visa and therefore falls outside the definition in section 13 is an unlawful non-citizen. Unlawful non-citizens who enter or attempt to enter Australia by boat are assigned the additional moniker of ‘unauthorised maritime arrival’ pursuant to section 5AA(1) of the Act.

The Migration Act confers wide ranging powers on the Minister, the Department of Immigration under its various iterations and other federal government organs with respect to unlawful non-citizens. These include a requirement to detain a person known or reasonably suspected to be an unlawful non-citizen (section 189(1)), a Ministerial power to declare certain countries as ‘regional processing countries’ (section 198AB) and a power conferred on officers to take unauthorised maritime arrivals to a regional processing country (s 198AD). The exercise of these powers is examined further below in the section entitled ‘The Consequences of Criminalisation.’

Like the invocation of war within political and popular rhetoric, the war metaphor has been invoked judicially in the context of the statutory detention regime. Analogies have been drawn between unlawful non-citizens and those deemed to be disloyal or to present a threat to the nation during wartime. Michael Head observes that the judgment of McHugh J in Al-Kateb v Godwin was ‘akin to a political speech in favour of indefinite detention in general, drawing pointed analogies between the detention of ‘aliens’, prisoners-of-war and people considered to be a threat to national security during wartime, and using language such as ‘protection of the community from undeserved infiltration.’

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55 Ibid, 4.
56 Al-Kateb v Godwin (2004) 219 CLR 562 at [47], [55]-[58].
Fixing the moniker of ‘unlawful’ and ‘unauthorised’ on asylum seekers may be observed to ‘circumscribe identity solely in terms of a relationship with law: those who are illegal have broken (our) law.’ 59 Like the war metaphor considered by Pickering, Dauvergne observes that ‘being illegal’ obscures asylum seekers’ identities and has furthermore emerged as ‘a globally meaningful identity label.’ 60 Notwithstanding the right to seek asylum which is enshrined in the Universal Declaration of Human Rights 61 and underpins the Convention Relating to the Status of Refugees 62 (Refugee Convention), the construct of illegality has become fixed within the Australian idiom and has supported a broad misunderstanding as to what amounts to unlawful conduct in the context of seeking asylum. In Pickering’s examination of media reporting, she has observed that ‘the very act of being present without prior refugee status is portrayed as an aggressive deviant act against the nation state that is inherently illegal.’ 63 The statutory language of the Migration Act has fed into political rhetoric and in turn been reflected in public portrayals of IMAs. The resulting misconception that seeking asylum by boat is illegal entrenches the queue jumper label, with the resettlement process standing in contrast as the lawful means by which protection can (and should) be sought.

This thesis argues that the provisions of the Migration Act ‘make people illegal’, to use Dauvergne’s term, through their statutory definition as unlawful non-citizens and unauthorised maritime arrivals and the detention and removal provisions which are applied to them. The requirement that they be detained under the Migration Act has generated and perpetuated public hostility towards IMAs and this hostility, combined with the sense of moral panic which reached its zenith in 2001, has enabled the introduction of further extraordinary measures in the form of the Pacific Strategy and subsequent models of offshore processing. Offshore processing may thus be seen as a corollary of immigration detention, replicating its objectives and exacerbating its effects of distancing and isolation. As unauthorised maritime arrivals, IMAs are removed and effectively exiled offshore. The application of such a coercive legal regime to vulnerable people seeking protection raises deep questions about the rights of disenfranchised and unpopular groups within a liberal democracy. Are such people entitled to the protections accorded by human rights and refugee

59 Dauvergne, note 54 above, 16.
60 Ibid, 18.
61 General Assembly Resolution 217 A (III), 10 December 1948.
63 Pickering, note 28 above, 175-176.
law? Is the effect of harsh domestic policy tempered by the operation of norms with which Australia has agreed to comply under international law? This thesis examines the applicability of international human rights norms and the problems of enforcement.

A right to have rights?64

Hannah Arendt described stateless refugees65 in 1951 as 'the most symptomatic group in contemporary politics'.66 Having lost all human rights and political status, the members of this group had lost 'the very qualities which make it possible for other people to treat him as a fellow man.'67 All that was left was 'unqualified, mere existence'68 embodying the 'abstract nakedness of being human'69 or 'bare life.'70 The IMAs attempting to reach Australia on the SIEV 4 and Tampa were reduced to bare life, with even their unqualified, mere existence rendered precarious in the face of the perilous circumstances in which they sought passage by sea.

Arendt argued that the plight of people who exist without the protection of their home state demonstrated the paradox of human rights which are intended to operate independently of citizenship and nationality but are in fact dependent upon national governments for their implementation:

The Rights of Man, after all, had been defined as "inalienable" because they were supposed to be independent of governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.71

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64 Arendt, The Origins of Totalitarianism, note 1 above, 293.
65 In the chapter entitled ‘The Decline of the Nation-State and the End of the Rights of Man’, Arendt refers primarily to ‘stateless persons’, including those who seek asylum (p 178) and ‘the new refugees’ (p 291). Within the purview of Arendt’s conception of stateless persons are those without nationality and those who are de jure members of a political body (p 275) but who exist without the protection of their home state. Arendt’s work pre-dates the adoption of the Refugee Convention, which operates on the basis that a refugee is either de facto or de jure stateless; having no nationality or having lost the protection of their country of nationality. Arendt’s comments are therefore directly applicable to asylum seekers and refugees. It should nevertheless be noted that not all stateless persons are refugees. The term ‘stateless person’ is defined as ‘a person who is not considered as a national by any State under the operation of its law’ in the Convention relating to the Status of Stateless Persons (adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954; entry into force: 6 June 1960). The Convention contains obligations with respect to stateless persons but does not apply to those who are currently receiving protection or assistance from UN organs, including UNHCR.
66 Arendt, The Origins of Totalitarianism, note 1 above, 276.
67 Ibid, 296.
68 Ibid.
69 Ibid, 299.
70 Ibid, 296.
71 Ibid, 288.
With human rights woven into the complex edifice of sovereignty, they are at once recognised yet precarious; conditional upon sovereign will and ultimately unenforceable. The calamity of the stateless was loss of 'a community willing to guarantee any rights whatsoever.' They became 'rightless, the scum of the earth.' Arendt asserted a right to have rights in the form of a place in the world which makes opinions significant and actions effective. This right to have rights was essentially preconditioned by citizenship and thus inclusion in a political community.

Arendt decried the absence of a ‘sphere that is above nations’ to transcend that statist system of international law, with the best intentioned articulations of universal human rights norms limited by ‘the present sphere of international law which still operates in terms of reciprocal agreements and treaties between sovereign states.’ This statist system is better adapted to enforcing treaties concerned with the mutual rights and obligations of states than those in which the obligations sought to be enforced are not owed by one State to another, but by State parties to individuals. The notion of reciprocity of State rights and obligations in relation to instruments concerned with the inherent rights of all humans is incongruous. Arendt observed that the ‘supposedly inalienable’ rights of man ‘proved unenforceable—even in countries whose constitutions were based upon them—whenever people appeared who were no longer citizens of any sovereign state.’

These concerns about the application and enforceability of human rights have retained their currency with respect to human rights under Australian law. Australia’s willingness to ratify international human rights treaties has not been matched by a corresponding desire to embed their standards into its domestic law. As a dualist state which is not party to any regional human rights regime, the only operational ‘enforcement mechanism’ which applies with respect to core human rights obligations is that of the ‘communications’ regime established under key instruments such as the International Covenant on Civil and Political Rights.

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72 Ibid, 294.
73 Ibid, 266.
74 Ibid, 293.
75 Ibid.
76 See for example Chapter 3C of the thesis; see also Belilos v Switzerland (1988) 10 E.H.R.R.466 and the comments of the European Court of Human Rights concerning the limitations on reciprocity in the context of treaties concerned with human rights.
77 Arendt, note 1 above, 293.
This mechanism has been invoked repeatedly on behalf of asylum seekers in immigration detention but the resulting decisions have proved to be legally unenforceable. The UN Human Rights Committee has concluded repeatedly that Australia’s mandatory immigration detention regime is arbitrary and not amenable to review in contravention of articles 9(1) and 9(4) of the ICCPR. The Committee’s findings have been rejected by successive governments, with the Howard Government adopting an openly hostile approach to the work of UN committees, characterising their adverse findings as another unwelcome intrusion into Australia's sovereignty.

Despite the requirement of good faith performance and interpretation of treaty obligations and principles which call for statutory interpretation to accord with fundamental rights and freedoms, human rights have been largely dismissed as irrelevant within the sphere of Australia’s domestic law. The most dramatic judicial embodiment of Arendt’s vision of rightlessness is the 2004 High Court decision of Al-Kateb v Godwin. Mr Ahmed Ali Al-Kateb was a stateless Palestinian from Kuwait who remained in indefinite detention in circumstances where his removal from Australia was impracticable in the reasonably foreseeable future. The majority judgments illuminated a judicial order which had largely operated independently of international human rights norms. They concluded that, notwithstanding Mr Al-Kateb’s remote prospects for removal, the Migration Act authorised his indefinite detention which may continue for life.

The majority judgments revealed what was possible under Australian law. Detention can continue indefinitely irrespective of individual circumstances and in the absence of criminal conviction or even suspicion of criminal conduct. Al-Kateb’s statelessness denuded him of the right to have rights. Even without human rights protections embedded in domestic law, such a regime could not be imposed on Australian citizens. It would be unconstitutional because its penal or punitive character would bring it within the exclusive power of the courts. To this end, citizenship confers a right not to be arbitrarily detained; a fundamental

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79 See Chapters 3C and 7 of the thesis.
80 See note 48 above.
81 See generally Chapter 7, especially [14.40] and [14.80].
82 (2004) 219 CLR 562, see also notes 56-57 above. This case is examined in Chapters 2 and 7 of this thesis.
83 See generally note 65 above. Mr Al-Kateb’s statelessness met the definition in the 1954 Convention relating to the Status of Stateless Persons.
84 See Lim v Minister for Immigration (1992) 176 CLR 1, note 14 above.
right enshrined in international human rights law. Notwithstanding the punitive effect of immigration detention, the authority to detain an alien for the purposes of exclusion, admission or deportation is an incident of the constitutional power with respect to aliens.\footnote{Ibid at 32 per Brennan, Deane and Dawson JJ.}
The detention provisions of the Migration Act took their character from the administrative purpose of the detention and remained valid as long as the detention was limited to what was reasonably necessary to achieve the purpose.\footnote{Ibid at 33 per Brennan, Deane and Dawson JJ, at 57 per Gaudron J and at 71 per McHugh J.} The courts' increasingly commodious pronouncements concerning the scope of the administrative purpose have called into question whether there are any limits on the power to detain an alien under the Migration Act.\footnote{See Head, note 58 above.} The High Court has adopted the same approach in determining challenges focusing on intolerable conditions of detention\footnote{Behroz v Secretary of Department of Immigration and Multicultural and Indigenous Affairs (2004) 219 CLR 486.} and the effect of detention on children.\footnote{Re Woolley; Ex parte Applicants M276/2003 (2004) 225 CLR 1.} The provisions of an Act designed to regulate the entry, presence and departure of aliens are capable of stripping them of legality altogether;\footnote{Arendt, note 1 above, 292.} removing them from the pale of the law.\footnote{Ibid, 284.}

The rightlessness of Mr Al-Kateb and other IMAs in detention is incongruous in a liberal democracy which purports to uphold human rights. It challenges us to find creative paths towards the recognition of rights; to render IMAs political subjects (and not the subjects of political expediency) and to ensure that the right to have rights is indeed the birthright of all; not just the beneficiaries of the happenstance of citizenship. The chapters in this thesis provide a detailed examination of the range of avenues available to those who seek to bring IMAs within the sphere of rights and move Australia beyond Arendt's prescient and highly disturbing critique.

The consequences of criminalisation

The processes whereby IMAs have been demonised and constructed as transgressive have been considered above. Beyond this construction as unlawful or even criminal, IMAs have been managed and treated in ways that replicate the management and treatment of criminals under the law. The administration of law and policy used to manage IMAs have assumed key objectives of criminal sentencing while the enforcement powers and sanctions adopted also
emulate those which operate under criminal law. This convergence of immigration control and responses to crime has been dubbed 'crimmigration' or the 'criminalization of immigration law.' 92

In the United States, Stumpf has cautioned that this growing convergence has seen immigration law (encompassing the law concerning irregular migration) become 'suffused with the substance of criminal law itself' 93 and 'set us on a path towards establishing irrevocably intertwined systems: immigration and criminal law as doppelgangers.' 94 Both systems of law function as 'gatekeepers of membership in our society, determining whether an individual should be included or excluded.' 95 Both systems are designed to create distinct categories of people; innocent versus guilty, admitted versus excluded, 'legal' versus 'illegal.' 96 Stumpf has observed that it is 'unremarkable' that when policymakers seek to increase barriers to inclusion of non-citizens in society, they should look to the criminal law which 'similarly functions to exclude.' 97

While criminal law operates from the presumption that the accused has full membership of society and requires the government to prove otherwise in accordance with the requisite standard before 'stripping critical elements of citizenship', 98 immigration law operates from the opposite assumption. Asylum seekers are thus deemed unworthy of membership unless they can establish their entitlement to protection under the criteria set out in Article 1A(2) of the Refugee Convention. Non-membership is assumed, with the immigrant 'presumed inadmissible' and required to establish membership. 99 Although a high percentage of IMAs have been able to establish refugee status, the immigration detention regime has operated from the premise that they are not entitled to membership while the offshore processing regime seeks to deny the very opportunity of establishing membership. Despite operating

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93 Stumpf, note 4 above, 381.
95 Stumpf, note 4 above, 396.
96 Ibid.
97 Ibid, 380.
98 Ibid, 399.
99 Ibid.
from opposite assumptions about the membership status of individuals, the consequences of the operation of immigration and criminal law are similar 'once the individual is deemed unworthy of membership,' 100 with society becoming 'increasingly stratified by flexible conceptions of membership in which non-members are cast out of the community by means of borders, walls, rules and public condemnation.' 101

The most coercive measures designed to deter and deny access to membership in Australia have been seen in the administration of the naval interdiction program dubbed 'Operation Relex' under the Pacific Strategy. Operation Relex engaged the Australian Defence Force in the surveillance and interception of boats within Australian waters and removal of their occupants to Nauru and PNG for processing. Its measures included operations on the high seas during which boats were redirected, towed or escorted to Indonesian waters. 102 Naval Component Commander Rear Admiral Smith, the lead component commander for Operation Relex, 103 characterised the measures adopted as 'law enforcement activity' which 'had real potential to rapidly escalate into a violent situation or just as quickly deteriorate into a major safety or preservation of life situation or, worse, both.' 104 Rear Admiral Smith noted that such hazardous and volatile situations had not been previously encountered by defence force personnel 'during non-warlike operations.' 105 Operation Relex may be seen as a corollary of the rhetoric of war. These coercive measures were unprecedented in peacetime. In the dangerous responses they would inevitably bring about, they increased the vulnerability of IMAs while fortifying the view that their attempted arrival must be addressed as a matter of law enforcement.

Law enforcement objectives may also be seen in the administration of immigration detention, the objectives of which coincide with those of criminal sentencing. Foremost among its rationalisations is deterrence. Its further aims include containment and segregation from the Australian community and preventing disappearance into the community. 106 Former Immigration Minister Phillip Ruddock described immigration detention as 'a very important

100 Ibid, 418.
101 Ibid, 419.
103 Select Committee for an inquiry into a certain maritime incident, Main report (October 2002) [2.24] – [2.28].
104 Ibid [2.80], n 91.
105 Ibid.
106 Joint Standing Committee on Migration, note 25 above, 110-112.
mechanism for ensuring that people are available for processing and available for removal, and thereby a very important deterrent in preventing people from getting into boats." The belief that IMAs are likely to abscond and must accordingly be held in closed detention emanates from the unauthorised mode of their arrival and assumptions with respect to future infractions. Offshore processing mirrors the same objectives as immigration detention, but operates subject to the additional objective of expelling IMAs from Australian altogether.

The criminalisation of asylum is further apparent in the sanctions and enforcement powers employed in the administration of these policies. The detention of IMAs in mainland facilities and offshore in the excised territory of Christmas Island and in other nations emulates the incarceration of criminals. A duty to detain a person known or reasonably suspected to be an unlawful non-citizen is imposed by section 189 on a range of persons who fall within the purview of the term 'officer' under the Migration Act, including officers of the Australian Federal Police and Department of Immigration. The power to detain an unlawful non-citizen in Australia's migration zone has been extended to unlawful non-citizens in an excised offshore place and even to persons outside the migration zone who are not unlawful non-citizens but would become unlawful non-citizens if they entered the migration zone in circumstances where an officer reasonably suspects that they are seeking to enter the migration zone or an excised offshore place. Beyond this, an officer is empowered to 'use such force as is necessary and reasonable' to remove an 'unauthorised maritime arrival' to a regional processing country, including placing or restraining them on a vessel or removing them from a vehicle, vessel or place of detention. These powers of detention and removal parallel police powers which exist under the criminal law and the sanctions of detention and removal offshore mirror the incarceration and deportation of convicted criminals.

108 Joint Standing Committee on Migration, note 25 above, 110-111.
109 See section 5, Migration Act.
110 Section 189(1).
111 Section 189(3). The consequences of excision are examined below.
112 Section 189(2).
113 Section 189(4).
114 Section 198AD.
Although detention under the Migration Act pointedly employs more neutral language than
that used with reference to the incarceration of criminals, its shares the effect of punishing its
subjects. Punishment is indeed one of the key aims of criminal incarceration.\textsuperscript{115} Numerous
reports and witness statements have documented a culture of hostility towards detainees and a
tendency for staff, particularly those drawn from a correctional background (of whom there
are many) to treat detainees 'as if they were criminals.'\textsuperscript{116} Harsh treatment by staff has
intensified the punitive effect of detention. The High Court has accepted in another context
that '[p]unishment is punishment, whether it is imposed in vindication or for remedial or
coercive purposes. And there can be no doubt that imprisonment...constitute[s] punishment.'\textsuperscript{117} For reasons outlined above, the alien constitutes the exception to this self-
evident truth. While the identical treatment of a citizen would be unconstitutional, it becomes
administrative detention when applied to aliens, pursuant to an all-encompassing purpose
with few discernable limits.\textsuperscript{118} Yet this constitutionally-based particularity does not alter the
effect of the detention, which for reasons outlined below, is even more punishing than
criminal incarceration.

\textit{From criminalisation to ‘deprivation of legality’}\textsuperscript{119}

Parallel objectives and enforcement powers notwithstanding, asylum seekers in immigration
detention are denied key procedural and substantive rights which are afforded under the
criminal law.\textsuperscript{120} The presumption that the accused has full membership of society has
translated to significant procedural safeguards. Imprisonment must follow the establishment
of criminal guilt subject to the high threshold of proof beyond a reasonable doubt, conviction
by a court of law and imposition of a sentencing order. An IMA must be detained simply due
to their status as an unlawful non-citizen. A sentence of imprisonment is imposed by court
order following a detailed examination of a convicted criminal’s individual circumstances.
The individual circumstances of unlawful non-citizens are irrelevant. An officer must detain

\textsuperscript{115} See for example Dennis J Baker, Glanville Williams Textbook of Criminal Law (Third edition) (Sweet and
Maxwell 2012), 1-065 to 1-076.

\textsuperscript{116} Flood P, Report of Inquiry into Immigration Detention Procedures 2001 at [7.4]; see also Statutory
declaration of Anthony Hamilton-Smith, ex DIMIA manager from Woomera to National Enquiry 24 October
2002.

\textsuperscript{117} Witham v Holloway (1995) 183 CLR 525, 534 per Brennan, Deane, Toohey and Gaudron JJ. This case was
concerned with contempt of court.

\textsuperscript{118} Head, note 58 above, 41-42.

\textsuperscript{119} Arendt, note 1 above, 292.

29:5 Alternative Law Journal 228-234; Russell Skelton, Jail ‘better’ than detention centres, The Age 22
any person known or reasonably suspected to be an unlawful non-citizen. While criminal sentences are imposed for a defined time period, immigration detention is subject to no time limit and has often been lengthy and in certain circumstances indefinite.

These characteristics of immigration detention have exacted a toll on detainees’ mental health. The number of asylum seekers in immigration detention facilities who were observed to require psychological and psychiatric help was described by former Human Rights Commissioner Dr Sev Ozdowski as staggering. After visiting prisoners who had previously been held in immigration detention, Dr Ozdowski observed that ‘[u]nhesitatingly they tell me that given a choice, they would prefer prison to immigration detention’. Prisoners were advantaged by rigid rehabilitation programs which Dr Ozdowski found only operated sporadically in immigration detention and were beset with problems.

In the conditions which pertain, the immigration detention environment is comparable to a prison yet the detainee exists in a situation where ‘unless he commits a crime, his treatment does not depend on what he does or does not do’. Arendt has observed that those who lived without the protection of the state were liable to be imprisoned without charge and ‘subject to a reversal of “the entire hierarchy of values which pertain in civilised countries.” Through being deprived of all rights, they were “deprived of legality”, their legal status negated. They were “the anomaly for whom the general law did not provide” and the true barometer of their rightlessness was the reality that their position would be improved by becoming the anomaly for which the law did provide, namely a criminal. The commission of a crime therefore held the promise of elevating a stateless person from an existence outside the law to “some kind of human equality, even if it be as a recognised exception to the norm.” Like the prisoners met by Dr Ozdowski, their position would be elevated through incarceration in prison. Such was the condition of bare life that ‘[o]nly as an offender against the law’ could

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121 The impact of detention on mental health is explored below under the section entitled ‘The Materialisation of the Exception’. It is also the focus of Chapter 1 of the thesis.
122 Ozdowski, note 107 above.
123 Ibid.
124 Ibid.
125 Ibid, note 1 above, 197 above.
126 Ibid.
127 Ibid, 284.
128 Ibid, 284.
129 Ibid.
one be 'safe from the arbitrary police rule against which there are no lawyers and no appeals.'

**Bare life and the state of exception**

The consequence of the criminalisation of asylum is thus to deprive IMAs of legality altogether. As bare life, they are excluded from the sphere of rights-holding through policies which seek to deter and deny access to protection. Arendt's conceptualisation of bare life has been built upon by Italian philosopher Georgio Agamben through the figure of *homo sacer*, drawn from ancient Roman law as 'sacred man' who 'may be killed and yet not sacrificed' and is banished from the normal juridical order. *Homo sacer* is a form (or condition) of bare life which exists outside the sovereign law, with the consequence that their killing does not constitute homicide, and is furthermore excluded from the religious community and divine law and therefore unworthy of sacrifice. Being excluded from both the religious community and political life, 'his entire existence is reduced to a bare life stripped of every right by virtue of the fact that anyone can kill him without committing homicide; he can save himself only in perpetual flight or a foreign land. And yet he is in a continuous relationship with the power that banished him precisely because he is at every instant exposed to an unconditional threat of death.'

According to Agamben's political philosophy, the exercise of the sovereign power to exclude (or 'ban') certain forms of life creates a state of exception. Through the practices, or 'logic' of sovereignty, the sovereign is able to create a state of exception by suspending the operation of sovereign law. The form of life relegated to the condition of *homo sacer* can thus be excluded from the operation of the ordinary sovereign law. In the logic of binary opposition favoured by Agamben, the forms of life excluded by the sovereign are subject to an 'inclusive exclusion.' *Homo sacer* becomes the subject of sovereign power and is included in the political order by virtue of their exclusion.

The concept of inclusive exclusion is manifest in Australia's response to IMAs and illuminated by the Tampa and SIEV 4 incidents. The IMAs rescued from the ocean were

130 Ibid.
132 Ibid., 183.
133 Ibid., 25-29.
134 Ibid, 21, 27.
voiceless and depoliticised, bare life cast into inhospitable nature. Yet they were portrayed through political rhetoric and media reporting as a serious threat which necessitated their exclusion from the Australian community and body politic through public condemnation and the operation of law and policy. The political success of the Howard government’s stance with respect to their arrival confirmed their exclusion from membership in Australian society. But it is through this very exclusion that they emerged as the subject of a significant body of law which consigned them to places of containment in the form of offshore processing. They also became included in the national consciousness, emerging as the fodder of news headlines and the subject of intense public interest. In their de-politicised voicelessness, IMAs became included in the body politic as a defining political issue of the time.

In introducing laws to deter and deny access to the protections afforded under Australian law, the Australian government was creating a state of exception. The state of exception underpins the paradox of sovereignty, which sees the sovereign exist ‘at the same time outside and inside the judicial order;’ 135 with the ‘legal power to suspend the validity of the law’. 136 The sovereign is accordingly able to ‘legally place [itself] outside the law’ 137 and create zones of exception in which the law is suspended. Through creating a state of exception, Agamben asserts that the sovereign “creates and guarantees the situation” that the law needs for its own validity. 138 The ability to create exceptions to the operation of the law, to exclude from the legal order, is thus constitutive of sovereign power.

The exclusionary effect of the state of exception is a taking outside, with the term exception derived from the Latin ex capare; taken outside. 139 IMAs are taken outside Australia’s society, laws and territorial boundaries. Exclusion of homo sacer through the creation of a state of exception creates zones of indistinction between inside and outside. 140 While the individual is included in the body politic through their very exclusion, or relegation outside the normal juridical order, the creation of the state of exception has the effect of internalising

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135 Ibid, 15.
136 Ibid.
137 Ibid.
138 Ibid, 17.
139 Ibid, 18.
140 Ibid, 29.
the 'outside', entering a threshold of indistinction\textsuperscript{141} in which 'law constantly passes over into fact and fact into law, and in which the two planes become indistinguishable.'\textsuperscript{142}

The 'materialization of the state of exception' in which 'bare life and juridical rule enter into a threshold of indistinction' is the camp.\textsuperscript{143} The camp is 'a piece of land placed outside the normal juridical order'\textsuperscript{144} and the 'very paradigm of political space at the point at which politics becomes biopolitics and \textit{homo sacer} is virtually confused with the citizen.'\textsuperscript{145} The camp, broadly defined, includes the extermination camps of the Nazi regime in addition to spaces in which refugees and immigrants are held, such as refugee camps and 'apparently innocuous spaces\[s\]' such as French airport \textit{zones d'attentes} in which refugees and asylum seekers are detained. While his conflation of concentration camps with spaces in which asylum seekers are held has generated understandable controversy,\textsuperscript{146} Agamben does not seek to equate the experiences of those held in these broadly defined spaces. He seeks instead to explore the characteristics of this 'most absolute biopolitical space ever to have been realized, in which power confronts nothing but pure life, without any mediation'\textsuperscript{147} and investigate the 'juridical procedures and deployments of power by which human beings could be so completely deprived of their rights and prerogatives that no act against them could appear any longer as a crime.'\textsuperscript{148} Bare life is held in 'a space in which the normal order is de facto suspended and in which whether or not atrocities are committed depends not on law but on the civility and ethical sense of the police who temporarily act as sovereign'\textsuperscript{149} Echoing Arendt, he observes that within these nightmare realms, everything had truly become possible.\textsuperscript{150}

\begin{flushleft}
\textsuperscript{141} Ibid, 174. \\
\textsuperscript{142} Ibid, 171. \\
\textsuperscript{143} Ibid, 174. \\
\textsuperscript{144} Ibid, 169-70. \\
\textsuperscript{145} Ibid, 171. \\
\textsuperscript{147}Georgio Agamben, 'The Camp as the \textit{Nomos} of the Modern' in Hent de Vries and Samuel Weber, \textit{Violence, Identity and Self-Determination} (Stanford University Press, 1997) 105-118, 110. \\
\textsuperscript{148} Ibid, 110. \\
\textsuperscript{149} Agamben (\textit{Homo Sacer}), note 131 above, 174. \\
\textsuperscript{150} Agamben (\textit{Camp as Nomos}), note 147 above, 110. 
\end{flushleft}
The materialisation of the exception

In the context of the law and policies which are the focus of this thesis, the state of exception may be seen to operate with respect to three principal spheres, or ‘camps’. The first and indeed foundational sphere is that of immigration detention. Agamben observes that the state of exception ‘was essentially a temporary suspension of order’ which within the camp becomes a ‘new and stable spatial arrangement inhabited by bare life that more and more can no longer be inscribed in that order.’ The immigration detention regime was introduced in 1992 to address ‘the pressing requirements of the current situation’ constituted by the increase in numbers of IMAs arriving in Australia. It was in that respect an exceptional measure. Two years later, it would be applied to all IMAs until their refugee status had been determined. While immigration detention facilities were initially located in mainland Australia, they were ex capare in their operation; designed to take IMAs outside the normal juridical order. The facilities in which most IMAs were held are located in remote parts of the country, insulating the citizenry from detainees and in tum distancing the latter from information, supporters, advocates, lawyers and any connection with Australian society. The degree to which these facilities are ‘outside’ was succinctly encapsulated a decade ago in Bernard Cohen’s description of the Woomera Immigration Detention Centre as ‘not-Australia.” The regime operates without reference to the detainees’ circumstances and there is no realistic avenue for challenging their detention under the law.

The starkest manifestation of entry into the threshold of indistinction is the prevalence of mental illness within the detention environment. The mental harm emanating from the policies of immigration detention and offshore processing is the examined in Chapters 1 and 7 respectively. By 2002, a significant body of medical research had established the deleterious effect of immigration detention on mental health. The experience of

151 As explained below, these three principal spheres are supplemented by two subsidiary spheres or conditions of further exclusion effected through privatisation of detention services and the operation of the ‘no advantage’ principle. A further interstitial sphere exists between the spaces constituted by immigration detention and offshore processing in the form of detention and offshore processing in the excised offshore territory of Christmas Island. Like the Migration Act itself, this constellation of spaces is convoluted, with overlapping and intersecting planes which would look like a chaotic solar system if translated to diagrammatic form.
152 Agamben (Camp as Nomos), note 147 above, 114.
153 Gerry Hand, Second reading speech, Migration Amendment Bi/11992, 5 May 1992.
immigration detention has precipitated the onset of mental illness and exacerbated pre-existing conditions but the provision of appropriate psychiatric treatment has constituted the exception. Detainees suffering from severe mental illness have been transferred to psychiatric facilities only in the ‘most desperate’ circumstances, while most have been held in solitary confinement. Demonstrating a blurring of the inside and outside, the mental health of staff working in the detention environment has been undermined. Staff necessarily traverse the divide between inside and outside by working in detention centres but residing in the community. The stress of working in the detention environment has been linked with binge drinking, post-traumatic stress disorder, depression and even suicide.

Immigration detention facilities emerged as a modern dystopia in which the manifestations of mental dysfunction were so commonplace as to be unrecognisable. Depression became so prevalent that staff came to regard mental illness as a concomitant of the detention experience with the consequence that abnormal behaviour was normalised and a range of vulnerable individuals absorbed into immigration detention centres form the Australian community. The most notorious of these is the case of Cornelia Rau, an Australian permanent resident who remained in detention as a suspected unlawful non-citizen for 10 months while the behavioural symptoms of her serious mental illness were met with periods of solitary confinement and other inhumane treatment. The Palmer Enquiry into Rau’s detention led to the identification of a further 247 cases of wrongful detention of vulnerable people with


157 Ibid.

158 ABC Lateline, ‘Guard blows whistle on detention centre conditions’ (5 May 2011) at http://www.abc.net.au/lateline/content/2011/s3209164.htm

159 See Chapter 1.

160 Official Committee Hansard, Joint Standing Committee on Australia’s Immigration Detention Network, 6 September 2011, evidence given by Kaye Bernard, General Secretary, Union of Christmas Island Workers.


162 Mick Palmer, Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, July 2005, p 168, [7.3.2]. Palmer observed an ‘assumption culture’ which ‘generally allows matters to go unquestioned when, on any examination, a number of the assumptions are flawed.’ For example, it was assumed that depression is ‘simply a normal part of detention life’ thus ‘normalising abnormal behaviour in the assessment of medical and mental health.’

163 Ibid.
Australian citizenship, permanent residence or valid visas between 1997 and 2004 and cases have emerged since. These people included children and people with mental illness, substance abuse problems and/or intellectual disabilities. These vulnerable individuals from outside the space of exception were thus absorbed within it; effectively losing their legal status and moving into a zone in which exception and norm are indistinguishable. They had crossed the threshold of indistinction into spaces where ‘power confronts nothing but pure life, without any mediation.’ While their detention was not authorised under the law, they were held in a space where ‘law passes over into fact’ and the ‘police who temporarily act as sovereign’ were immigration officials and staff engaged by the private contractors which operate these spaces. These officials have been found in many cases to have made erroneous suppositions with respect to immigration status and undertaken insufficient efforts to identify the detainees or address their needs.

A further manifestation of law passing over into fact is the reality that immigration detention facilities have become places of punishment, aptly referred to by Coleman as ‘extra-juridical space[s] of punishment’ and spheres of ‘extra-juridical violence.’ The extent to which the normal juridical order has been suspended is further demonstrated by the discussion above concerning the differences between the experience of incarceration in prison and immigration detention and the culture of hostility towards detainees within the detention environment. Although punishment is not one of the objectives underpinning the statutory regime, its objectives have to some extent evolved in administrative practice despite the statutory language remaining unchanged. The objectives of detention, as understood by those

166 Australian permanent resident Van Phuc Nguyen was detained at Villawood for more than 3 years after Immigration Officers failed to recognise his visa: see ABC News, ‘Wrongful detention was ‘serious error’ (3 October 2009) at http://www.abc.net.au/news/2009-10-03/wrongful-detention-was-serious-error/1089818
167 See note 147 above.
170 Ibid.
exercising de facto sovereignty, would appear to have evolved to include punishment for the unauthorised mode of IMAs' arrival.  

The demonisation of those held within this first sphere of exception is premised upon their failure (or, as we have seen, presumed failure) to seek protection in a manner considered lawful and legitimate, namely by waiting for resettlement from outside Australia. The spaces in which those in need of humanitarian protection await resettlement comprise the second sphere of exception to which Australian refugee policy addresses itself. These spaces have not been created under Australian law but have been fashioned as the proper trajectory for humanitarian protection. Under the offshore component of Australia's humanitarian program (outlined in Chapter 7), visas are granted to people residing in these spaces either as refugees or pursuant to the Special Humanitarian Program owing to the danger of substantial discrimination amounting to a gross violation of their human rights in their home country. Refugees resettled under the offshore program are referred by the office of the UN High Commissioner for Refugees (UNHCR) after registering their claim, being determined to be refugees and establishing further criteria demonstrating that they are in need of resettlement.

Contrary to widely held public perceptions fuelled by political rhetoric, people awaiting resettlement in refugee camps are not granted visas in accordance with an orderly queue system. The reality is that less than 1% of the world's refugees find resettlement places each year. The UNHCR registration process is at best slow and dependent upon the safety of UNHCR personnel and cooperation of the host nation which in some cases is limited. Many refugees are unable to register with UNHCR and never become eligible for resettlement. In light of the significant numbers of refugees languishing in overseas camps, obtaining a visa under the offshore resettlement program is akin to winning a lottery. Barbara Harrell-Bond observes that '[d]espite their ostensibly temporary nature, these settings have become the main living environments for many refugees for years and, in some cases, for more than one generation.' The asylum seekers who inhabit these spaces are not the beneficiaries of an obligation of resettlement under international law. Their prospects of resettlement rest upon the fragile aspiration of international cooperation reflected in the fourth preambular

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171 See note 115 above.
172 UNHCR, Resettlement Fact Sheet, as at 9 September 2013, available at http://www.unhcr.org/pages/4a16b1676.html
paragraph of the Refugee Convention and the recommendation adopted at the conference during which the Convention was adopted that 'governments ... act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.'

The ‘camps’ and settlements within this second sphere of exception operate outside Australian law and largely outside the law of their host nations, with de facto sovereignty assumed by the humanitarian agencies responsible for their governance. While the places where refugees await resettlement or receive services from the offices of the UNHCR are diverse in character and structure, most fall within Agamben’s conception of the camp. These spaces, in which asylum seekers are dependent on humanitarian support, have been observed to share common characteristics. Harrell-Bond has noted an authoritarian structure of administration, with ‘humanitarian workers and refugees “trapped” in asymmetrical relationships’ in a structure which sees refugees’ views disregarded and ‘accountability... skewed in the direction of donors.’ Accordingly, it is the interests of the donor states that are prioritised in the allocation of resources.

Within these ‘camps’, assistance is ‘conceived of in terms of charity rather than as a means of enabling refugees to enjoy their rights’ and workers are assisted in facilitating the distribution of aid by ‘pathologizing, medicalizing, and labelling the refugee as helpless and vulnerable’ or invoking the countervailing stereotype of ‘bad’ refugees as thankless, ungrateful, cheating, conniving, aggressive, demanding, manipulative, and even dangerous persons who are out to subvert the aid system. Their mere existence as bare life within these spaces is thereby further de-politicised and they have been subject to inhuman treatment which Harrell-Bond considers to be so widespread and well documented as to be normative.

One explanation for workers’ ill-treatment of those they are charged to protect is the distress and disempowerment which flow in part from budgetary constraints and an inability to effect significant improvements to the refugees’ living conditions. Beyond

175 Harrell-Bond, note 173 above, 76.
176 Ibid, 53.
177 Ibid.
178 Ibid, 57.
179 Ibid, 58.
180 Ibid, 64.
181 Ibid, 72.
blaming bureaucratic and structural realities, Walkup has charted the tendency for workers to manage refugees as a problem to be eliminated.\textsuperscript{182} Within this materialization of the state of exception,\textsuperscript{183} the exercise of power through coercion and discipline\textsuperscript{184} signals entry into the threshold of indistinction. Within this space, those who have chosen to undertake humanitarian aid work become the police who temporarily act as sovereign\textsuperscript{185} and it would appear that many lose their civility and ethical sense, rendering protector indistinguishable from aggressor.

The extent to which this second sphere of exception has been legitimated through the operation of Australian policy is reflected in the ‘no advantage’ principle which is addressed in Chapter 8 of the thesis. The principle was introduced by the Gillard Government to ensure that IMAs gain no benefit ‘through circumventing regular migration arrangements;\textsuperscript{186} namely offshore resettlement. It manufactures a state of exception by replicating aspects of the experience of residing in the second sphere, requiring IMAs to wait for the same period of time that they would have waited for resettlement under the offshore program. The principle would be applied to all IMAs, whether they are processed offshore under the third sphere of exception examined below, held in the first sphere of exception in the form of immigration detention or released into the community under a bridging visa. The latter would have the grant of their protection visa postponed in order to send a message of deterrence to others ‘until such time that they would have been resettled in Australia after being processed in our region\textsuperscript{187} and exist with restricted access to financial support and accommodation. The state of exception had infiltrated the ordinary law to the point that even those living in the Australian community who have established their status as refugees were denied their entitlements under the ‘normal’ sovereign law and required to exist in a suspended limbo. For those included within Australia’s territorial bounds and outside the immigration detention space, a subsidiary space of exception has thus been created.

\begin{thebibliography}{9}
\bibitem{183} Agamben (Homo Sacer), note 131, 174.
\bibitem{184} Ibid, 59.
\bibitem{185} Ibid, note 149 above.
\bibitem{187} Chris Bowen MP, Minister for Immigration and Citizenship, No Advantage Onshore for Boat Arrivals (21 November 2012).
\end{thebibliography}
The replication of the offshore refugee camp has thus touched every aspect of refugee processing but is most clearly reflected in the offshore processing regime first introduced under the Pacific Strategy. Offshore processing constitutes the third principal sphere of exception and engages the sovereign bar in excluding *homo sacer* from entering the juridical order in the first place. Like the first sphere, it creates spaces of exclusion and isolation in which IMAs are subject to prolonged detention of indeterminate duration. But rather than simply detaining them outside the Australian community, the third sphere of exception appropriates key elements from the second by keeping IMAs outside Australia’s territorial space. With offshore resettlement conceived as the legitimate path for protection, the Pacific Strategy (and its subsequent iterations) have sought to erase Australia’s onshore protection program and reconstitute it in the image of offshore resettlement. Offshore processing seeks to duplicate the model of the offshore camp, with refugees processed outside Australia and resettled on a discretionary basis without engaging Australia’s protection obligations under the Refugee Convention. This third sphere of exception is thus a hybrid of the first and second.

Its hybrid nature is further demonstrated by one key similarity with immigration detention. Like places in which IMAs are held in immigration detention, spaces of offshore processing are managed by private contractors.\(^{188}\) The human rights implications of outsourcing are explored in Chapter 5 of this thesis. The private management of these spaces in which people are excluded from the normal juridical order and the rule of law takes IMAs further outside through the relinquishment of Ministerial control and obfuscation of responsibility. Outsourcing has become a mechanism for distancing the government from the administration of its own harsh detention policy and from those it wishes to comprehensively exclude. Outsourcing has created another subsidiary exception within spaces of exception: an unbreachable gulf between the sovereign and those excluded as bare life.

A further interstitial space of exception was constructed at great expense by the Howard Government in the excised offshore territory of Christmas Island. Under the Pacific Strategy, asylum seekers who arrived in excised offshore places were barred from making a valid visa application without an exercise of non-reviewable, non-compellable Ministerial discretion. The ramifications of excision are examined further below. Despite the Rudd Government’s

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\(^{188}\) In light of Harrell-Bond’s observations about the de facto sovereignty assumed by humanitarian workers in the second sphere, some further parallels emerge.
purported abandonment of the Pacific Strategy, it legislative framework remained in place and the Christmas Island detention facility became the new processing venue of choice. IMAs were processed on the island through a ‘non-statutory’ regime under which they were excluded from the protections afforded under Australian law. The government maintained that the status determination process applied on Christmas Island was not subject to the Migration Act, Australian case law or rules of procedural fairness. This view did not withstand judicial scrutiny. But the remote Christmas Island venue, located 2,800 kilometres west of Darwin and 360 kilometres south of Java, has remained a key site for processing IMAs. In its liminal position, it sits between the first and third sphere of exception; constituting both an immigration detention centre and an offshore processing centre, albeit one located in a remote Australian territory.

A notable aspect of the ‘new’ offshore processing regime introduced by the Gillard Government was the shift in the political rhetoric which accompanied its introduction. The parliamentary debate in mid-2012 was not coloured by descriptions of IMAs as the sort of people who would throw their children overboard. Instead, IMAs emerged as the subjects of parliamentarians’ rhetorical concern; the desperate victims of people smugglers. Tears were shed on the floor of Parliament. Offshore processing was re-fashioned as a humanitarian policy necessary to prevent deaths at sea; to save IMAs from themselves. Notwithstanding these expressions of compassionate concern, the IMAs remained voiceless and de-politicised. The exclusionary effect of the revised offshore processing regime replicated those of the Pacific Strategy. The emotive parliamentary debate was another iteration of the state of exception, seeking to highlight the exceptional nature of the situation and the need for a strong policy response.

Unlike people held in immigration detention relegated to spaces of exception within Australia, people subject to offshore processing are prevented from reaching Australian territory and barred from claiming protection and participating in political life. They are excluded through a ‘very strategic geography of isolation’ which renders the very nation itself a zone of

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189 Chris Evans MP, ‘New Directions in Detention - Restoring Integrity to Australia’s Immigration System’ (Speech delivered at Seminar, ANU College of Law, Canberra, 29 July 2008).
191 Hyndman and Mountz, note 47 above, 258.
exception for IMAs. With respect to this type of extraterritorial migration control, Gammeltoft-Hansen has observed that the national realm becomes the ‘bounded sphere of justice.’ This transformation of Australia’s political geography was achieved through the amendment of the Migration Act to declare certain parts of Australian territory ‘excised offshore places.’ As discussed above with reference to processing at Christmas Island, IMAs arriving in excised offshore places were barred from applying for a protection visa and could furthermore be removed for processing offshore in Nauru or PNG. After an unsuccessful attempt to extend the excision provisions to mainland Australia in 2006, a Bill was passed in May 2013 to facilitate the mandatory detention and offshore transfer (to a regional processing country) of all unauthorised maritime arrivals, irrespective of whether they are seeking asylum or have been assessed as refugees.

The effect of this type of territorial redefinition has been dubbed ‘neo-refoulement’, namely a ‘geographically based strategy of preventing the possibility of asylum’ by barring access to the territory of the sovereign state. Again, IMAs have been reduced to bare life and excluded completely from Australia’s political space and from the operation of its sovereign law. They are transferred to countries in which they are unseen and unheard; detained in appalling conditions and consigned to mere existence with little hope of resettlement in the foreseeable future. Through the paradox of inclusive exclusion, the exclusion of IMAs brings them into Australia’s juridico-political order. Their exclusion through offshore processing is a culmination of demonization, political posturing and manifold amendments to the Migration Act.

It would appear reasonable to conclude that this exclusion is now inscribed in the political order and has come to define Australia as a nation in which asylum seeker policy becomes an exercise in consigning IMAs to a ‘no-man’s-land between public law and political fact.’ It would furthermore appear reasonable to conclude that the state of exception has become

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194 Migration Amendment (Excision from Migration Zone) Act 2001 (Cth).

195 s198AH(2).

196 Although the legislation effectively excises the Australian mainland from the migration zone, it retains the now-redundant notion of the ‘excised offshore place.’

197 Hyndman and Mountz, note 47 above, 250, 268-9.

198 Agamben (Camp as Nomos), note 147 above, 109.

and that confinement, segregation and banishment of those we would wish to exclude has become embedded in logic of sovereignty.\footnote{Rajaram and Grundy-Warr, note 192 above, 47-48.} These conclusions must be rejected. The task ahead is to understand what such logic entails, to appreciate the costs of acquiescence and to commit to seeking and enacting new methods for challenging and disturbing the logic. The nature of this formidable task is elaborated below.

**Conclusion**

Becoming a refugee is a noble challenge if it offers the only way to preserve your dignity and integrity. The danger is that in flight one will escape with one's life but lose one's self in the process. Taking that risk must be greatly admired.\footnote{Howard Adelman, 'Jonah and Socrates as Refugees: Repentance, Redemption and Responsibility' in Satvinder Juss (Ed), The Ashgate Research Companion to Migration Law, Theory and Policy (Ashgate, 2013) 79-101, 99.}

Agamben's political philosophy, combined with Arendt's understanding of bare life upon which Agamben's theory is founded, challenge us to fully comprehend the Australian government's impulse to exclude IMAs from the rule of law. They illuminate the ease with which the logic of sovereignty may be invoked through the creation of a state of exception,\footnote{Agamben (Homo Sacer), note 131 above, 15-29.} and the devastating consequences which flow. For those who wish to address these consequences, to disturb this brutal logic and prevent it from bleeding further into Australian society, a challenge must be mounted on three principal bases. First, the sovereign's determination that an exception has arisen should be called into question. Second, the differentiation between forms of life should be challenged and third, means should be sought and enacted for asserting IMAs into the political space.

The state of exception is created through the suspension of the ordinary law.\footnote{Ibid, 18.} The laws which removed IMAs from the normal juridical order and relegated them to spaces 'outside' have been rationalised by the demonization of IMAs as a threat to Australia. The belief that IMAs calling on Australia's protection was exceptional was further supported by the
misconception that Australia was being overrun by refugee boats.\textsuperscript{205} While boat crossings are inherently hazardous, these hazards may be reduced through an increase in safe humanitarian pathways. What must be understood is the reality that the presence of asylum seekers is not exceptional. As Haddad has noted, refugee flows are an inevitable if unanticipated part of the international system of sovereign nation states,\textsuperscript{206} without which there would be no refugees. In 2012, there were 45.2 million people forcibly displaced worldwide, 15.4 million of whom were refugees and 10.5 million of whom were within UNHCR’s mandate.\textsuperscript{207} From this 10.5 million, a total of 88,578 were resettled internationally, with 5,737 resettled in Australia.\textsuperscript{208} There is no queue to join and there is presently no comprehensive durable solution to this significant global problem. The phenomenon of asylum seekers trying to obtain protection is normative. Punishing IMAs for seeking the hope of a future as a means of deterring others who might follow their path is an inappropriate invocation of the state of exception. This reality must be communicated and understood, disturbing any understanding that the present legislative response is an appropriate or normative response.

The second basis for disturbing the brutal logic applied to IMAs is by challenging the differentiation between forms of life and relegation of some outside the sphere of sovereign law. The law and policy which exclude IMAs on the arbitrary basis of their mode of arrival are dealt with comprehensively in the chapters of this thesis. They represent a nightmare vision of innocent people consigned to spaces of exception in which the sovereign state tries to replicate the horrors from which they have fled in the forlorn hope of deterring others from attempting to gain political capacity, protection and rights. The condition of bare life to which IMAs are reduced exhort us to recognise our common humanity and to confront the reality that creating arbitrary distinctions between forms of life renders us all vulnerable. Savitri Taylor eloquently makes the point thus:

If Australians wonder how arbitrary denial of procedural safeguards to a non-citizen, the obvious ‘other’, can be a threat to them, consider this: the ‘Australian community’ is not a

\textsuperscript{205} For an emblematic articulation of this fear, see for example Paul Toohey, ‘Record armada of boat people’ \textit{The Daily Telegraph} (19 July 2010) available at http://www.dailytelegraph.com.au/record-armada-of-boat-people/story-fa5zm695-1225892651112


Taylor cites a number of examples to demonstrate the point, including the internment of 947 naturalised and 62 Australian-born British subjects of Italian ethnicity during the Second World War due to ‘attitudes which equated race with nationality and which regarded assimilation as a necessary precondition to citizenship.’\footnote{Ibid, note 60. The example is drawn from Ilma Martinuzzi O’Brien, ‘The Internment of Australian Born and Naturalised British Subjects of Italian Origin’ in Richard Bosworth and Romano Ugolini (eds), War, Internment and Mass Migration: The Italo-Australian Experience 1940-1990 (1992) 89, 92–3.} As Taylor recognises, the issue raises deep questions about that status of human rights in Australian law, which the experience of IMAs exposes as presently conditional. If rights are to operate conditionally and be withheld from the most vulnerable and disenfranchised, the whole human rights enterprise will be denuded of meaning. The present stance adopted by Australia with respect to IMAs sees the position of refugees decried by Arendt reverberate through the 6 decades that have passed since the publication of The Origins of Totalitarianism. IMAs seeking Australia’s protection are denied the right to have rights, the supposed inalienability of which rests upon the will of the sovereign. What is required is a reconstruction of the sovereign will. Twenty-first century Australia is well-positioned to reconfigure its understanding of the human rights obligations it has undertaken through the ratification of international instruments. These are not tokenistic motherhood statements which only require implementation in undemocratic and repressive nation states. They are legal obligations to be honoured in good faith. For those who value human rights and the advances in human dignity they have brought about internationally, it is essential to recognise what is at stake in acquiescing to the view that certain groups may be legitimately singled out for exclusion from the sphere of rights holding.

In advancing the rights of IMAs, there is an urgent need to assert the IMA into the political space. The shape and form that efforts to achieve this end may assume is examined in Chapters 1, 2, 3 and 7 of this thesis, and Chapter 3B specifically addresses the movements challenging the detention of children. These movements include court proceedings, challenges by parliamentarians within government and opposition, efforts to utilise organs of the United Nations, the activities of the Australian Human Rights Commission (AHRC) and
civil society. These efforts must accommodate the agency of IMAs and appreciate the reality that success can only follow repeated failure. They must ensure that IMAs are not marginalised through their portrayal as fearful and tragic victims of circumstance. Such stereotypes are frequently invoked and it has been persuasively argued that the wording of the Refugee Convention has contributed to this phenomenon. In asserting the IMA into the political space, advocates must also ensure that their own ambitions and political goals do not override the interests of those they are charged to assist.

The most powerful efforts towards enacting IMAs as political subjects are initiatives which draw on their narratives and voices. A notable example is the AHRC (then known as the Human Rights and Equal Opportunity Commission) enquiry into children in immigration detention which went beyond providing a detailed account of the law and practice of immigration detention and included the powerful narratives and artwork of child detainees. The Commission’s report became an important part of the advocacy movements which led to the release of all children from immigration detention centres in June 2005. As outlined in Chapter 4 of this thesis, the government’s commitment to keep children out of the detention environment was short-lived, not altogether sincere and difficult to implement in the context of a mandatory detention regime.

But the Commission’s report and the efforts of those who lobbied for the rights of children were far from futile. They created a rallying point for public pressure. It is through the needless suffering of children in detention that Australians glimpsed the truth that their assumptions with respect to their own morality and decency, so skilfully affirmed and manipulated during the Children Overboard fiasco, could not be sustained. The detention of children became a source of embarrassment to the government, which went to great and sometimes bizarre lengths to distance itself from its own practice. While the (first) Rudd

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211 See for example Adelman, note 202 above.
212 Some lawyers have been accused of subjecting their clients to the unwelcome scrutiny that is a concomitant of litigation in pursuit of the lawyers’ self-interest and an unrealistic hope that their efforts may bring about wholesale policy change. For an example of a case in which lawyers have been accused of drawing unwilling clients into legal proceedings, see ABC Lateline, Reporter: Geoff Thompson; ‘Bakhtiari brothers seek return to Australia’ (5 October 2005) transcript available at http://www.abc.net.au/lateline/content/2005/s1475568.htm
Needless to say, the hindsight afforded by unsuccessful litigation (and the consequences which follow) may play a role in informing a client’s grievances and litigation which may appear speculative and ambitious may be necessary to effect significant change. But the Bakhtiyari proceedings illuminate the importance of ethical conduct and pursuit of the client’s best interests in informing the issue and conduct of legal proceedings.
214 Ibid.
Government committed to a policy of detaining children only as a last resort and for the shortest possible time, it engaged in the disingenuous rhetorical exercise of re-naming various detention settings in which children were residing (which remained places of immigration detention under the Migration Act) and then declaring that they are not places of immigration detention. These were places in which, according to Agamben’s logic, there is an absolute impossibility of deciding between fact and law, rule and application, exception and rule. Further pressure saw the release of children from these places into the community under residence determinations and bridging visas. Such piecemeal victories have been short-lived and inadequate. But they do provide a powerful demonstration that the exercise of a brutal logic, under which detention of all IMAs without reference to circumstances is considered necessary, may be disturbed through skilful and sustained advocacy.

Another notable initiative is the People’s Inquiry into Detention undertaken by the Australian Council of Heads of Social Work in response to the restricted terms of reference of the Palmer Enquiry into Cornelia Rau’s detention. The enquiry bore witness to the events which have occurred in the sphere of exception constituted by immigration detention facilities, also examining the trajectory of IMAs prior to and following the experience of detention. The report of the enquiry provided a permanent record of the experience of bare life in a hostile environment and gave voice and thereby agency to the hitherto voiceless. Moving beyond the stereotyping of IMAs as deviant or helpless victim, it called on readers to adopt a more nuanced understanding of endurance, needless suffering and what it means to be human. Such narratives may bring us to an understanding that we are all bare life in search of a place which makes opinions significant and actions effective. Through efforts to promote such an understanding, those who were hitherto ‘scum of the earth’ may be accepted within the political order and respected for their courage and endurance.

By challenging the logic of sovereignty, it may be possible to reverse the paradigm under which the intense politicisation of IMAs has seen them denuded of political capacity. By depoliticising the issue of spontaneous boat arrivals, IMAs may be positioned to stake a participatory claim in the body politic. There is nothing to be lost in seeking to effect this transformation, and much to be gained.

215 Agamben (Homo Sacer), note 131 above, 173.
216 Palmer, note 162 above.
217 Briskman, Latham and Goddard, note 42 above.
218 Arendt, note 1 above, 293.
Part II

Summary of Chapters
Summary of the Chapters

Chapter 1: ‘Mental harm as an instrument of public policy’, Psychiatry, Psychology and Law, vol 15, No 1 2008, pp140-152 (8,243 words)

After considering the mental harm experienced by people held in immigration detention and those engaged to work with them, the chapter examines the extent to which Australian law has addressed the impact of immigration detention on mental health. It is observed that Australia’s immigration detention centres have become repositories of human suffering where the manifestations of mental illness are met with punitive treatment through solitary confinement. The article examines the ways in which the mental harm emanating from immigration detention may be addressed under Australian law, including the common law and the domestic implementation of Australia’s obligations under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.


Building upon the first chapter’s examination of wrongful detention of those who do not fall within the statutory purview of Australia’s mandatory immigration detention regime, this chapter explores the potential for the tort of false imprisonment to address concerns about human rights abuses arising from wrongful immigration detention. The philosophical compatibility of tort law and human rights and the extent to which human rights arguments may inform Australia’s common law are explored with reference to false imprisonment litigation in Australia.

Chapter 3: Children in Immigration Detention

Chapter 3 is comprised of three publications concerning the detention of children. Children seeking asylum represent one of the most vulnerable and disenfranchised groups within our society yet the decision to detain under section 189 of the Migration Act makes no allowance for individual circumstances such as age, vulnerability, medical condition or flight risk. Coinciding with the misinformation and hysteria
surrounding the 'Tampa' incident and portrayal of asylum seekers as a threat to Australians' way of life was an entirely contradictory phenomenon. The stories of child asylum seekers were being reported in the media, creating an increase in public awareness about the devastating and preventable harm caused to children in immigration detention. The report of the National Enquiry into 'Children in Immigration Detention undertaken by the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) provided the most comprehensive account of the harm caused to children by the policy and practice of immigration detention. By the time the report was tabled in Parliament in May 2004, it had become increasingly clear that a range of challenges to the mandatory immigration detention regime would be located around the detention of children.


After considering the constitutional underpinnings of the mandatory detention provisions in the Migration Act and efforts by parliament to prohibit judicial review of detention, the first article in this chapter considers the place occupied by children within the constitutional framework. The paper furthermore compares the protections accorded to children in immigration detention with those accorded to children charged with a criminal offence. In line with Arendt's observation that it is easier to deprive a completely innocent person of legality than a criminal offender, the paper concludes that the operation of the immigration detention policy emulates the criminal law and to some extent the Immigration Restriction Act 1901 (Cth) under which a prohibited immigrant was guilty of an offence and liable on summary conviction to imprisonment of up to six months and/or deportation.

3B: 'Like a Bird in a Cage: Children's voices and challenges to Australia's immigration detention regime' (2005) 2;2 International Journal of Equity and Innovation in Early Childhood, pp 32-44 (with Adiva Sifris) (4,922 words)

The excesses of the detention regime could most readily be appreciated through the experiences if children. Children are less amenable to vilification as 'queue jumpers' than adults and their preventable suffering in the detention environment does not lend
itself to glib rationalisation. The second paper in this chapter examines the social and legal movements calling for the release of children from immigration detention. Increased public awareness and concern about the experiences of children in immigration detention led to a wave of advocacy and legal challenges concerned exclusively with children. These culminated in a decision by the Howard government to release children and their families from immigration detention centres.


The final paper in this chapter focuses on the impact of Australia’s immigration detention regime on children and their families. It contends that immigration detention may be used as a lens through which Australia’s commitment to children’s rights may be gauged. It is suggested that a substantive commitment to children’s rights would extend to the incorporation of the Convention on the Rights of the Child into Australian law via domestic legislation, thus facilitating the development of a culture and jurisprudence of children’s rights and averting future institutionalised violations of fundamental human rights.

Chapter 4: ‘Labor’s ‘New Directions in detention’ three years on: Plus ça change’ (2011) 36(4) Alt LJ 222, 240-244 (3,774 words)

This article examines the changes to the mandatory detention regime as administered between 2008 and 2011. The election of the first Rudd Government in 2007 brought with it the promise of a more humane approach to processing asylum seekers. In July 2008, a set of policy values were introduced which were to fundamentally change immigration detention in Australia. This chapter examines the direction taken by the (first) Rudd and Gillard Governments and the extent to which their policies represented a shift from the regime administered by the Howard Government. Key reforms included the putative dismantlement of the Pacific Strategy and the introduction of policy values which were to guide detention practice. The paper examines how these policies operated in practice. It furthermore interrogates the government’s approach to the privatisation of detention services in light of its earlier
calls (while in opposition) for the return of detention services to the public sector, a position reflected in the Australian Labor Party's 2007 election platform.

Chapter 5: Privatised immigration detention services: challenges and opportunities for implementing human rights, Law in Context (forthcoming) (11,506 words)

Building on the previous chapter's discussion of privatised detention services, this paper examines the outsourcing of immigration detention in Australia and explores the opportunities and obstacles presented by privatisation to the realisation of human rights. It examines three distinct phases of privatised immigration detention services and considers whether privatisation is intrinsically antithetical to the realisation of human rights or whether it may in fact create opportunities for advancing human rights. It concludes that a return to public management of Australia's immigration detention facilities would not resolve serious concerns which emaate from the nature of the regime in which people seeking protection, who are neither convicted nor charged with any crime, are deprived of their liberty for indeterminate -and often prolonged- periods of time. The ill-conceived and punitive detention regime breaches Australia's human rights obligations irrespective of the institutional character of the detention services provider. Nevertheless, the lived experience of immigration detention over the past fifteen years demonstrates that privatised management has created further challenges to the realisation of human rights.


This article examines the evolution of the Howard Government's Pacific Strategy with reference to its objectives, its consequences and its ramifications for Australia's performance of its human rights obligations under international law. It concludes that the offshore processing regime has breached Australia's human rights obligations, damaged Australia's international standing and cost taxpayers hundreds of millions of dollars, but that its highest cost has been in human terms.

Chapter 7 examines the evolution of, and links between, immigration detention and offshore processing. After outlining the Pacific Strategy, the article considers the law and practice of offshore processing after the Howard Government's defeat in 2007. This includes the maintenance of the legislative architecture of the Pacific Strategy, processing in the excised offshore territory of Christmas Island, the Gillard Government's efforts to reinstate offshore processing in East Timor and Malaysia, the cooperative transfer agreement concluded between Australia and Malaysia in July 2011 and the High Court judgment which invalidated the Ministerial declaration pursuant to which transfer to Malaysia could be effected. The Chapter examines the government's subsequent efforts to re-instate offshore processing, including amendments to the Migration Act which immediately followed the delivery of a report by the Expert Panel on Asylum Seekers (Expert Panel) \(^1\) and the re-establishment of processing facilities in Nauru and PNG.


Chapter 8 is comprised of two brief publications which deal with the offshore processing regime introduced in the wake of the Expert Panel's report. The first paper focuses on the offshore processing policy and the second examines the underpinning legislative framework. Both papers consider the principle of 'no advantage' recommended by the Expert Panel as one of six guiding principles which should shape Australian policy on asylum seekers in order to 'ensure that no benefit is gained through circumventing regular migration arrangements.' It engages the government in the impracticable counterfactual exercise of discerning the length of time an IMA

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would have waited for resettlement from overseas. The grant of protection is then deliberately delayed in order to send a message of deterrence to others, thus manufacturing a state of exception which replicates the harsh realities of awaiting resettlement in camps and settlements overseas.
Part III
Academic Contribution
PART III

Academic Contribution to the Literature

The eight chapters of this thesis form a comprehensive body of work on Australian asylum seeker policy. The content of these chapters is complemented by my contribution to public policy and law reform in the areas covered by the thesis. The work of the Castan Centre for Human Rights Law in informing policy and law reform is an important component of its activities. I have authored a number of submissions and provided oral evidence to parliamentary committees on behalf of the Centre. These submissions and transcripts of evidence are available online at http://www.law.monash.edu.au/castancentre/policywork/submissions.html

I have assisted students at Monash University in the preparation of their own policy work and with reference to my work on asylum seeker (and broader human rights) policy, I am regularly quoted in committee reports.

My policy work which is directly relevant to the areas covered by this thesis comprises the following activities:

• Appearance before Senate Legal and Constitutional Affairs Committee in Enquiry into Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, 31 January 2013

• Appearance before Parliamentary Joint Committee on Human Rights concerning Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related Bills and Legislative Instruments, 19 December 2012 (with Professor Susan Kneebone and Professor Sarah Joseph)

• Submission to Senate Legal and Constitutional Affairs Committee on Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, December 2012 (with Adam Fletcher)

1 My policy work has also been concerned with women’s rights and access to justice.
• Appearance before Senate Standing Committee on Legal and Constitutional Affairs with respect to the *Migration Amendment (Health Care for Asylum Seekers) Bill 2012*, 23 November 2012 (with Adam Fletcher)

• Submission to Expert Panel on Asylum Seekers, 19 July 2012 (with Professor Susan Kneebone, Professor Sarah Joseph, Maria O’Sullivan and Dr Adiva Sifris)

• Submission to Inquiry into the agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia, September 2011 (with Professor Susan Kneebone and Maria O’Sullivan)

• Submission to the Joint Select Committee on Australia’s Immigration Detention Network, August 2011

• Submission to Senate Legal and Constitutional Affairs Legislation Committee into the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*, June 2011 (with Professor Susan Kneebone)

• Submission to Legal and Constitutional Affairs Committee on the *Migration Amendment (Immigration Detention Reform) Bill 2009*, July 2009 (with Professor Susan Kneebone and Ors)

• Submission to the Senate Legal and Constitutional Affairs Committee on the provisions of the *Migration Amendment (Review Provisions) Bill 2006* (with Professor Susan Kneebone)

• Evidence given before the Senate Legal and Constitutional Legislation Committee on the provisions of the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, 26 May 2006
• Submission to the Senate Legal and Constitutional Legislation Committee on the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (with Azadeh Dastyari and Jessie Taylor).

My contribution to the literature on asylum seeker policy in Australia is reflected in the invitation to contribute the chapter on asylum seeker policy, alongside other chapters contributed by experts in their respective fields, in Melissa Castan and Paula Gerber's Contemporary Human Rights Issues in Australia (Thomson Reuters, 2012). This chapter is included as Chapter 7 of this thesis. My work has furthermore been used for teaching purposes and included in reading guides, including Berkeley Human Rights: Law, Policy and Practice.

I regularly represent the Castan Centre on issues of asylum seeker law and policy and with reference to my paper ‘Labor’s ‘New Directions in detention’ three years on: Plus ça change’” (Chapter 4 of this thesis), I was cited as an immigration ‘expert’. I have been invited to present a program on ABC Radio National concerning children in immigration detention and have been interviewed and quoted by the Los Angeles Times. Extracts from my oral testimony presented on 31 January 2013 to the Senate Legal and Constitutional Affairs Committee concerning the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 were played on ABC radio news across Radio National, local radio and Triple J.

My contribution to the literature is also reflected in the citation of the papers included in this thesis in the following scholarly publications:

• Danny Sullivan, Ethical Issues in Australian Prison Psychiatry in Norbert Konrad, Birgit Vollm and David N. Weisstub (Eds), Ethical Issues in Prison Psychiatry (Springer, 2013) 125-144

• Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution', (2012) 34(3) *Sydney Law Review* 437

• Sharon Pickering, 'Asylum seekers and Australia: the evidence', *The Conversation* 19 July 2012


• Godfrey Baldacchino, 'Surfers of the ocean waves: Change management, intersectoral migration and the economic development of small island states', (2011) 52:3 *Asia Pacific Viewpoint*, 236-246

• Richard Bailey, ‘Transitory persons, precarious lives: irregular migrants in Australian law (Part 1)’, *Critical Legal Thinking*, 4 April 2011
• Sharon Rodrick, ‘Open justice, the media and identifying children involved in criminal proceedings’ (2010) 15 Media and Arts Law Review 409

• Columbia Law School Human Rights Clinic, Intervenor Brief in the European Court of Human Rights Application No. 27765/09, Hirsi and Others v Italy, Written comments of the Columbia Law School Human Rights Clinic, African Refugee Development Centre, Allard K. Lowenstein International Human Rights Clinic at Yale Law School, Center for Social Justice at Seton Hall University School of Law, Florida Coastal School of Law Immigrant Rights Clinic, Institute for Justice & Democracy in Haiti, Migrant and Refugee Rights Project of the Australian Human Rights Centre at the University of New South Wales School of Law, Physicians for Human Rights, Professors James Gathii, Tally Kritzman-Amir, Stephen H. Legomsky & Margaret L Satterthwaite, 17 April 2010


• Rosemary Kennedy, Duty of Care in the Human Services: Mishaps, Misdeeds and the Law (Cambridge University Press, 2009)


• Michael Grewcock, Crimes of exclusion: The Australian state's responses to unauthorised migrants, PhD thesis, Faculty of Law, University of New South Wales, 2007


• Paul Harpur, ‘The evolving nature of the right to life; the Impact of Positive Human Rights Obligations’ (2007) 9 University of Notre Dame Australia Law Review


- Barbara Rogalla, Justitia in the Shadow of the Law, Deportate, esuli, profughe. Revista telematica di studi sulla memoria femminile, Dep n.5/6, December 2006. ISSN 1824 – 4483


- Michael Head, Detention without trial: is there no limit? AltJVol 30:2Ap'1l 2005

- Michael Head, Detention without trial—a threat to democratic rights, (2005) 9 University of Western Sydney Law Review, Annual, p.33-51


Related Publications:
Further work in the area of research covered by the thesis includes conference papers, the convening and hosting of public events and a range of published work.

Conference papers and public events

- Host and commentator, Castan Centre event, Seeking security: Refugee policy in a time of complexity and change with Associate Professor Harry Minas and Alex Pagliaro, Monash University Law Chambers, Lonsdale Street, Melbourne; 13 February 2013

• Host and commentator, *Castan Centre Public Event, The People Smuggler*: Ali Al Jenabi – *Villain or Hero* with Robin de Crespigny, Monash University Law Chambers; 22 November 2012

• ‘International Justice and Human Rights’ speech to Australian Institute of International Affairs ACCESS Youth Network forum *Inside the World of International Law*, Dyason House, East Melbourne, 30 September 2009

• ‘Seeking asylum in Australia, the path to refuge’ delivered at *Unpacking the Suitcase* conference sponsored by VicHealth and the South Eastern Migrant Resource Centre, Dandenong; 12 July 2007

• ‘Mental harm as an instrument of public policy’ delivered at Monash University and Kings College London conference *Public Health and Human Rights*, Prato, Italy; 7-10 June 2007

• ‘False imprisonment as a surrogate claim for promoting personal liberty’ presented at Castan Centre workshop *Compensation, Torts and Immigration Detention*, Monash University, Melbourne; 30 March 2007

• ‘Refugee processing and mental health: how far does the duty of care extend?’, part of *Refugee Research @ La Trobe*’ seminar series, sponsored by the La Trobe University Faculty of Health Sciences and Victorian Foundation for Survivors of Torture, Foundation House, Brunswick; 28 March 2007

• ‘Racism and the non-citizen child’, paper delivered for the Centre for Equity and Innovation in Early Childhood and the Victorian Multicultural Commission, University of Melbourne; 9 November 2005

• Co-convenor of Public Workshop (with Adiva Sifris), *Children in Immigration Detention: the Policy, the Practice and the Prognosis*, Monash University, Melbourne, 2 April 2004. Presenters included Professor Susan Kneebone, Adiva Sifris, Paris Aristotle, Dr Sev Ozdowski and Julian Burnside QC and sessions were chaired by Professors Mary Crock and David Kinley.

• 'The separation of powers, Lim and Australia's 'voluntary' detention of children', at *Children in Immigration Detention: the Policy, the Practice and the Prognosis*, 2 April 2004.

• 'Children in Immigration Detention' presented at 21st Annual Law and Society Conference 'Societies and Laws: (Re)act? (Re)create? (Re)form?', University of Newcastle, 10 December 2003.

**Additional Publications**


• 'Another 356 pages on the excesses of immigration detention' *Castan Centre for Human Rights Law Blog*, WordPress, 4 April 2012.


• 'Children in Immigration Detention: The High Court Verdict in *B and B* and Beyond', 29:5 *Alternative Law Journal*, October 2004, 217-221 (with Adiva Sifris)

• 'Interest rates in human suffering at an all-time low', 29:5 *Alternative Law Journal*, October 2004, 210-211 (editorial opinion with Bronwyn Naylor and Adiva Sifris)

Part IV
The Chapters
Chapter 1

Tania Penovic, ‘Mental harm as an instrument of public policy’ (2008) 15(1)
Psychiatry, Psychology and Law 140-152
Mental Harm as an Instrument of Public Policy*

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Since 1992, several thousand children and adults have been held in Australia's immigration detention centres. The detention environment has created a quagmire of human tragedy. It has exacerbated pre-existing trauma and precipitated preventable mental illness. I will argue in this article that Australia's treatment of vulnerable people who have sought its protection as refugees is contrary to the international prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment. I will then consider the extent to which Australian law has addressed the effect of immigration detention on mental health and comment on the ramifications of the policy.

Since 1992, Australia has maintained a regime of immigration detention. The Migration Act 1958 (Cth) assigns the descriptor 'unlawful non-citizen' to all persons within Australia's migration zone and who are without a valid visa. All persons known or reasonably suspected to be unlawful non-citizens must be detained pursuant to subsection 189(1) of the Act. Several thousand people have been detained in accordance with section 189(1). Extensive research by health professionals has established that the experience of being held in immigration detention has a deleterious effect on detainees' mental health. A consultant psychiatrist who examined a number of detainees held at South Australia's Baxter Detention Centre has made reference to the 'pervasive atmosphere of hopelessness' in 'an environment almost designed to produce mental illness'. Another consultant psychiatrist considered that 'Baxter itself is unwell'.

Australia's federal human rights body, the Human Rights and Equal Opportunity Commission (HREOC), has repeatedly linked immigration detention with serious mental illness and in 2007 identified the length and uncertainty of detention as fundamental problems which 'inevitably lead to' mental harm. The Commission noted that 'it does not take years of detention for mental health problems to begin... HREOC staff met some detainees who were starting to suffer symptoms after just months of detention.' Upon their release, detainees may be required to pay the costs of their detention pursuant to section 209 of the Migration Act 1958 (Cth). The resulting financial burden further inhibits their integration into the community and recovery from the trauma of detention.

Australia's detention centres have absorbed mentally ill Australian citizens, permanent residents and visa holders. Cornelia Rau, a mentally ill Australian permanent resident, was detained by the Immigration Department at the Brisbane Women's Correctional Centre and subsequently the Baxter Immigration Detention Facility for ten...

* A shorter version of this paper was delivered at the Monash University and Kings College London conference 'Public Health and Human Rights' held on 7–10 June 2007 in Prato, Italy.

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Email: taniapenovic@law.monash.edu.au
months. It is an absurd tragedy that Ms Rau was not identified by immigration officials or detention centre staff until a connection was made in February 2005 between her and media reports about a missing Australian woman.

Cornelia Rau is not the only mentally ill Australian to find her way into immigration detention. A 249 further cases involving the detention of vulnerable Australian citizens, permanent residents and visa holders have come to light, one of which involved three separate occasions of detention of a mentally ill Australian citizen for a total of 253 days. Rather than being identified by immigration officials or coming to light, one of which involved three separate occasions of detention of a mentally ill Australian citizen for a total of 253 days. Rather than

... addressing such behaviour, combined with the failure to provide medical treatment, has further undermined the already compromised mental health of these vulnerable individuals.

The detention together of children and adults of both genders has increased women's and children's vulnerability to sexual assault and has generated fear which has manifested itself in mental harm. HIROC has detailed a number of cases in which women and children were routinely escorted to toilets by male family members because of a fear of assault. One officer employed at Woomera has reported as follows:

A [girl in her early teens] ... tried to kill herself because she could not cope with men pressuring her for sex. There is no women's and children's only compound at the detention centre, hence there was no escape from the threat of sexual abuse ...[Her] mother in tears and desperate told me how she and her daughter were subject to constant harassment because they were not accompanied by a man... Staff reported [her] situation to in-house and government authorities yet the girl remains at Woomera ...

In such an environment, the psychological burden has not been borne by detainees alone. A number of employees and contractors who have worked at the notorious Woomera facility, which was decommissioned in April 2003, were so distressed by the hopelessness and despair in their midst that they were themselves vulnerable to psychiatric illness. These workers were dubbed the 'care bears'.

When he took on the role of managing the Woomera centre, Allan Clifton reported:

I saw the women and children and was told about the unaccompanied minors and single men. I sensed the unease... There was no infrastructure. The gatehouse was a tent. The medical centre a shambles. Those people hadn't been charged with any crime other than being in Australian territorial waters. I looked at the kids, thinking about my own girls.

After 18 months, Clifton reported: 'I was suicidal. I couldn't go out of the house. I couldn't get off the couch. I was basically a vegetable.'

Dr Simon Lockwood sank into depression after working at Woomera for three years because of 'the sheer volume of distress that [he] saw and the experiences that [he] witnessed and just the nonsensical nature of it all, and the fact that [he] couldn't rationally explain it all.' Staff, such as Lockwood, who display compassion for detainees are said to have been derided by staff members who are dubbed the 'gas and bash' contingent. These workers were largely sourced from the prison sector and were known for their hostile stance towards detainees. Their characterisation of detainees who invoked their lawful right to seek asylum as 'crims' echoed the Liberal/National Party government's demonisation of undocumented arrivals and its use of pejorative labels such as 'unlawfuls', 'queue-jumpers', and 'illegals'.

While the first group of workers at Woomera suffered from mental harm and in many cases developed post-traumatic stress disorder, the second group were also damaged by the immigration detention policy. Members of this second group became a stark manifestation of Australia's immigration policy by being rendered incapable of recognising the inherent dignity in the detainees. Their own humanity was thereby diminished.

Since 2001, immigration detention has extended beyond the Australian mainland to offshore centres such as Christmas Island, as well as Nauru and Papua New Guinea. Individuals processed offshore fall outside Australia's legal protection and are largely inaccessible to lawyers, community visitors or journalists. The despair experienced as a result of abandonment, isolation and hopelessness as to their future has led detainees to engage in frequent hunger strikes...
and acts of self-harm. A psychiatrist employed in Nauru expressed his observations over several months in the following terms: 'I seldom or never encounter an asylum seeker who still sleeps soundly and is able to enjoy life. Mental health, or psychiatry for that matter, is basically not equipped to improve their situation in any essential respect.'

Since 2005, children and their families have been permitted to live within the community and a number of others have lived in the community pursuant to bridging visas. The Migration Amendment (Detention Arrangements) Act 2005 (Cth) provides that a minor shall only be detained as a measure of last resort. It further empowers the Immigration Minister to permit children and their families to reside outside the detention centre environment while deemed to be in detention for the purposes of the Migration Act 1958 (Cth). Nevertheless, 355 people remain in detention centres on the Australian mainland with a further 90 held in Nauru.

International Law
Australia's immigration detention regime has been the subject of considerable international scrutiny. The United Nations (UN) Committee that supervises the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) has scrutinised decisions to deport asylum seekers and determined whether deportation would violate Article 3 of the Convention. Article 3 prohibits the return (or refoulement) of a person where there are substantial grounds for believing that he/she would be in danger of being subjected to torture. But Australia's detention arrangements have largely escaped the Committee's gaze. I will argue that immigration detention may constitute torture or alternatively cruel, inhuman or degrading treatment or punishment.

The international prohibition on such treatment is one of the most deep-rooted prohibitions in international law. Most international human rights treaties deal with a broad range of protections, typically falling within categories of rights, such as civil and political rights, or rights applicable to vulnerable groups, such as children, women or migrant workers. The prohibition on torture and cruel, inhuman or degrading treatment is the subject of its own treaty. It is also included in more generic treaties, such as the International Covenant on Civil and Political Rights (ICCPR), regional human rights treaties and customary international law, where it has assumed the status of a peremptory norm.

Customary international law is binding on all states, whether they have ratified international treaties prohibiting torture or not. The conclusion that government policy contravenes such a significant prohibition in international law is therefore not lightly drawn.

To exemplify two such contraventions, I shall examine the circumstances surrounding the detention of Mohammed Amin Mastipour and Shayan Badraie.

Mastipour
Mohammed Amin Mastipour is an Iranian citizen who arrived in Australia with his five-year-old daughter Massoumeh in early 2001. After Mastipour requested removal from Baxter due to the humiliation associated with unfounded allegations of child abuse, five officers informed him that he would be strip searched in the presence of his daughter. When he refused to submit to the search he was handcuffed and placed in Baxter's behaviour-management unit known as the 'Management Unit'. The Management Unit accommodates detainees whose transfer is considered necessary to maintain the good order and security of the facility and safety of other detainees. Mastipour was held alone in a cell of approximately 3 metres square, which was always lit, and which allowed no view of anything outside the cell. The only furniture was a mattress, and a closed-circuit television camera observed and recorded his movements at all times. He was confined in the Management Unit for more than 23 hours a day without any reading or writing material, access to television, radio or other form of entertainment.

His time in the Management Unit was punctuated by daily visits by Massoumeh which he was told would cease if he did not sign a confession falsely acknowledging that he had assaulted officers. Shortly after these threats were made, Mastipour was informed that his daughter could not visit him. The next day, he found out that she had been returned to her mother in Iran.

Psychiatric evidence revealed that Mastipour had experienced symptoms of post-traumatic stress disorder and depression in Iran which were exacerbated by his detention in Australia. Prior...
to his daughter’s removal, Mastipour was diagnosed with a severe, major depressive disorder with co-morbid chronic post-traumatic stress disorder.22 His suicidal thoughts were said to have been contained by the presence of his daughter. One month after her removal, psychologists reported as follows:

His depressive illness has markedly deteriorated and is now associated with profound impairment. Mr Mastipour spends the majority of his time sobbing, lying listlessly in his cell with no energy to attend to even basic daily activities such as washing himself. It is our clinical opinion that such a severe depressive illness requires treatment in an acute psychiatric setting.

The forced removal of Mr Mastipour’s daughter from Australia has been a major life catastrophe for him. In response to this major traumatic experience, Mr Mastipour appears to have created a make-believe world for himself where he continues to have an ongoing relationship with Masoumeh and engages in conversations with her. He gains emotional relief from speaking to his daughter in this way and describes intentionally producing the circumstances that lead him to hear her voice by staring at her photo or paintings. This pattern of behaviour appears to be part of an extreme grief response to his traumatic separation ...

Mr Mastipour is one of the most distressed individuals that either assessor has encountered in our clinical careers. We are of the opinion that the severity of his depressive illness necessitates that Mr Mastipour receive treatment in an acute psychiatric setting. We are also of the opinion that Mr Mastipour’s mental state is highly reactive to the detention environment and that he is unable to be cared for in the foreseeable future in such a setting without placing his mental health in serious jeopardy.24

Mastipour’s requests for removal to an alternative detention facility were resisted by detention centre staff. Yet three psychiatrists examined him and all three agreed that he was suffering from a depressive illness which required acute psychiatric treatment and that his health would be better served if he were removed from Baxter.

Badraie
Shayan Badraie’s family fled religious persecution in Iran in 2000 when, at the age of five, Shayan was a healthy boy excited by his boat journey to Australia.25 Shayan spent a year at Woomera during which the detainee population reached 1,400. During his year at Woomera, Shayan witnessed several riots, hunger strikes and acts of violence by detainees and detention centre staff. After seeing a detainee threaten to kill himself with broken glass, Shayan was reported to be in fear of being cut and was unable to eat or sleep. At this stage, Shayan was 5 years old. He was then placed with his family in Woomera’s ‘Sierra Compound’, an area generally used for security or behaviour-management purposes. The move was arranged without prior consultation with appropriate experts in circumstances where it was known that the detention environment was causing Shayan emotional distress. The only children accommodated in Sierra Compound were Shayan, his baby sister, and two teenagers.26

A psychologist who met Shayan identified symptoms of psychiatric illness and recommended urgent relocation of Shayan and his family, and stated that ‘failure to take any action to protect this child from further exposure is abusive on the part of the governing authorities’.27 The family was then removed to Villawood. The new environment turned out to be as corrosive as the old. Shayan witnessed an adult detainee cutting his wrists in an attempt to take his life. Shayan then stopped eating, taking liquids, and speaking and was reduced to a near-catatonic state. He was admitted to hospital on eight occasions for rehydration. On each occasion he was returned to detention after regaining the ability to eat, drink, and speak, only to regress and require rehospitalisation.

After 5 months in Villawood, Shayan was placed in foster care for a period of six months without his parents’ permission. His family were then granted temporary protection visas and began living in the community. Psychiatric reports indicate that Shayan continued to suffer from post-traumatic stress disorder and that his psychological and intellectual development were so severely undermined by his experiences in detention that he is unlikely to ever recover.28

Immigration Detention as Torture
Article 1 of the Torture Convention defines torture as any act by which severe pain or suffering, whether physical or mental, is
intentionally inflicted on a person for purposes which include the following: obtaining a confession or information from him or a third person, punishing him for an act he or someone else has committed or is suspected of having committed, intimidating or coercing him or a third person, or any other reason based on discrimination of any kind. The pain and suffering must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Cruel, inhuman or degrading treatment or punishment is prohibited by Article 16 of the Torture Convention and is constituted by acts which do not amount to torture and which are committed by, instigated by, or committed with the consent or acquiescence of a person acting in a public capacity. Pain or suffering arising from lawful sanctions is not excluded by Article 16.

Articles 1 and 16 of the Torture Convention are complemented by Article 7 of the ICCPR, which prohibits torture and cruel, inhuman or degrading treatment. Article 7 constitutes one of the seven non-derogable standards in the ICCPR. It is supported by Article 10(1), which provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

In similar circumstances to those experienced by Mastipour, the UN Human Rights Committee found a breach of Article 7. The Committee examined the case of a man assigned the pseudonym of 'Mr C' who was, like Mastipour, kept in immigration detention in circumstances where it was known that his mental illness was triggered by his detention experiences and where a range of international and domestic human rights bodies had associated the detention environment with violations of fundamental human rights.

The placement of Mastipour in the Management Unit was an act 'inflicted' by officials who were operating the Baxter Centre on behalf of Australia's Immigration Department. It would appear that the intention behind the act of placing and keeping him in the Management Unit with concomitant isolation and harsh conditions was to punish him for refusing to submit to a strip search and subsequently the failure to sign a confession. His severe mental pain had been established by the specialists' reports. Mastipour was kept in Baxter in circumstances where psychiatrists linked the detention environment with his mental decline and recommended his removal.

Shayan Badrai's mental harm was caused by the following conduct of the Immigration Department and its delegates:

1. Placing him in detention at Woomera and Villawood when the environment at both centres was known to be harmful to children and where a range of international and domestic human rights bodies had associated the detention environment with violations of fundamental human rights.
2. Failing to take appropriate measures to prevent him from being exposed to acts of physical violence that caused him psychological harm.
3. Keeping him in detention despite strong medical evidence that it was seriously undermining his mental health.
4. Separating him from his parents against their will and placing him in foster care.

This conduct must be assessed in light of the developmental needs, cognitive immaturity, and vulnerabilities of children. English barrister Jeremy
McBride has argued that violations of economic and social rights may constitute torture in circumstances that include where:

- conditions imposed on those seeking social security benefits...are so humiliating that they operate effectively as a deterrent from seeking them and, therefore, the denial of it to those who ought to receive it...and inadequate or incompetent care by the very institutions that are supposed to help those who are weak emotionally or mentally could well be degrading, if not worse. 32

The conditions of detention, including the detention of children and adults together in prison-like conditions, and concomitant traumatic events had an effect on Shayan which could be seen as degrading, humiliating, and cruel. Yet immigration detention has been maintained as a key element of the government’s ‘border protection’ policy because of its deterrent effect on other prospective asylum seekers. The Australian government has maintained that immigration detention is an ‘essential element underpinning the integrity of Australia’s migration program and the protection of our borders’. 33 When presented with HREOC’s 2004 report 34 detailing the harm to children emanating from immigration detention, Prime Minister John Howard stated that: ‘We don’t like detaining children, we really don’t, but the problem is that if you reverse the policy of mandatory detention you will be sending a beckoning signal to people smugglers and you could see a resumption of the problems we had a few years ago.’ 35

Indeed, it can be said that the detention policy in some respects coincides with the elements of torture. It may amount to punishment of asylum seekers for an act that they have committed by arriving in Australia and seeking protection. The requirement that torture be inflicted by, at the instigation of, or with consent or acquiescence of a public official can also be established. Immigration detention is mandated by the Migration Act 1958 (Cth). Subsection 189(1) of the Act requires public officials of the Immigration Department, customs, or police to detain all persons whom they know or reasonably suspect do not hold a valid visa. Australia’s mainland detention centres are privately operated pursuant to a commercial ‘whole of service’ agreement between the Immigration Department (on behalf of the Commonwealth) and service provider Group 4 Global Solutions (GSL). GSL employees engaged in detention centre operations are thus engaged in administering a regime that was instigated by public officials. With respect to the day-to-day operations of detention centres, GSL employees are acting in a public capacity. The mental harm sustained by Mastipour and Shayan Badraie would indicate that the threshold of severity required by the torture definition can also be established.

The conclusion that depriving Mastipour and Badraie of their fundamental human rights amounts to torture is consistent with the acknowledged indivisibility, interdependence, and interrelatedness of all human rights. 36 It is also consistent with the objectives cited in the Torture Convention’s preamble, which make reference to the Universal Declaration of Human Rights and the ICCPR. While McBride has focussed on economic, social, and cultural rights, severe deprivations of other key human rights might also be considered in this light. McBride has focused on children, but his formulation may be extended to members of other vulnerable groups. Asylum seekers have often experienced extreme trauma and persecution prior to being detained and are by definition vulnerable. The torture of some of these individuals has resulted in severe mental suffering for reasons that include the indeterminate duration of detention, the sense of hopelessness and anxiety generated by uncertainty about the future, and by the detention environment and conditions, including the prevalence of self-harm and the detention together of children and adults of both genders.

The human rights violations associated with immigration detention include the following:

- arbitrary detention in contravention of Article 9(1) ICCPR 37
- breach of Article 2 of the ICCPR’s obligation on state parties to respect and ensure that individuals within its territory are accorded the rights recognised in the Covenant 38
- detainees have not been treated with humanity and respect for inherent dignity as required by Article 10 of the ICCPR 39
- mandatory immigration detention violates Article 24(1) of the Convention on the Rights of the Child (CRC) 40 which requires that every child shall be afforded, without
discrimination, such measures of protection as required by his status as a minor, on the part of his family, society, and the state; 41
• the best interest of the child are not a primary consideration in decision-making surrounding detention in contravention of Article 3(1) of CROC; 42
• appropriate measures for protection necessary for children’s well-being have not been adopted, as required by Article 3(2) of CROC; 43
• Article 7 of the ICCPR (prohibition on torture) has been violated when a detainee’s mental condition is well-known and there is a failure to take the steps necessary to ameliorate this mental deterioration; 44
• failure to fulfill the right of children to be protected from all forms of physical and mental violence as required by Article 19(1) of CROC; 45
• failure to promote the right to the highest attainable standard of physical and mental health as required by Article 24(1) of CROC; 46
• failure to accord unaccompanied children the right to special protection and assistance to ensure the enjoyment of the rights accorded by Article 20(1) of CROC; 47
• detention is not a measure of last resort pursued for the shortest appropriate period of time as required by Article 37(b) of CROC; 48
• detention is not subject to effective independent review in contravention of Article 9(4) of ICCPR and Article 37(d) of CROC; 49
• failure to fulfill the right of children with disabilities to ‘enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate active participation in the community as set out in Article 23(1) of CROC; 50
• failure to extend to children in detention the right to an appropriate education on the basis of equal opportunity in accordance with Article 28(1) of CROC. 51

In the face of such a large number of violations of fundamental rights, it is strongly arguable that when immigration detention results in foreseeable mental harm, that harm will constitute torture. The greatest impediment, however, to establishing torture is the exclusion in the ‘Torture Convention’s Article 1 of ‘pain and suffering resulting from lawful sanctions’. There are two possible interpretations as to the extent of this limitation. First, lawful sanctions may refer to treatment authorised by domestic law and, second, treatment authorised by international law. If the first interpretation is accepted, then the Convention may have the effect of excusing tyrannical laws which, but for their domestic legal character, would amount to torture. Such an interpretation is antithetical to the premise which underpins international human rights law, that individuals are entitled to a common core of human dignity irrespective of variables such as domicile. The second interpretation is consistent with the importance of the international prohibition on torture and analogous treatment, its place in a large number of human rights treaties including its eponymous convention, its status as a peremptory norm of customary international law and a non-derogable right under the ICCPR. Nevertheless, the issue remains unresolved. 53

If the ‘lawful sanctions’ limitation is interpreted to apply to domestic laws, then the argument that immigration detention is torture must fail. But the lawful sanctions limitation does not apply to cruel, inhuman or degrading treatment or punishment under Article 16. The following acts, which have parallels with the experiences of Mastipour, Badraie, and the detention regime in general, have been found by the supervising UN Committee to the Torture Convention to constitute violations of Article 16:

• long term detention of asylum seekers while their asylum claims are being considered; 54
• detention for 22 hours a day with no meaningful activities; 55
• non-segregation of juvenile and adults, and/or male and female prisoners; 56
• the requirement that, upon release into the community, detainees pay for their detention; 57
• prolonged solitary confinement as a measure of retribution in prisons. 58

While the lawful sanctions limitation threatens any finding that Mastipour and Badraie were tortured, it is not an impediment to the conclusion that their treatment amounted to cruel, inhuman, or degrading treatment or punishment. CROC complements the ICCPR and the Torture Convention in its application to children.

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Article 39 requires states to take appropriate measures to promote recovery from cruel or inhuman or degrading treatment or punishment in an environment that fosters their health, self-respect and dignity. In addition to prohibiting cruel, inhuman or degrading treatment or punishment, Article 37(a) prohibits the torture of children. In its National Enquiry into Children in Immigration Detention, HREOC found that the government breached Article 39 and Article 37(a) in circumstances where mental health professionals recommended removal from the detention environment and placement in community based accommodation and the government's failed to act. HREOC concluded that:

there was no reasonable justification for the continued detention of children over the clear (and in some cases repeated) recommendations of mental health experts that they be released immediately in the interests of their mental health...the continued detention of children in these circumstances is a breach of their rights not to be subjected to cruel, inhuman or degrading treatment.

At the conclusion of the refugee status determination process, asylum seekers are deported or alternatively granted a protection visa and permitted to live in the Australian community. With respect to the first contingency, Australia may be deporting individuals whose mental health has been severely undermined. These individuals may be required to travel when they are in an unfit condition to do so and may be deported to countries where they are unlikely to receive appropriate treatment. Some individuals may be vulnerable to acts of torture or cruel, inhuman, or degrading treatment or punishment in their home counties, thus raising concerns about Australia's compliance with Article 3 of the Torture Convention. Those who are granted a visa will require treatment for ongoing mental health problems. These individuals, and Australian society as a whole, are thereby burdened with preventable mental illness.

Australian Law

Australia has been bound by the Torture Convention since 7 September 1989. Australia's dualist jurisdiction does not automatically absorb international law into domestic law, but requires incorporation of international law by the legislature as authorised by the external affairs power in section 51(xxxix) of the Constitution. Australia's legislative efforts to incorporate its obligations under the Torture Convention into its domestic law have been limited to enacting the Crimes (Torture) Act 1988 (Cth). Section 6 defines torture in accordance with Article 1 of the Convention and facilitates the prosecution of public officials and people acting in an official capacity or with the consent of a public official. Fortifying the argument above that the Convention's 'lawful sanctions' limitation should be confined to treatment authorised by international law, section 3 of the Act provides that an 'act of torture' does not include any act arising from lawful sanctions provided that such sanctions are consistent with the ICCPR. Undermining the same argument and showing the ease with which key international obligations may be marginalised within dualist jurisdictions, is the proviso in section 5(1) that the Act is not intended to exclude or limit the operation of any other law of the Commonwealth. Accordingly, conduct authorised or required by the Migration Act may not amount to torture even though the United Nations Human Rights Committee has reiterated the inconsistency of Australia's detention policy with the ICCPR.

The Crimes (Torture) Act 1988 (Cth) is limited to conduct that has taken place outside Australia and which would constitute an offence against the law then in force in Australia. The legislation is therefore incapable of application to detention practices in mainland Australia. It may be applied to Australian Immigration Department or Federal Police officers in Nauru who engage in conduct that would fall under the torture definition. But those officers would have to be violating Australian law and could only be prosecuted if they were Australian citizens or present in Australia. Prosecutions may only proceed with the written consent of the Attorney-General. This legislation therefore appears unlikely to address the punitive effect of Australia's immigration detention policy.

There have been a series of High Court proceedings that have challenged the detention provisions on the basis of their punitive effect. Because punishment is an exclusively judicial function, immigration detention was alleged to contravene the separation of executive, parliamentary, and judicial powers. These arguments have all...
failed on the basis that constitutional validity is determined only by the purpose underlying the legislation. The power of Australia's federal Parliament to pass laws authorising the detention of asylum seekers emanates from the aliens' power and the immigration power in sections 51 (six) and 51(xxvii) of the Constitution. The detention provisions remain valid provided that the detention is reasonably capable of being seen as necessary for the constitutionally valid purposes of removal, deportation, or enabling a visa of asylum seekers. The Court of Australia has thus determined the application to be made and considered. The High Court of Australia has thus determined the practical consequences of detention to be constitutionally irrelevant matters. From this position, it may be argued that immigration detention does not amount to a sanction notwithstanding its punitive effect.

Tort Law

The dearth of opportunity to bring human rights arguments within Australia's domestic legal system has resulted in litigators testing the boundaries of the tort law to explore the opportunities to protect human rights in Australian law. Unlike Australia's Constitution, tort law does not distinguish between citizens and aliens. Tort litigation has recently met with some success in its utilisation of the law of negligence on behalf of asylum seekers held in immigration detention.

Mastipour's case was adjudicated by the full bench of the Federal Court of Australia in 2004. The Court accepted that the Immigration Department owed a duty 'to take reasonable care of [Mr Mastipour] in relation to his safety whilst in detention', and that it was a duty that was breached by the following conduct: the actions that led to Mastipour's placement in the Management Unit; his confinement in the Management Unit in light of its conditions; the removal of his daughter from Australia to Iran without notice being given to him; the removal of his daughter under cover of a lie; and keeping Mastipour detained in Baxter knowing that to do so might cause him mental injury. The Federal Court granted Mastipour a mandatory interlocutory injunction which compelled the Immigration Department to remove him from Baxter. In a subsequent and unrelated decision, Justice Finn in the Federal Court held that the Commonwealth owed a non-delegable duty to ensure that reasonable care was taken of detainees who, by reason of their detention, could not care for themselves. As in the relationship between hospital and patient, the Commonwealth government exercised control over and assumed responsibility for the health care of a class of persons susceptible to serious mental illness. This Commonwealth duty required the provision of a level of psychiatric care reasonably designed to meet detainees' needs. Where the Commonwealth contracts out the provision of services, it was obliged to see that 'care is taken'.

In proceedings issued in the Supreme Court of New South Wales, it was accepted that a non-delegable duty of care was also owed to Shayan Badraie. Part-way through the hearing, after the Commonwealth had spent A$1,535,562.71 defending the action, the matter was settled. Permanent residence visas were granted to Shayan and his family and A$400,000 in compensation paid in addition to legal costs. The probability that the action would succeed precipitated a settlement which assured Shayan and his family permanent protection and provided some degree of monetary compensation with respect to Shayan's exposure to physical and mental violence and the failure to address his medical needs.

Although the New South Wales Supreme Court was not ultimately called upon to determine Shayan's claim for damages, the partial hearing of his case was not the first time his treatment came under scrutiny. In 2002, after hearing a complaint issued by Shayan's father, HREOC concluded that Shayan's detention and foster placement involved breaches of a range of human rights in the CROC. These included Article 19(1) which requires parties to CROC to take positive steps to protect children from harms such as physical and mental violence. HREOC found that Shayan was exposed to acts of physical violence and acts that caused psychological harm so as to constitute mental violence. Furthermore, there was insufficient evidence that the government took all appropriate measures to prevent Shayan's exposure to physical and mental violence. The Commission noted that alternatives to detention were not pursued and that Shayan was kept in detention despite strong medical evidence that it was seriously undermining his mental health. It was accordingly concluded that the following guarantees in CROC were not met: Article 3(1), which requires the best interests of the child to be a primary consideration in all actions concerning children; Article 37(b), which prohibits the
arbitrary detention of children and requires state parties to use detention of children as a last resort; and Article 37(c), which requires, inter alia, that children deprived of their liberty be treated with humanity and respect for their inherent dignity. Shayan's separation from his parents and placement in foster care were also found to contravene Article 9(1) of CROC which prohibits separation of a child from their parents against their parents will unless such separation is in the best interests of the child.71

Damages were assessed by HREOC in accordance with tort principles, with the aim of placing Shayan in the same position as if the wrongs had not occurred. The Commission recommended damages in the sum of $70,000, an apology to Shayan and his family, payment of Shayan's medical and psychological counselling expenses for the treatment of his post-traumatic stress disorder and any other associated problems, and the establishment of infrastructure, guidelines, and procedures to provide appropriate arrangements for other children in detention. Upon the determination of individual complaints by HREOC, the Commonwealth is required to provide details to both Houses of federal Parliament on any actions taken. But unlike curial proceedings, HREOC determinations are not legally binding. The extent of the Commonwealth's compliance with HREOC's determination was to report that procedures were being introduced to address the experiences of child detainees. No compensation was paid or apology offered.

The issue of proceedings on Shayan's behalf was required to secure a legal remedy. Having yielded a settlement, the case is widely regarded as a success. Damages in tort are conceptualised as a vehicle for restoring the status quo. Yet when viewed in light of Shayan's preventable demise from a healthy child to one unlikely to recover from his psychiatric condition, the monetary reward offered appears inadequate and the legal steps taken to secure it riddled with delay and uncertainty.

Tort law is unlikely to furnish the solution for addressing harsh legislative regimes which undermine fundamental human rights, such as the detention provisions of the Migration Act 1958 (Cth). The common law must confine itself to issues raised by litigants and is thus, by its very nature, piecemeal in its victories unless the threat of legal liability reaches a point where it precipitates legislative change. Mastipour and Badraie are but two asylum seekers who have been held in immigration detention and suffered concomitant privations. Several thousand more have been detained on Australia's mainland and in other countries such as Nauru. Human rights protections afforded by tort law can offer some remedies to successful litigants, but afford little comfort to individuals in the same position who have not subjected themselves to the vicissitudes of litigation. In light of the large number of individuals who have suffered mental harm as a consequence of their detention a more comprehensive and speedy response is called for. In light of the preponderance of psychiatric evidence linking immigration detention with serious mental illness, this response requires Australia's federal government to build on Parliament's 2005 decision to remove children and their families from detention. It calls for an acceptance of the realities of human vulnerability and a concomitant understanding that, irrespective of the outcome of their substantive claim for protection, asylum seekers are a vulnerable group within society. Their psychiatric needs must accordingly be met. Such acceptance is a necessary precondition to the scrapping of the immigration detention regime.

Conclusion

Australia’s detention of vulnerable individuals has precipitated considerable mental harm to many of those individuals. The infliction of that harm has, in effect, become an instrument of public policy. In some respects, the detention policy corresponds with the definition of torture enshrined in the Torture Convention. The treatment of some individuals in detention would amount to torture if the ‘lawful sanctions’ limitation was confined to sanctions authorised by international law. Whether lawful sanctions are so confined is an unresolved area of international law. Nevertheless, if lawful sanctions are extended to all treatment authorised by domestic law, the acts and omissions explored in this article amount to cruel, inhuman, or degrading treatment or punishment which has left detainees with ongoing psychiatric problems.

For detainees who fail to establish an entitlement to refugee protection, their deportation raises further concerns about Australia’s obligations under the Torture Convention. Many of those who successfully establish that they are refugees
will enter the Australian community with mental illness. Some will be required to repay the costs of the very system that has caused them harm, with the consequence that the burden of debt may further diminish their prospects of recovery and undermine their ability to establish a life in Australia. Shayan Badrate and others like him are unlikely to ever realise their human potential or make the contribution to Australian society that they could. The policy that brought about their mental decline is one that will be remarked upon with disbelief in generations to come and stands as a clear warning to other states that want to follow Australia's path.

Endnotes


3 S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs (2005) 216 ALR 252, [180].

4 Ibid [182].


7 Ibid.


9 HREOC (n 5) 333.


11 Ibid.

12 Ibid.


16 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, entered into force 26 June 1987.


Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour (2004) FCAFC 93 [15].

Ibid [76].

Ibid [80].

Ibid [81].


See generally, HREOC, Report of an Inquiry into a Complaint by Mr Mohammed Bakhtiyari on behalf of his son Shayan regarding the acts or practices of the Commonwealth of Australia (Department of Immigration, Multicultural and Indigenous Affairs) Report 25 (2002).

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Joseph, Mitchell, Gyorki and Benninger-Budel (n 20) 214.


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HREOC (n 5) [9.5.5], [9.5.6], [9.6].


Section 7.


Mastipour (n 21).

S (n 3).

Ibid [212].


Ibid [13.3].


Ibid [15.2].
Chapter 2

Testing the boundaries of administrative detention through the tort of false imprisonment

Tania Penovic

The broad administrative power of detention conferred by the Migration Act has been exercised in a manner which fails to accord due regard to the right to personal liberty. At least 250 individuals who fall outside the ambit of its detention provisions have been detained. Many of these individuals have been among the most vulnerable and marginalised members of Australian society and their detention has raised concerns about Australia's compliance with its international human rights obligations. This article examines the scope for the tort of false imprisonment to address concerns arising from wrongful immigration detention. The philosophical compatibility of tort law and human rights and the extent to which human rights arguments may inform Australia's common law are explored with reference to the way in which false imprisonment has been, and may in future be, invoked to address incursions into the right to personal liberty.

Introduction

Within the common law, the law of torts stands out as the most suitable vehicle for addressing human rights violations. Within the corpus of tort law, false imprisonment is the most intrinsically applicable to the concerns arising from Australia's practice of immigration detention. Immigration detention was introduced as federal government policy in 1992 and since 1994 has been mandated by the Migration Act 1958 (Cth). Prima facie, immigration detention would always amount to false imprisonment were it not for the operation of s 189(1) of the Migration Act. Section 189(1) requires officers of the Department of Immigration and Citizenship (Immigration Department), customs or police to detain all persons in Australia's migration zone whom they know or reasonably suspect to be unlawful non-citizens. An unlawful non-citizen is defined in s 14 as a non-citizen who does not hold a valid visa. All unlawful non-citizens detained under s 189(1) must be kept in detention until they are removed from Australia, deported or granted a visa in accordance with s 196(1), which as prescribed by s 196(3) has the effect of preventing their release, even by a court, unless they are granted a visa. Nevertheless, s 196(2) states that subs (1) does not prevent the release from immigration detention of a citizen or a 'lawful non-citizen' who holds a valid visa.

Several thousand children and adults have been held in Australia's immigration detention centres. At least 250 Australian citizens and lawful non-citizens have been detained as 'unlawful non-citizens' under s 189(1). The policy under which they have been detained, which is introduced in Part I of this article, has exacted significant human cost and raised serious concerns about Australia's compliance with its international human rights obligations. False imprisonment litigation in the context of immigration detention is explored in Part II, while Part III explores the Commonwealth's wrongful detention of citizens, permanent residents and visa holders who fall within vulnerable and marginalised groups in Australian society. Part IV considers whether a person who is lawfully detained has any residual liberty which may found a false imprisonment action and whether intolerable conditions may render legitimate administrative detention unlawful for the purposes of the tort. The parallel aims and philosophies which inform both tort law and human rights and underscore tort law's suitability in promoting human rights are discussed in Part V, while Part VI considers the opportunities for human rights-based arguments in Australian courts with reference to developments in the United Kingdom.

I Immigration detention in Australia
Australia's Howard government maintained the position that immigration detention is an 'essential element underpinning the integrity of Australia's migration program and the protection of our borders'. The recently elected Rudd government has maintained that mandatory detention is an essential component of strong border control, but has committed itself to detaining unlawful non-citizens for health, identity and security checks on arrival, with detention to continue only for those individuals considered to pose a risk to the community and those who fail to comply with immigration processes. Constitutional challenges to the detention regime have failed on the basis that detention serves the legitimate aliens power purpose of enabling visa applications to be determined, ensuring that unsuccessful applicants are available for removal or deportation and preventing unlawful non-citizens from entering the Australian community.

The physical conditions of immigration detention facilities are comparable to Australian prisons. The key distinguishing feature between immigration detention and prison is the defined duration of prison sentences. Asylum seekers are held in detention until their entitlement to refugee protection has been finally determined. The longest documented period spent in immigration detention is seven years.

Children and adults of both genders have been detained together, leaving women and children vulnerable to sexual assault and to the effects of witnessing acts of violence and self-harm. Representatives from Australia's federal human rights body, the Human Rights and Equal Opportunity Commission (HREOC), have visited detention centres over the last decade and concluded without exception that the detention experience has a deleterious effect on mental health. A number of medical studies have linked the experience of immigration detention with severe mental harm. A psychologist described the detention environment in which she had worked in the following terms:

The detention environment was emotionally stressful and mentally destructive for all detainees. This created an environment where adults were unable to create a safe caring family space. Many parents and adults tried to care for the children and protect them. This was a common element of their distress. The Detention Centre was particularly damaging to children and to families. The environment was punitive, penal and depriving of autonomy and stimulation. Added to this detainees had frequently experienced prior trauma. Distress and self-harm and talk of suicide were daily enacted.

In the Federal Court matter of \textit{S v Secretary, DIMIA} one consultant psychiatrist gave evidence to the effect that South Australia's Baxter detention facility 'is an environment almost designed to produce mental illness', marked by a 'pervasive atmosphere of hopelessness'. Evidence from two psychiatrists and one general practitioner to the effect that conditions at the Baxter detention facility were a contributing cause of two detainees' mental illness was accepted by Finn J as 'not unreasonable'. His Honour held that these psychiatric opinions, required the Commonwealth to obtain independent advice concerning the detainees' treatment plans in order to comply with its duty to ensure that reasonable care was taken with respect to their medical care.

Child asylum seekers and their family members have been permitted to live outside the detention centre environment since 2005 while remaining deemed to be in detention. Confinement in designated detention centres has otherwise been retained as a part of Australia's refugee processing regime in order to deter prospective boat arrivals and the people smugglers who may facilitate their arrival.

The practice of immigration detention has raised ongoing concerns about Australia's compliance with its international human rights obligations. The right to personal liberty is a fundamental norm of international human rights. It is enshrined in standards such as Art 9(1) of the International Covenant on Civil and Political Rights (ICCPR) which prohibits arbitrary detention, and Art 37(b) of the Convention on the Rights of the Child (CROC) which prohibits unlawful or arbitrary detention and provides that detention of minors shall be used only as a last resort and for the shortest appropriate period of time. Both the ICCPR and CROC have been ratified by Australia. Under the ICCPR's First Optional Protocol, the United Nations (UN) Human Rights Committee has jurisdiction to determine complaints alleging breaches of ICCPR standards. On six occasions, the committee has determined that Australia's immigration detention regime is arbitrary and violates Art 9(1). The same conclusion has been reached regarding Art 9(1) and/or CROC's Art 37(b) by a range of international human rights bodies and Australia's HREOC. These findings do not enliven any binding enforcement mechanisms, thus inviting the question of whether tort law may address the
deprivation of liberty constituted by immigration detention.

II False imprisonment litigation in Australia

A False imprisonment and the right to personal liberty

The right to personal liberty has deep roots in English common law. The right was recognised in such declarations as the 1215 Magna Carta's statement that 'no freeman shall be taken or imprisoned ... but ... by the law of the land' and also found protection in documents from other jurisdictions such as the French Declaration of the Rights of Man and the Citizen and the US Constitution. It was described by Blackstone as 'an absolute right inherent in every Englishman' and by Lord Bingham CJ as a 'fundamental Constitutional principle'. It is very well established as a fundamental human right which long pre-dates the formulation of human rights norms by inter-governmental organisations such as the UN and Council of Europe. At common law the protection of personal liberty could be pursued via three avenues. The first is the prerogative writ of habeas corpus, which has been described as 'the foundation stone of the liberties of the subject' and can facilitate judicial review of detention and release of persons unlawfully imprisoned, but offers no remedy to persons released following unlawful detention. It has been pursued unsuccessfully in the Federal Court of Australia with respect to the isolation of 433 rescued asylum seekers held on the MV Tampa and the High Court regarding an asylum seeker detained on Nauru pursuant to arrangements made by the Australian government. The second avenue is via criminal offences such as false imprisonment and kidnapping and the third is the tort upon which this article is focused.

The monolithic tort of negligence dominates the pantheon of tort law, with the torts which fall under the umbrella of trespass to the person receiving relatively little attention from litigants and commentators. Undergraduate students are frequently taught false imprisonment through late nineteenth and early twentieth century cases and have come to regard the tort as largely irrelevant to modern legal practice. One commentator who has challenged this perception is Professor Francis Trindade who, writing a decade ago, described false imprisonment as capable of ensuring that Australia's common law is in harmony with Art 9 of the ICCPR and conforms with any constitutional implied freedoms of liberty and movement. One decade on, Trindade's hope that the High Court may recognise an implied constitutional right to freedom of liberty and movement has not been realised. The status of the ICCPR in domestic law, considered in Part VI below, has remained circumscribed, thus highlighting the continuing importance of false imprisonment in protecting personal liberty.

False imprisonment may be defined as 'a wrongful total restraint on the liberty of the plaintiff that is directly brought about by the defendant'. Since false imprisonment is actionable per se, a plaintiff does not have to prove damage as a result of the imprisonment. Once a plaintiff establishes confinement by the defendant, the onus shifts to the defendant to prove that the confinement lacked the necessary intention or negligence or that the defence of lawful justification attaches to the confinement. In offering a remedy in the form of damages, false imprisonment may facilitate the realisation of the enforceable right to compensation for victims of unlawful arrest or detention enshrined in Art 9(5) of the ICCPR. The extent to which false imprisonment has addressed incursions into the right to personal liberty resulting from immigration detention is considered in the context of two cases examined below.

B Goldie v Commonwealth of Australia

Brian Goldie was a UK citizen who was granted a series of bridging visas which entitled him to remain in Australia during the processing of his substantive application for a permanent residence visa. Goldie was detained under s 189 for three days after an immigration officer relied on inaccurate information contained in the computer record. An inspection of Goldie's file would have revealed that he held a current visa. Goldie brought proceedings in the Federal Court against the Commonwealth, the Immigration Minister and various Immigration Department officers involved in his detention. Claims in negligence and misfeasance in public office were unsuccessful. His claim for false imprisonment was successful only on appeal.

The central question for determination was whether Goldie's detention was unlawful. In considering the detaining
officer's reasonable suspicion for the purpose of s 189(1), Gray and Lee JJ held that '[r]easonable suspicion lies somewhere on a spectrum between certainty and irrationality. The need to ensure that arrest is not arbitrary suggests that the requirement for a reasonable suspicion should be placed on that spectrum not too close to irrationality.' Their Honours held that to empower arrest based on an irrational suspicion would offend the importance of individual liberty underlying the common law and allow the possibility of arbitrary arrest with the consequence that Australia would be in breach of its obligations under Art 9 of the ICCPR. The word 'reasonably' attaches to the word 'suspects' in s 189 to avoid these consequences, making it clear that the suspicion must be justifiable upon objective examination of relevant material. Such examination extends to that which is discoverable by efforts of search and inquiry that are reasonable in the circumstances. The detaining officer was under an obligation to make such searches and inquiries.

The reasonable suspicion required by s 189 was considered to be the section's only protection against arbitrary detention. The officer is not empowered to act on a suspicion that a person may be an unlawful non-citizen. They must reasonably suspect that he or she is an unlawful non-citizen. Gray and Lee JJ concluded that in light of the detaining officer's failure to make reasonable enquiries, Goldie's arrest was precipitate and not justified by s 189(1) because the decision to detain was not based on knowledge, reasonable suspicion or any other justification. Goldie's damages were later assessed by French J at $22,000.

In her dissenting judgment, Stone J held that there is no substantive difference between an officer reasonably suspecting that a person may be an unlawful non-citizen and suspecting that the person is an unlawful non-citizen. The reasonableness of a suspicion must be assessed in the light of the information that an officer has at the relevant time. The discrepancies in Goldie's visa history were not easily resolved and, in the circumstances, it was reasonable for the detaining officer to suspect that Goldie was an unlawful non-citizen.

**C Ruddock v Taylor**

Graham Taylor, a British born long-term Australian resident, was entitled to stay in Australia indefinitely because he held a transitional (permanent) visa. After serving a three and a half year prison term for child sex offences, his visa was cancelled on two occasions. After the first cancellation, by the Immigration Minister, he spent 161 days in detention. The second cancellation, by the Minister's Parliamentary Secretary, led to a further detention for 155 days. Subsequent to each cancellation, his detention was effected by officers of the Immigration Department. His 316 days of confinement were spent partly in immigration detention centres and partly in prison. Both visa cancellations were quashed by orders of the High Court, the first by consent and the second on the basis that it had exceeded the Parliamentary Secretary's lawful exercise of power because Taylor was not an alien within the ambit of s 51(xix) of the Constitution.

In proceedings against the Minister and Parliamentary Secretary (the Ministers) and the Commonwealth, the NSW District Court awarded Taylor $116,000 in damages for false imprisonment. The NSW Court of Appeal, upheld the decision and held that Taylor's detention by Immigration Department officers was caused directly by the Ministers' visa cancellation decisions. His detention was seen as an inevitable step brought about by the self-executing operation of the statute, of which the Ministers must have been aware. The detention was unlawful because the visa cancellations which brought it about had been quashed. The Ministers appealed to the High Court.

In a joint judgment, Gleeson CJ and Gummow, Hayne and Heydon JJ characterised Taylor's detention under the Migration Act as a separate issue from the Ministers' exercise of power. If the Ministers brought about a state of affairs in which an officer formed the requisite state of mind by taking steps which were beyond the lawful exercise of the Ministers' powers, it did not automatically follow that the resulting detention was unlawful. The detaining officers had been provided with what, on their face, appeared to be regular and effective ministerial decisions. The officers had checked whether Taylor had a visa, found that he did not and formed the belief that he was an unlawful non-citizen. The detention was accordingly lawful and required by s 189(1).

The decision to detain was not invalidated by the mistake as to Taylor's immigration status. As long as a detaining officer has the necessary knowledge or reasonable suspicion, the detention remains valid even in circumstances where it emerges that the detainee is not an unlawful non-citizen. Callinan J agreed with their Honours' conclusion.
considering the detaining officers' knowledge or reasonable suspicion to be based on that of the Ministers. The basis for Taylor's detention turned out to be erroneous, but the detention remained lawful because absolute certitude as to the respondent's precise legal status was not required. Such a low threshold of conviction leaves personal liberty in a precarious state and offers little scope to examine the tort invoked by the plaintiff.

In a strong dissent, McHugh J noted that the High Court has recognised personal liberty as the 'the most elementary and fundamental of all common law rights'. Section 189 represents a drastic interference with the right and must be construed strictly so that a person cannot be lawfully detained unless the detaining officer holds one or other of the precise mental states referred to, namely, knowledge or a reasonable suspicion that the person is an unlawful non-citizen. A reasonable suspicion cannot be formed by a person who believes or knows that someone is an unlawful non-citizen. Knowledge does not encompass erroneous states of mind. The detaining officers considered that they knew that Mr Taylor was an unlawful non-citizen and accordingly failed to establish a condition precedent to his detention.

In considering whether the element of directness required for trespass was established, McHugh J drew a distinction between the Minister issuing a direction to detain (which attracts Ministerial liability) and an officer forming an independent assessment and deciding to detain (which does not attract Ministerial liability). The language of s 189 afforded no opportunity for discretion by detaining officers. The Minister's visa cancellation led the officers to believe that they had a duty to detain, making the Minister active in promoting and causing the imprisonment. In concluding that the defence of lawful authority did not apply, McHugh J cited Gibbs CJ's statement in A v Hayden that '[i]t is fundamental to our legal system that the executive has no power to authorize a breach of the law.'

Like McHugh J, Kirby J accorded great weight to the common law right to personal liberty. His Honour considered that the 'strictest approach' must be taken to interpreting s 189 because personal liberty is in question. The requirement that the executive can only detain pursuant to clear statutory mandate was a bulwark against tyranny. Like McHugh J, he invoked the principle that legislation which abrogates common law rights must be expressed in clear and unambiguous language. The Ministers did not argue that Federal Parliament had acted to abrogate or modify the tort of false imprisonment within the context of particular migration decisions and no such modification could be found in the words of s 189. The element of directness was satisfied because Taylor's detention was an inevitable consequence of the Ministers' visa cancellations. The officers who physically effected Taylor's detention acted in accordance with their perceived statutory duty and there was no real scope for the officers not to detain Taylor after the visa cancellations. Section 189 'falls well short' of permitting the Ministers to engage in conduct which would otherwise be tortious.

Unlike the majority judgment in Goldie, the dissenting judgments in Taylor did not make reference to Australia's human rights obligations, instead examining Taylor's detention under the Migration Act with reference to the common law right to personal liberty. Yet, like the majority judgment in Goldie, they accommodated the fundamental importance of personal liberty. In light of this fundamental importance, it is appropriate that s 189 be interpreted to require a high level of satisfaction that the person whose liberty is endangered is in fact an unlawful non-citizen. Although their Honours did not resort to international standards, reference to such standards would encourage the courts to focus on the objectives underpinning false imprisonment and would thereby enrich domestic jurisprudence around the tort and facilitate more just outcomes.

The experiences of both Goldie and Taylor illustrate the dangers of being wrongfully detained as a consequence of errors in administration of the Migration Act. Such errors have occurred most frequently with respect to members of the most vulnerable and marginalised groups in Australian society. The following section of the article examines the detention of members of these groups.

III Detention of the marginalised

Malkin and Voon have described tort law as a vehicle through which marginalised individuals 'may attempt to effect change through tort, one of the few mechanisms in which they could possibly be empowered, using open public
processes to subject powerful wrongdoers to judicial scrutiny. Asylum seekers are a marginalised and generally unpopular group within society. Asylum seekers who are mentally ill or live with a disability fall within a sub-group comprised of the extremely vulnerable. In February 2005, media reporting led to the location of a missing Australian permanent resident suffering from a mental illness in the Baxter Immigration Detention Facility. Cornelia Rau was detained for six months at the Brisbane Women's Correctional Centre and subsequently for four months at the Baxter Immigration Detention Facility. Her 10 months in detention were the primary subject of Mick Palmer's 'Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau'. The subsequent location in the Philippines of a disabled Australian citizen who had been detained and subsequently deported led to an expansion of the enquiry to investigate the case of Vivian Alvarez. A further enquiry into the Alvarez matter was conducted by Neil Comrie pursuant to the Ombudsman Act 1976 (Cth).

The Palmer and Comrie enquiries led to the identification of a further 247 cases involving the immigration detention of visa holders, permanent residents and Australian citizens who fall within one or more of the following categories: children, the homeless, people with a mental illness, people with a substance abuse problem and people with intellectual disabilities. Between 2005 and 2006, the Federal Government referred the 247 cases to Commonwealth Ombudsman John McMillan under s 5 of the Ombudsman Act 1976. In March 2006, the Ombudsman released his first report on the referred cases. The report concerned the detention of 'Mr T', a homeless Australian citizen diagnosed with a mental illness, who was detained on three occasions between 1999 and 2003 for a total of 253 days. Mr T's experiences in detention raise questions about when a detaining officer's suspicion is reasonable so as to warrant detention and whether detention under s 189 may at some stage become false imprisonment. The circumstances of his detention are discussed below.

Seven further reports dealing with the remaining 246 cases have been concluded. These reports concern the following:

- The detention of a mentally ill Australian permanent resident for 43 days.
- Nine cases in which officers uncritically accept[ed] information from 'unmistakably irrational or delusional' individuals suffering from mental illness or incapacity in forming their erroneously based suspicion under s 189 of the Migration Act.
- 10 cases involving the detention of children, eight of whom were Australian citizens or lawful non-citizens.
- 70 cases in which the decision to detain under s 189 involved process deficiencies.
- 45 cases involving data recording errors in the detention process.
- 78 cases in which systemic issues occurred with respect to notifications concerning visa applications. The notification as to immigration status and visa refusals following notification were ineffective, with the consequence that the individuals involved could not be lawfully detained.
- 33 cases of detention following a flawed visa cancellation or refusal.
- A summative report drawing on all of the above and proffering '10 lessons for public administration' which follow from the referred cases.

A 'Mr T'

Mr T was an Australian citizen born in Vietnam. I will focus on the second of his three periods in detention, which lasted 242 days, in order to explore the parameters of false imprisonment in the context of his confinement. Notes of interview with an Immigration Department compliance officer which preceded his detention indicate that Mr T presented with 'possible mental health issues, hearing problems or signs of intoxication'. Despite these observations, his inability to provide satisfactory evidence that he was not an unlawful non-citizen led to his detention under s 189(1). The compliance officer did not reconsider her decision after she delivered Mr T to the Villawood Immigration Detention Centre and observed that it was 'almost as if he had been [there] before.'
On his first day of detention at Villawood, Mr T's erratic behaviour led medical staff to conclude that he suffered from a mental illness. Three months later, an Immigration Department compliance team leader observed that Mr T was likely to have been in the care of other mental health institutions and that she had no idea who Mr T was, stating that 'for all we know, he could be an Australian citizen'. No identifying information was sought from psychiatric hospitals. Mr T was finally identified when an accredited Sino/Vietnamese interpreter translated the characters for his first and family names and matched them with electronic records. Professor McMillan concluded that if such translation had occurred earlier, Mr T would have been correctly identified.

When the Ombudsman's report was released, then Attorney-General Philip Ruddock was questioned as to whether Mr T should be compensated. Assuming negligence to be the most appropriate vehicle for compensation, the Attorney-General stated as follows:

I notice that one of the concepts that's never spoken of by those who often assert there ought to be claims of compensation is contributory negligence ... A lot of the reports today focus only on the difficulty of identification and the fact that he was held and don't deal with the issue about the degree to which there is personal responsibility.

Although contributory negligence extends beyond the tort of negligence to negligent trespass to the person, it is not available with respect to the direct consequences of intentional trespass to the person. The common law's refusal to relieve defendants of liability in circumstances where the plaintiff has failed to avoid foreseeable risk reflects the importance ascribed to the defendant's wrongful intention. A failure to take reasonable care with respect to one's own safety is by no means easy to establish in circumstances in which an individual presenting as confused or mentally ill is unable to adequately identify himself. Nevertheless, even if it could be proved that Mr T failed to take steps to avoid wrongful confinement, the department would remain fully liable when an intention to detain in the absence of the necessary knowledge or reasonable suspicion can be established.

A failure to amass sufficient identifying information would appear to be an insufficient basis for the suspicion or knowledge required by s 189 in circumstances where a person's mental health is in question. When Mr T was detained it appears clear that his identity was capable of being established from available information. The decision to detain him therefore failed to satisfy the High Court's formulation in Taylor of knowledge or reasonable suspicion in accordance with what is reasonably capable of being known. In his report, John McMillan concluded that it is difficult to understand in the circumstances how any reliance could be placed on any of Mr T's statements.

If Mr T's detention was not wrongful from the outset, it appears likely that the necessary knowledge or suspicion could not be sustained for the full duration of his confinement. The Ombudsman's report states that '[i]t is probable that implicit in s 189 is a requirement that [Immigration Department] officers continue to hold a reasonable suspicion that a person is an unlawful non-citizen.' This view accords with the judgment of Gray J in the Federal Court in VHAF v Minister for Immigration and Multicultural and Indigenous Affairs. His Honour considered that detention under s 189 is unlawful unless continuing justification could be provided. Accordingly, an unlawful non-citizen who was granted a visa while in detention was required to be released while further steps were taken to reconsider his case. The Full Federal Court approved the judgment of Gray J and stressed the importance of the principle that courts do not impute to the legislature an intention to abrogate fundamental common law rights in the absence of a clearly expressed intention. In Mr T's case, the Ombudsman found no evidence of internal review or reconsideration of the decision to detain and made reference to 'five months of [Immigration Department] inactivity ... and a complete lack of systematic attempts as identification'. It would be difficult indeed to argue that a reasonable suspicion that Mr T was an unlawful non-citizen was sustained for 242 days in circumstances where his identity was unknown, his need for psychiatric support was apparent from his very first day in detention and no efforts were made to identify him.

B Others wrongfully detained

It is not known whether Mr T has received compensation for his 253 days in detention. Compensation has been paid to a number of individuals who have been wrongfully detained, but these settlements are confidential and no information is
available as to whether they followed the issue of legal proceedings. It may be assumed that some of these settlements involved individuals considered in the 247 cases examined by the Commonwealth Ombudsman. Proceedings concerning the wrongful detention and deportation of Vivian Solon have led to a 'substantial' confidential settlement. French tourist Mahamadou Sacko issued proceedings against the Immigration Department with respect to four days spent in detention at Villawood after his damaged passport led officers to suspect that the document was a forgery. The case is reported to have settled for approximately $25,000. In October 2007, proceedings against the Federal Government were issued in the Supreme Court of Victoria by Tony Tran, a lawful non-citizen detained for five years on the incorrect belief that his visa had been cancelled.

Proceedings against the Commonwealth of Australia were issued on behalf of Cornelia Rau in the NSW Supreme Court in April 2007, claiming exemplary and aggravated damages for negligence and false imprisonment. Rau was apprehended by Queensland police after absconding from hospital. Within two days of being taken into police custody, a recommendation was made for urgent medical attention, which was not acted upon. During her six month detention in the Brisbane Women's Correctional Centre, she was transferred to hospital where she was diagnosed with a probable psychotic illness, then returned to prison after a registrar concluded that she was not mentally ill. After her transfer to the Baxter immigration detention facility, Rau's confused and bizarre behaviour led to her examination by three practitioners, all of whom concluded that she suffered from a mental illness. Further examination and management were recommended by each of the three examining practitioners in addition to a psychologist and other staff employed at Baxter. None of these recommendations was adopted. Rau's 10 months in detention ended when she was identified through newspaper reports.

In prison, Rau was detained alongside the general prison population. On several occasions, her erratic behaviour led to placements in solitary confinement. At Baxter, she spent time in isolation in the 'Red One' and 'Management Unit'. In the former, she could be monitored through a peephole, while in the latter she remained under 24 hour video surveillance. The failure to provide her with appropriate medical treatment in prison and at Baxter was matched by a failure to make systematic efforts to identify her. In his enquiry into the circumstances of her detention, Mick Palmer described the Immigration Department database infrastructure as 'silouette', with no organised, systematic approach to the inquiry process, and nobody in charge. The early release of a photograph might have 'made her journey' in detention 'a short one'.

In Senate Estimates hearings, the Immigration Department's Secretary indicated with reference to Rau's detention that '[i]f you have reasonable doubt you must detain ... we must release at the point at which we can establish that the person is lawfully in Australia'. The Secretary sought to rationalise the period of time that Rau was kept in detention in the following terms:

At no stage did we have any basis on which to conclude that she ... had a lawful basis to be in Australia. In the absence of that determination, the officers continued, rightly, to have a reasonable suspicion ...  

The Secretary's approach purports to reverse the onus of proof required for false imprisonment, maintaining that the department can keep a person in detention until information (coming from the detainee or elsewhere) establishes that the detention is not lawfully justified. Unless the legislation states otherwise, and it does not, the common law in fact requires the department to establish and maintain lawful justification for detention.

Rau's false imprisonment claim alleges that the requisite knowledge or reasonable suspicion that she was an unlawful non-citizen was not held, or not held on proper grounds, or alternatively, not reviewed or maintained during her 10 months of detention. Whether the NSW Supreme Court would agree with Palmer's view that the detaining officer had a proper and lawful basis for forming a reasonable suspicion under s 189, it would appear unlikely to disagree with Palmer's conclusion that this suspicion could not be sustained over the 10 month period of Rau's detention. Palmer found that officers should have continued inquiries aimed at identifying her and continued to question whether they were able to demonstrate that their original suspicion was sustained and remained reasonably held. Even a broad construction of s 189 with little regard to the right invoked would be unlikely to exempt the Commonwealth from
liability. With the spectre of a precedent pronouncing at least some portion of Rau's detention to be unlawful, the matter did not proceed to judgment. An offer by the government to settle the matter for an undisclosed sum in compensation for her 10 month confinement was accepted on Rau's behalf in February 2008 and is awaiting Supreme Court approval.

IV Conditions of detention and residual liberty

Cornelia Rau's negligence claim set out 54 particulars of breach, some of which concerned the conditions of her detention. Her false imprisonment claim focused more broadly on her initial and ongoing detention. Yet Rau's experiences in detention and particularly in solitary confinement raise two further questions about the scope of false imprisonment. First, may intolerable conditions themselves render detention unlawful? Secondly, can a detainee maintain any 'residual liberty' or freedom which prohibits further encroachments upon their freedom of movement? Such questions engage a range of norms enshrined in the ICCPR and other international instruments. Article 7 of the ICCPR prohibits cruel, inhuman and degrading treatment and Art 10(1) calls on state parties to treat all persons deprived of liberty with humanity and respect for the inherent dignity of the human person. Rau's detention alongside the general prison population raises particular concerns with respect to Art 10(2), which requires that 'accused' persons be segregated from convicted prisoners and receive treatment appropriate to their status as 'unconvicted persons'. Like Art 9, Arts 7 and 10 have been the focus of a rich body of Human Rights Committee jurisprudence.91

The question of whether intolerable conditions may render detention unlawful fell for determination in Behrooz v Secretary of Department of Immigration and Multicultural and Indigenous Affairs,92 but the action was based on constitutional argument rather than tort law. It was argued that the conditions of detention were so intolerable as to constitute torture, rendering the detention punitive in effect and within the exclusive power of the courts. A 6:1 majority held that there does not come a point where the conditions of detention are sufficiently harsh to render the detention punitive. While detention of a citizen by its very nature involves punishment, the detention of an alien is not a form of punishment, but rather an incident of the exclusion and deportation to which an alien is vulnerable under the aliens power.93 Harsh treatment of an alien in detention does not alter the legitimate purpose.94 But unlike the Constitution, tort law does not differentiate between citizens and aliens. Gleeson CJ stated:

An alien does not stand outside the protection of the civil and criminal law. If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages. If those who manage a detention centre fail to comply with their duty of care, they may be liable in tort. But the assault, or the negligence, does not alter the nature of the detention. It remains [immigration] detention...95

Beyond acknowledging the applicability of tort law, the High Court did not have cause to determine whether the conditions under which Behrooz was held attracted tortious liability.

The questions of whether intolerable conditions render detention unlawful and whether prisoners retain a residual liberty were examined by the English courts in conjoined appeals concerning the segregation of two prisoners in R v Deputy Governor of Parkhurst Prison; Ex parte Hague, Weldon v Home Office.96 The House of Lords rejected the Court of Appeal's conclusion97 that a prisoner retains a residual liberty within the prison environment which the governing authority cannot lawfully restrain. A prisoner is deprived of liberty when originally confined and further incursions into their freedom of movement did not amount to a wrongful deprivation of liberty.98 Nevertheless, an action in false imprisonment may lie against a prisoner who restrains a fellow prisoner or a prison officer who restrains a prisoner without authority to do so.99

The Court of Appeal's view that detention in intolerable conditions with knowledge that the conditions are intolerable may give rise to an arguable case of false imprisonment was also rejected by the House of Lords.100 The argument that intolerable conditions may render detention unlawful was considered by Lord Jauncey to confuse conditions of confinement with the nature of confinement.101 Lord Bridge considered that defining intolerable conditions for the purpose of false imprisonment would raise formidable problems and permit a detainee to go free in circumstances where
conditions deteriorate to the point of intolerability. The 'logical solution' to the definitional problem was the application of negligence and its malleable duty of care.

Trindade has suggested that in extending lawful imprisonment to any kind of confinement and any type of conditions, the House of Lords has taken a position contrary to current notions of personal liberty, freedom of movement and equality, and which may amount to a violation of the UK's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Writing in 1997, Trindade noted that the privatisation of prisons would require the formulation of contractual standards with respect to conditions and the government would need to ensure compliance with these standards. When the Immigration Department outsourced the provision of detention services in that year to Australasian Correctional Management, it formalised service requirements into a set of principles and standards that were expressed in Immigration Detention Standards (IDS) scheduled to the service contract. The Department's Migration Series Instructions and their accompanying Procedures Advice Manual are policy instructions that provide guidance to officers administering the Migration Act, including Immigration Department officers and private contractors.

In S v Secretary, DIMIA, Finn J's conclusion that the Commonwealth breached its non-delegable duty to provide appropriate health care to the detainee applicants was informed by the Commonwealth's own standards set out in the IDS. It is arguable that the IDS, possibly in combination with the Migration Series Instructions or Procedures Advice Manual could be used to identify core minimum standards, a departure from which might render detention unlawful for the purposes of false imprisonment. Nevertheless, difficulties of definition remain. The Australian National Audit Office has concluded that it is difficult to effectively monitor the private contractor's performance against the IDS, which are 'derived from poorly specified standards and targets'. The formidable difficulties identified by Lord Bridge in Hague may be more readily addressed by an application of human rights standards assumed by a ratifying state. If the conditions of detention fall below such standards, permissible administrative detention may be transformed into a wrongful restraint. Such an approach has the capacity to broaden the ambit of false imprisonment while developing the common law to correspond with society's contemporary values. The scope afforded for taking this approach is examined below with reference to the philosophical compatibility of tort law and human rights and the extent to which human rights arguments may inform Australia's municipal law.

V Philosophical compatibility of tort law and human rights

Honore characterises the objectives and justifications for the tort system in the following terms:

the state aims to reduce the incidence of undesirable conduct by treating certain individual interests as rights and giving the right-holder the power to protect his rights and obtain compensation if they are infringed by undesirable conduct marked as a civil wrong. The state is justified in maintaining, and probably in subsidizing, a tort system and its institutional framework, including courts, to give effect to it.

Honore's conception of individual interests as rights worthy of state protection accords with the formulation of rights held by individuals on account of their humanity. Tort law tends to focus on the wrongs which undermine individual interests which can be described as rights and has been associated with 'a higher concept of human welfare' and belief that human beings have an end, a manner of life in which their human potentialities are realised. Both human rights and tort law are concerned with defining the boundaries of acceptable conduct. Tort law regulates human behaviour by providing a 'set of norms of human conduct, compliance with which, it is hoped, will promote harmonious and productive social life'. Norms of human rights, found in customary international law and a range of international treaties, aspire to the fulfillment of human dignity, irrespective of variables such as gender, age, racial characteristics and where one happens to reside. Both tort and human rights law extend protection to all individuals irrespective of their constitutional rights or legal status.

Entitlements which have been recognised under public international law as human rights may find protection through tort law. The right to security of the person, for example, finds protection in the torts of assault and battery. International
human rights treaties have specifically addressed the rights of members of vulnerable groups, which include children, women, refugees, disabled persons and migrant workers.

Both tort law and human rights are underpinned by overlapping objectives. The compensation objective promoted by Kantian legal philosophy features prominently in tort theory, particularly in formulations of corrective justice. It also lies at the heart of the obligation of states to provide victims of human rights violations with an 'effective remedy'. The deterrence goal which underpins economic analyses of tort features prominently in human rights law. The UN's seminal human rights document, the 1948 Universal Declaration of Human Rights, notes in its preamble that disregard and contempt for human rights have resulted in the 'barbarous acts that have shocked the conscience of mankind', and the legal protection of human rights is described as an essential safeguard against rebellion as a response to tyranny and oppression. A recent study of tort litigation seeking to promote corporate compliance with human rights norms through the US Alien Tort Claims Act concluded that the deterrence goal is more readily achievable than compensation. Fear of negative publicity and concomitant impact on profits was seen to prompt improved company practice while the compensation goal was frustrated by a magnification of barriers experienced in domestic tort systems, including problems in assembling evidence and costs of litigation. In the context of tort litigation against public authorities, the prospect of significant liability or a 'flood' of litigation may precipitate policy change and, in some cases, abandonment of harmful policy.

To the extent that such litigation may apply to the practice of immigration detention, it may facilitate the introduction of safeguards in the implementation of s 189(1) and shape practices within the detention centre environment. It may thereby promote what Malkin characterises as the educative function of tort law with an 'ability to set higher standards of behaviour, with a view to improving conditions of detention'. Concerns have arisen in the context of tort law's ability to shape the conduct of public authorities. Underlying the recommendations of the Ipp Panel and the legislative amendments which followed its review of the law of negligence is the assumption that the risk of liability may threaten the proper discharge of public functions. Tort law may intrude upon decisions involving resource allocation and require courts to step outside their proper role by adjudicating upon issues of a policy or political character. The assumptions which underpinned the recommendations and statutory response do not translate to false imprisonment in the context of immigration detention. Quite apart from the human cost of immigration detention, the maintenance of the detention policy exacts a significant drain on public funds, which is only exacerbated by decisions to detain in circumstances where s 189's requirement of knowledge or a reasonable suspicion is not established. It is therefore appropriate that such maladministration of executive functions be dealt with by the law of tort. Detention by the executive is a constitutional privilege. It must accordingly be discharged with care and not exercised in a manner which diminishes the place occupied by the right to personal liberty under international human rights law and the law of torts.

The common objectives shared by tort law and human rights are no coincidence. Norms of international human rights are underpinned by longstanding common law values. The powerful influence exerted by English common law on the development of human rights law is well-chronicled. Geoffrey Marston has traced the UK's 1947 'draft of an International Bill of Rights', which was prepared in pursuit of the goal of promoting human rights expressed in Arts 1(3) and 68 of the UN Charter. The draft was stated to have 'firm foundations in the deepest convictions of Parliament and the people' and exerted considerable influence on the substantive rights enshrined in the ECHR. The rights incorporated in the UK draft included life, liberty, religion, expression, assembly, association and freedom from slavery and have been described as providing 'an interesting insight into what rights and freedoms the government of the day considered to be recognised as fundamental by the English common law'.

The ECHR was intended to provide a concrete mechanism for enforcing human rights in Europe and was drafted with the belief that the Universal Declaration and Instruments giving its standards binding effect would be beset by delay. At the time of its commencement, the ECHR was seen as embodying principles which already existed in the common law. This view has been reflected in a number of English cases which pre-date the Human Rights Act 1998 (UK) (HRA), which now gives domestic legal effect to ECHR rights. The English courts' approach is of particular relevance for Australia because of our common legal tradition and dualist systems in which standards in ratified treaties share the
same legal status. Until such standards are expressly incorporated into municipal law, they fall outside its ambit. The opportunities for promoting human rights within the common law systems of the United Kingdom and Australia are considered below.

VI Human rights litigation

A The UK experience

Despite a tendency toward 'atavistic dualism' by English courts prior to the commencement of the HRA, whereby international treaties were seen as relevant only where ambiguities were manifest in domestic law, development toward a 'more nuanced reality' could also be charted. In a judgment which concluded that the English law on breach of confidence was consistent with the freedom of expression enshrined in Art 10 of the ECHR, Lord Goff stated: 'I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the ECHR].' Laws J described the freedom of expression as being 'as much a sinew of the common law as the ECHR'. ECHR standards were said by Sedley J to 'march with those of the common law', while freedom of expression was found by Sir Thomas Bingham MR to reinforce and buttress his conclusion that damages in libel should never exceed the minimum amount necessary to achieve the underlying public purpose. This conclusion was said to have been reached independently of the ECHR and by 1997 it was remarked that:

The formula that a conclusion has been reached purely on the basis of the common law, without needing resort to the ECHR or any other international instrument, is now appearing with remarkable regularity at the end of judgments in which courts have interpreted domestic law in an unusually creative way.

English courts have also utilised the ECHR to resolve ambiguities in, and to inform, the common law. ECHR jurisprudence of the European Court of Human Rights has been referred to by English courts in support of their conclusions. Where 'fundamental' rights are threatened, Lord Bridge noted that courts would afford these rights 'most anxious scrutiny'. Lord Bingham has speculated extra-judicially that Hague and Weldon would have been decided differently if heard today as a consequence of the HRA. Mountfield and Beloff conclude that the ECHR values are 'drawn into the pool of conventional values for the purpose of deciding what the common law should be' and will play an increasingly important role. An alternative approach is that some or all rights contained in ratified but unincorporated treaties form part of the common law. Cunningham argued prior to the HRA that the ECHR forms part of England's common law through its status as a statement of customary international law. Regarding some fundamental rights which ante-date an international treaty, Higgins has argued that the treaty is merely the instrument by which the rule of general international law is repeated. She states that these general rules of international law would cover 'much of what is in the ECHR and ICCPR' and specifically names the prohibition on arbitrary detention in addition to free speech, freedom from torture and freedom of religion. English courts have recognised norms of customary international law as part of domestic law, unless overridden by legislation, on the basis that it is 'the international equivalent of the domestic common law, the product of universal practice rooted in morality recognised on an international scale'.

Since the commencement in 2000 of the HRA, ECHR rights have been actionable in English courts with 'profound effect on the work of almost every part of the criminal and civil justice systems'. With no legislation which compares with the ECHR, Australian courts might be assumed to be at a similar stage in applying human rights to the common law as the pre-HRA courts of England and Wales. The following portion of the article examines the accuracy of such an assumption.

B The Australian experience

Subsequent to the HRA's enactment but prior to its commencement, Spigelman CJ commented extra-judicially that English common law was developing 'on a pre-emptive basis, in the shadow of the jurisprudence of the European Court to the extent that limits the use of British cases as precedents for the development of Australian common law'. His
Honour observed that the 'intellectual isolation', with which Australia's common law is therefore threatened could be averted by federal human rights legislation or by the states incorporating human rights provisions within the laws of the state. Initiatives such as the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Human Rights Act 2004 (ACT) are a significant step towards averting this threat within their respective jurisdictions. If similar legislation were enacted at the federal level, it is expected that the Migration Act's detention provisions would be pronounced inconsistent with human rights. No such legislation has been enacted.

Australian jurisprudence concerning the interrelationship between the common law and human rights has been aptly described by the President of the Victorian Court of Appeal as being in its 'early stages'. The relative advancement of UK human rights jurisprudence is largely attributable to the UK's acceptance of the jurisdiction of the European Court of Human Rights in the interpretation and application of the ECHR and acceptance of the right of petition for victims of alleged ECHR violations. The jurisprudence of the now disbanded European Commission of Human Rights and the European Court of Human Rights have exerted considerable influence on the UK's domestic law. The margin of appreciation doctrine used by the European Court of Human Rights to assess state performance of ECHR obligations (through an examination of the legitimacy of aims pursued by interferences with convention rights and proportionality of means employed to achieve those aims) may be used by English courts to inform their reasoning in the development of the common law. Submitting Australia's immigration detention regime to such a test would be likely to reveal that incarcerating individuals in harsh conditions for indeterminate and often lengthy periods of time is a disproportionate means to achieving the legitimate aim of facilitating the purposes set out in Al Kateb. A similar finding was made by the UN Human Rights Committee in A v Australia, but while the committee's views are not legally binding and have been rejected by the Australian government, the enforcement of judgments of the European Court of Human Rights is overseen by the Council of Europe's Council of Ministers and failure to comply with judgments may be met with expulsion from the Council of Europe.

Although Australia is not a member of the Council of Europe and despite the weak enforcement mechanisms of the ICCPR, human rights are not irrelevant to Australian law. The ways in which unincorporated human rights standards may influence Australia's domestic law have been catalogued as follows by the President of the Victorian Court of Appeal:

1. by the application of the principle that legislation should be interpreted to the extent that its language permits, in accordance with Australia's treaty obligations;
2. by the use of international standards as a legitimate guide to developing the common law but one which must be applied with due circumspection; and
3. as an indication of contemporary values.

The approach taken by the majority judgments in Taylor to the interpretation of the Migration Act has left little scope for an examination of the fundamental importance of the right to personal liberty. Yet the interpretive principle referred to in (1) above has been applied by the Federal Court of Australia which has, on occasion, informed its conclusions by examining relevant decisions of international bodies such as the UN Human Rights Committee. The principle was recognised by the High Court in 1945 but has seen limited application by the court in recent years. In Al Kateb v Godwin, Kirby J reached his conclusion that a 196 of the Migration Act should be read to limit the possibility of indefinite executive detention on bases which included the consistency of such a reading with principles of international human rights. In the same matter, McHugh J stated that in light of the proliferation of international treaties, the rationale for the rule ... bears no relationship to the reality of the modern legislative process. Gleeson CJ reached the same conclusion as Kirby J by applying the alternative principle of statutory interpretation which had been invoked by the dissentients in Taylor, in the following terms:

Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been reaffirmed by this court in recent cases. It is not new. In 1908, in this court, O'Connor J referred to a passage from the fourth edition of Maxwell on Statutes which stated that 'it is in the last degree improbable that the
The legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clarity.

The Chief Justice's reference to certain human rights or freedoms highlights the status of personal liberty as a human right and a common law right and reflects the reality that the right to personal liberty existed in the common law long before being recognised by the post-World War II international community as a norm of human rights. His approach accords with the view expressed by Lord Goff in Attorney-General v Guardian Newspapers and is to be preferred to that of the majority in Taylor. Its increased application may forestall the intellectual isolation apprehended by Spigelman CJ.

An approach which accommodates points (2) and (3) above and accords with Lord Bridge's 'most anxious scrutiny' may be found in the following passage by Brennan J with respect to the abolition of the common law doctrine of terra nullius:

The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the [ICCPR] ... brings to bear on the common law the powerful influence of the [ICCPR] and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

Some support for such an application of international standards can be found in extra-judicial comments of Sir Anthony Mason to the effect that, in principle, there is no reason why judges should not draw on the provisions of an international convention in order to resolve problems in the common law and, in appropriate circumstances, to develop the common law. Further support may be found in Glineson CJ's reference to international human rights norms in reaching the conclusion that the imposition of a duty of care to avoid economic loss emanating from 'wrongful birth' would be difficult to relate coherently with common law and statutory rules concerning child support and protection.

The dissenting judgment of the Chief Justice was, however, the only judgment in the case which made reference to international standards. In the absence of greater acceptance of human rights by Australia's legislature and executive, it would appear that the three avenues identified by Maxwell P in Victoria's Court of Appeal will be pursued only sporadically by judges at the federal level.

It is nevertheless foreseeable that Australia will not maintain its position as the only 'Western' democracy without a Bill of Rights. Such a position will become increasingly indefensible in light of the weak international enforcement mechanisms and dearth of domestic remedies for breaches of Australia's longstanding international obligations and the growing support for human rights at the state and territory level. This support is evidenced by initiatives such as the Charter of Human Rights and Responsibilities Act 2006 (Vic) and Human Rights Act 2004 (ACT) and the interest in adopting comparable legislation which has been expressed by the Attorneys-General of Tasmania and New South Wales. As human rights gain wider acceptance, it is likely that tort law and the developing jurisprudence of human rights will be mutually influential. The tort of false imprisonment may, over time, develop to accommodate arbitrary detention, as proscribed by Art 9 of the ICCPR, within the ambit of wrongful confinement and to consider that conditions of confinement which fall foul of Arts 7 or 10 may transform permissible administrative detention into a wrongful restraint.

Conclusion

The Migration Act confers a broad administrative power of detention, with the knowledge or reasonable suspicion required by s 189(1) functioning as its only check on arbitrary confinement. The ancient trespass of false imprisonment is particularly suited to addressing concerns resulting from the maladministration of the Migration Act and may be
flexible enough to provide compensation to individuals such as 'Mr T'. But in false imprisonment cases brought in the context of immigration detention, the judicial tendency remains one of interpreting s 189 without reference to the fundamental right at stake, leaving little scope for examination, and less still for development, of the tort. A focus on the right invoked, as exemplified by the approach adopted by the dissenting judgments in Taylor, or through one or more of the three avenues catalogued in Part VIIB above, would invigorate false imprisonment and move towards achieving its objectives in contemporary circumstances.

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1 Between 26 November 2001 and 27 January 2006, the department was constituted as the Department of Immigration and Multicultural and Indigenous Affairs, adopting the acronym DIMIA. Between 27 January 2006 and 30 January 2007, the department was constituted as the Department of Immigration and Multicultural Affairs (DIMIA).


11 Ibid, at [180] (evidence of Dr Jon Jureidini).

12 Ibid, at [261].

13 999 UNTS 171, entered into force 23 March 1976.


15 Optional Protocol to the ICCPR, 999 UNTS 302, entered into force 23 March 1976.


18 HREOC, A last resort?, above n 7.
19 Chapter 29.
20 Article 7.
21 Fifth Amendment.


24 Clayton and Tomlinson, above n 22, p 448.

25 Ibid, p 451, citing R v Batcheldor (1829) 1 Per and Dav 516.


30 Kruger v Commonwealth of Australia; Bray v Commonwealth of Australia (1997) 190 CLR 1; 146 ALR 126.


33 Ibid, at [3].

34 Ibid.

35 Ibid.


37 (2005) 222 CLR 612; 221 ALR 32.

38 Detention under the Migration Act may extend to confinement in prison. In Soh v Commonwealth of Australia [2008] FCA 520, BC200802589, Madgwick J held that immigration detainees may be legitimately detained in a prison or remand centre in circumstances which include threats to the good order and safety of others and considerations of health and welfare. The transfer of a detainee from Villawood Immigration Detention Centre to prison did not therefore amount to false imprisonment.

39 Re Patterson, Ex parte Taylor (2001) 207 CLR 391; 182 ALR 657.

40 (2003) 58 NSWLR 269 per Spigelman CJ, Meagher and Ipp JJA.

41 Ibid, at [277].

42 (2005) 222 CLR 612; 221 ALR 32 at [28].

43 Ibid, at [28].

44 Ibid, at [229].


46 Ibid, at [90]-[98].

47 Ibid, at [122].
48 (1984) 156 CLR 532 at 540; 56 ALR 82, cited ibid, at [120].

49 (2005) 222 CLR 612; 221 ALR 32 at [154].

50 Ibid, at [135]-[136].

51 Ibid, at [155].

52 Ibid.


65 Commonwealth Ombudsman, above n 56, para 1.17.

66 Ibid, para 1.18.

67 Ibid, para 1.30.


71 Trindade, Cane and Lunney, above n 31, p 689.

72 Commonwealth Ombudsman, above n 56, para 2.4.

73 Ibid, para 2.2.


75 VFAD v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 125 FCR 249, 196 ALR 111 at [110] per Black CJ.
76 Commonwealth Ombudsman, above n 56, para 2.4.


82 Palmer, above n 54, para 8.4.1

83 Ibid, para 5.3.1.

84 Ibid, main findings, para 31, p xiii.

85 Ibid, para 5.3.1.

86 Ibid, main findings, para 34, p xiv.

87 Senate, Legal and Constitutional Legislation Committee, Estimates, above n 79, p 145.

88 Ibid, p 158.

89 Palmer, above n 54, main findings, para 2.


93 Ibid, at [21].

94 Ibid.

95 Ibid. See also at [49]-[52] per McHugh, Gummow and Heydon JJ, [92] and [142] per Kirby J, [174] per Hayne J, [219] per Callinan J.

96 [1992] 1 AC 38 (CA & HL); [1990] 3 All ER 687 (CA); [1991] 3 All ER 733 (HL).

97 Ibid, at AC 145.

98 Ibid, at AC 163.


100 Ibid, at AC 145, 146; cf at AC 123 per Taylor J.

101 Ibid, at AC 177.
102 Ibid.

103 Ibid, at AC 166.

104 Trindade, above n 29, p 219.

105 213 UNTS 222, entered into force 3 September 1953.

106 S v Secretary, DIMA (2005) 143 FCR 217, 216 ALR 252 at [162].


108 Secretary, DIMA (2005) 143 FCR 217; 216 ALR 252 at [l62].


110 Trindade, Cane and Lunney, above n 31, p 26.

111 CROC, above n 14.


117 Eg, Wright, above n 116, pp 159-82.


119 Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

120 V Jivan and C Forster, 'Making the unaccountable accountable: Using tort to achieve corporate compliance with human rights norms' (2007) 15 TLJ 263.

121 Act of 24 September 1789, Ch 20, ss 9(b) (Stat 79), 28 USCA §1350.

122 Jivan and Forster, above n 120.

123 1 Malkin, 'Tort Law's Role in Preventing Prisoners' Exposure to HIV Infection while in Her Majesty's Custody' (1995) 20 MULR 423 at 475.


125 Ibid, paras 10.1-10.11.


128 The three documents which are now referred to collectively as the International Bill of Human Rights are the Universal Declaration of Human Rights, the ICCPR and the International Covenant on Economic, Social and Cultural Rights.

129 Marston, above n 127, at 798.


131 Ibid, p 33.


133 Ibid.

134 Ibid, p 41.

135 Attorney-General v Guardian Newspapers (No 2) [1990] 1 AC 109 at 283-4; [1988] 3 All ER 545.


137 R v Secretary of State for the Home Department; Ex parte McQuillan [1995] 4 All ER 400 at 422.


139 Hunt, above n 130, p 305.

140 R v Secretary of State for the Home Department; Ex parte NALGO [1993] Admin LR 785.

141 Derbyshire County Council v Times Newspapers [1992] QB 770 at 811-12; [1992] 3 All ER 65 at 77-8 per Balcombe LJ.

142 See, eg, R v Secretary of State for the Home Department; Ex parte Doody [1994] 1 AC 531; [1993] 3 All ER 92.

143 Budgbycy v Home Secretary [1987] AC 514 at 531; [1987] 1 All ER 940.


148 Ibid, at 1273.

149 Ibid, at 1272.

150 Hunt, above n 130, p 13.


153 Ibid, at 33.

154 The ICCPR is scheduled to the Human Rights and Equal Opportunity Commission Act 1986 (Cth) and 'human rights' are defined in s 3 to include the rights and freedoms recognised in the covenant, but the Act does not have the effect of incorporating the covenant's standards into Australian law. See Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273; 128 ALR 353; Minogue v HREOC (1999) 84 FCR 438; 166 ALR 129.
155 *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22 (CA) at [71].

156 Article 45.

157 Article 25.


159 The purposes of immigration detention are set out in the discussion attaching to n 5 above.


162 *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22 at [74]-[77] per Maxwell P.

163 Ibid, at [76].


165 *Polites v Commonwealth* (1945) 70 CLR 60 at 68-9, 77, 80-1.


167 Ibid, at [193]. The other two bases were that such a reading was available in the language and that it would avert problems resulting from the inconsistency between indefinite detention at the will of the executive and Australia’s constitutional arrangements.

168 Ibid, at [65].


172 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42, 107 ALR 1 at 29.


175 A Rolls, ‘Avoiding Tragedy: Would the decision of the High Court in Al-Kateb have been any different if Australia had a Bill of Rights like Victoria?’ (2007) 18 PLR 119 at n 3.
Chapter 3


3B: Tania Penovic and Adiva Sifris, ‘Like a bird in a cage: children’s voices and challenges to Australia’s immigration detention regime’ (2005) 2(2) International Journal of Equity and Innovation in Early Childhood 32-44

Chapter 3A

THE SEPARATION OF POWERS

Lim and the ‘voluntary’ immigration detention of children*

TANIA PENOVIC

Discussions within the legislature and the Executive over the role of the third arm of federal government is nothing new. Tensions have been played out in recent years in relation to issues such as freedom of communication and native title. But nowhere have these tensions been more persistent, and the parliamentary will to restrict judicial review of Executive action more comprehensive, than in Australia’s processing of asylum seekers. This article considers the constitutional underpinnings of the mandatory detention provisions in the Migration Act 1958 (Cth) which have been subject to repeated parliamentary efforts to prohibit judicial review since their introduction in 1994. It then examines the place occupied by children within the constitutional framework.

The beginnings of mandatory detention

When 22 Cambodian asylum seekers arrived in Australia by boat in 1989 and a further 13 in 1990, they were immediately detained under the Migration Act which at the time authorised discretionary detention of undocumented boat arrivals. One day before the scheduled Federal Court hearing of their application for release, the Migration Amendment Act 1992 (Cth) received Royal Assent. The provisions required non-renewable detention for up to 273 days of unauthorised arrivals within a specified period of those who were ‘designated’ by the Department of Immigration, Local Government and Ethnic Affairs.

The Bill was rushed through Parliament, according to the then Immigration Minister Gerry Hand, in order to deal with the ‘pressing requirements of the current situation’. In introducing the Bill the Minister stated:

‘The most important aspect of this legislation is that it provides that a court cannot interfere with the period of custody. I repeat: the most important aspect of this legislation is that it provides that a court cannot interfere with the period of custody.5

He concluded that ‘[n]o other law than the Constitution will have any impact on it.’

The ‘current situation’ referred to by Minister Hand was the potential Federal Court ordered release of the Cambodian detainees. In the reactive mode which has come to characterise the numerous piecemeal amendments made to the Migration Act in recent years, these amendments were intended to counter the judgment in ASIC v Commonwealth. Local Government and Ethnic Affairs v Malouf5 in which the Full Federal Court held that it could order interlocutory release of people seen as unlawfully detained under the Migration Act.

The Cambodian detainees challenged the validity of the provisions insofar as they authorised detention without court order and insofar as they prohibited courts from ordering release from detention in the case of Chu Rong Lim v Minister for Immigration, Local Government and Ethnic Affairs (Lim)6 which prompted the laying down of the constitutional foundations of immigration detention. The High Court considered, the doctrine of the separation of powers on which the Constitution is structured. Chapter III of the Constitution vests the Commonwealth’s judicial power in the courts and provides an ‘exhaustive statement’ of the manner in which the judicial power of the Commonwealth may be vested. Grants of legislative power in s 51 are, expressly subject to the Constitution as a whole. They do not permit conferment of any part of the judicial power on the Executive and do not extend to making laws requiring courts to exercise judicial power inconsistently with Chapter III or the essential character of a court. Adjudication and punishment of crime is considered to be the most important of essentially and exclusively judicial functions. Section 75(v) of the Constitution directly vests jurisdiction in the High Court in all matters in which the Commonwealth or its representatives are a party or in which mandamus, prohibition or an injunction is sought against a Commonwealth officer.

To the extent that the legislation prohibited courts from ordering release from custody, the Court held it to be ‘an impermissible intrusion’ into the Chapter III power.

The question remained whether there was a constitutional head of power which supported the provisions authorising detention without court order. Brennan, Deane and Dawson JJ indicated that if the provisions purported to apply to Australian citizens, they would be invalid because they would deprive courts of judicial power and because there was no applicable constitutional head of legislative power. But under the ‘aliens power’ in s 51(vi) of the Constitution, the provisions were held to be valid provided detention of an alien in custody was limited to a legitimate administrative purpose. The detention must be reasonably capable of being seen as necessary for the purposes of removal or deportation or to enable a visa application to be made and considered. If detention was not limited to one of these aliens power purposes, it would be punitive in character and violate the separation of powers, amounting to an exercise by the Executive of the judicial power of the Commonwealth.
Our ever-responsive Parliament reacted to the finding that the appellants' detention prior to the 1992 amendments was unlawful by introducing further legislation retrospectively 'extinguishing the detainees' right to damages for false imprisonment.

The Court's conclusion that the provisions were valid resulted from restraints which limited the operation of the provisions. These restraints included a statutory time limit of 270 days after the making of a visa application. They also included the requirement that detainees be removed from Australia as soon as practicable in the following circumstances:
- where an entry permit had been refused
- where any appeal had been finalised
- where a visa application was not made within two months of arrival or
- where removal was requested in writing by a detainee.

Because such a written request would result in expedient removal from Australia, the Court found that detention was in essence voluntary. Detainees were seen to have the power to bring their own detention to an end.

The applicants further argued that the provisions were beyond the Commonwealth's external affairs power in s 31(4)(a) of the Constitution on account of their inconsistency with treaty obligations undertaken by Australia in ratifying the Convention Relating to the Status of Refugees (Refugees Convention) of 1951 and its 1967 Protocol and the International Covenant on Civil and Political Rights (ICCPR). Brennan, Deane and Dawson JJ accepted that the provisions were inconsistent with the International Covenant on Civil and Political Rights and the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (the HREOCA) to which the Covenant is scheduled. If the language of the provisions was ambiguous, the Court accepted that they should be interpreted consistently with Australia's treaty obligations. But the provisions here were unambiguous and once it was accepted that they were a valid exercise of the aliens power, the plaintiffs' argument that they exceeded the external affairs power was seen as 'somewhat obscure'.

Our ever-responsive Parliament reacted to the finding that the appellants' detention prior to the 1992 amendments was unlawful by introducing further legislation retrospectively extinguishing the detainees' right to damages for false imprisonment.

The current detention regime

The detention regime in place today commenced in September 1994. Section 189 of the Migration Act requires detention of all unlawful non-citizens within the migration zone. Section 196(3) requires that unlawful non-citizens be kept in detention and not released 'even by a court, until granted a valid visa or removed or deported from Australia. No time limit is set down and 1s 196(1) requires removal as soon as reasonably practicable after the making of a written request.'

The High Court's assumption in Lim concerning the practicality of expedient removal was tested in the 2003 Full Federal Court decision of Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (Al Masri). Al Masri was a Palestinian from the Gaza strip who requested removal and then remained in detention while permission was sought for him to enter Israel, Egypt, Syria or Jordan. The Full Federal Court (Black CJ, Sundberg and Weinberg J) held that where (as in the present case) in light of Israel's unequivocal refusal to permit entry) there is no real likelihood or prospect of removal from detention in the reasonably foreseeable future, the connection between the purpose of removing aliens and the detention becomes so tenuous as to render the detention punitive. Section 196(3) is not an obstacle to the release of a person so detained. Their Honours commented that in a matter of such fundamental concern to the common law as the detention of a person in custody, it would be strange indeed if the non-punitive character of detention were able to be maintained indefinitely on the basis that, some day, something must surely turn up to allow detention to come to an end. The Court was fortified in its conclusion that s 196 of the Migration Act was subject to an implied limitation as to time by reference to the principle that, as far as language permits, statutes should be read in conformity with Australia's treaty obligations. Section 196 permitted such a limitation which was supported by art 9(1) of the ICCPR which prohibits arbitrary detention, by relevant determinations of the United Nations Human Rights Committee, by art 37(b) of the Convention on the Rights of the Child, and by the jurisprudence of the European Court of Human Rights.

The Court thought it unnecessary to determine the constitutionality of the detention provisions, and determined the appeal by applying the principle that courts do not impinge on Parliament's intent to curtail fundamental common law rights, such as the right to personal liberty, in the absence of clear and unambiguous language. This presumption was said to apply equally to citizens and to aliens who are unlawfully within Australia. But while no conclusion as to the provisions' constitutionality was reached.

2. Time did not run for events beyond the Executive's control such as delay in the supply of information or in finalisation of legal proceedings.
3. Migration Act 1958 s 54(1).
4. Lim, para 34; per Brennan, Deane and Dawson J.
5. Constitution s 51(viii).
7. On the basis that the boats in which the appellants arrived had been burnt by quarantine officers shortly after their arrival.
8. Migration Act 1958 s 54(1).
10. Sections 189, 196 and 198.

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Children within the constitutional framework

So where do children fit into the picture given that the status of children was not considered in Al Masri or Lim? While one of the 36 Lim applicants was an infant, no separate argument was put to the High Court in relation to the infant, his status or his capacity to request removal. Al Masri was an adult. But the precedent set by his case was applied in the landmark decision of B & B v Minister for Immigration and Multicultural and Indigenous Affairs ("B Family Court") which concerned the detention of five children of the Balitryan family and is considered by Achina Sîrî in this edition of the Alternative Law Journal (p 212). The Full Family Court regarded the five children as potentially unable to bring their detention to an end of their own accord notwithstanding their parents' ability to request the children's removal and thereby bring their detention to an end. The conclusion that the Family Court's welfare jurisdiction extended to the making of orders releasing children from immigration detention was overturned on appeal to the High Court on 29 April 2004.17

Nevertheless, the B Family Court judgment and Al Masri inspired further litigation challenging the constitutional validity of the detention provisions insofar as they concern children. Furthermore, the Al Masri precedent was not disturbed by the High Court judgment. This litigation will be discussed below.

The Al Masri precedent has given rise to some concern within the Executive. In what Kirby J described as ‘excessive enthusiasm’, the Minister sought special leave to appeal against the Federal Court decision. The application was rejected because Al Masri had departed Australia and the relevant issues were due for consideration in appeals pending before the Court. In a show of Executive determination Mr Ruddock introduced the Migration Amendment (Duration of Detention) Bill 2003 on 18 June 2003 to prohibit interlocutory release of unlawful non-citizens. The Bill sought to:

put beyond doubt that an unlawful non-citizen must be kept in immigration detention unless a court finally determines that:

+ the detention is unlawful or
+ he or she is not an unlawful non-citizen.18

In the second reading debate, Mr Ruddock said:

Given that the courts have now demonstrated an increasing willingness to release persons from immigration detention pending final determination of their case, it is absolutely crucial that this bill be passed as a matter of urgency.19

Don Randall, member for Canning and of Parliament’s migration committee, commented: ‘The Bill is required to prevent the mandatory detention regime in the Migration Act from being undermined and totally whitewashed by the Federal Court’. Mr Randall expresses ‘grave concern’ on the government’s behalf about ‘the activism of the Federal Court in recent years’. In relation to children, he states ‘Children do not need to be in detention for one sole reason: their parents could go home tomorrow’.

The ALP moved a second reading amendment calling for the immediate removal of children and their families from detention. Although this amendment was defeated, a large number of parliamentarians from the ALP, Greens and Democrats, used the second reading debate as an opportunity to voice their concerns about the detention of children. Amendments negotiated with Labor resulted in the passing of the Bill on 23 September 2003 in a form which did not extend to all unlawful non-citizens. Instead, denial of due process was restricted to criminal deportees under s 320 of the Migration Act and people subject to visa cancellation on character grounds pursuant to s 501.

Undeterred, the Minister announced his intention on 10 September 2003 to introduce a new Bill prohibiting interlocutory release of all unlawful non-citizens. The Migration Amendment (Duration of Detention) Bill 2004 was introduced on 19 February 2004. While judicial review is limited to the determination of points of law and does not extend to merits review, legislative perseverance in seeking to restrict the courts’ role has...
The ‘voluntary’ characterisation [of immigration detention] ignores the realities of flight and the lack of control asylum seekers (and especially child asylum seekers) can exercise over their destinies.

The invitation implicit in his Honour’s comments was accepted in Applications M276/2003, Ex parte Re Woolley and Another (M279) heard by the High Court on 3 February 2004; orders were sought on behalf of four children of the Sakhi family (detained since arriving in Australia in January 2001) that so 189 and 19% of the Migration Act are invalid to the extent that they authorise the detention of children. In this case, Gavan Griffith QC for the children argued that the scheme is unconstitutional in its reach because it provides for administrative detention of indefinitate term expressed in terms that apply, to children that are incapable, at the lowest, of being reasonably capable of being seen as necessary.

De Griffith also alleged that the provisions are unconstitutional in their indiscriminate application to children without accounting for their developmental needs and vulnerabilities. The Human Rights and Equal Opportunity Commissioner (HREOC) as intervenor broadly supported the applicant and alleged that the scheme is constitutionally flawed in not accounting for the distinct interests and nature of children as a class, nor any adequate provision for individual assessment of the relevant interests. Brett Walker QC on HREOC’s behalf characterised detention as comprising three notional periods. While Griffiths had argued that detention of children was unconstitutional for any length of time, Walker argued that in the initial assessment phase, and the final phase where deportation or removal might occur, detention could be reasonably necessary in order to achieve a legitimate purpose. No such purpose could be discerned from the long middle phase which, moreover, has significant detrimental effects on children.

 Solicitor-General David Bennett QC for the respondents argued that constitutionality must be determined by the legislative structure of the detention regime and not its consequences or effect on detainees. He submitted that the legitimate non-punitive purpose was facilitation of removal or deportation and prevention of absconding into the community which Mr Bennett argued applied equally to children of all ages and adults. In support of this argument he asserted without any substantiating evidence that a child could easily be concealed by a trusted adult. This assertion is hypothetical, implausible and highlights the lack of proportionality between the detention and its purported justification of seeking to prevent some perceived risk that a child may abscond. Whetever circumstances of detention may violate the separation of powers also awaits determination in the Al Khaliy Al Khaliy v Belmas joint appeal in which the Al Khaliy argument of no real likelihood or prospect of removal was heard in addition to the Belmas argument that the harshness of conditions of detention can exceed what is reasonably necessary, rendering the detention punitive and an invalid exercise of judicial power.

If the High Court finds the consequences of detention to be relevant, I would go so far as to say that the scheme is unconstitutional in its reach because it provides for administrative detention of indefinite term expressed in terms that apply to children that are incapable, at the lowest, of being reasonably capable of being seen as necessary.

22. Trustees of Proceedings, Applicants M279 v Walker and Another (M279) (High Court of Australia 3 February 2003) 2.
23. Ibid.
25. The Full Federal Court found as follows in the matter of NMA (2002) 202 ALR 90. If a punitive purpose is to be found, it must be discerned from the legislative structure of the regime for detention rather than from the consequences of the detention on individual detainees.
27. Trustees of proceedings, Beltrose & Ors v Secretary DWA v Ors, OB 058 v Gavan & Ors, NMA v Al Khaliy (High Court of Australia, 13 November 2003); in the Al Khaliy v OB 058 matter, Yee Dhuys (declined to follow the Al Khaliy decision and in the Al Khaliy matter, Harwood J) followed Al Khaliy. The Beltrose appeal requires determination of the argument that escape from ‘immigration detention’ could constitute an escape from immigration detention because the harshness of conditions resulted in the realisation of the child having a character of a detention centre.
28. The Commonwealth Government has maintained this purpose in all the cases which involve the separation of powers issues.
detention policy operating today (no matter as it extends beyond a matter of days required for legitimate administrative purposes) intends to achieve and in fact does achieve a punitive effect on all detainees and particularly children. Justice Marcus Einfeld commented 10 years ago that immigration detention constitutes 'punishment in advance and presumption of adverse determination.' The operation of the policy emulates the criminal law and to some extent the now repealed Immigration Restriction Act 1901 (Cth) under which a prohibited immigrant was guilty of an offence and liable on summary conviction to imprisonment of up to six months and/or deportation. The rhetoric of illegality and the repeated assertion that people held in immigration detention have broken Australian law seeks to justify the punishment imposed. Yet immigration detention in fact offers less protection to child detainees than that offered to criminal defendants. For example, the Children and Young Persons Act 1989 (Vic) provides that following a criminal charge a child must be released (unconditionally or on bail) or brought before a court or bail justice within 24 hours. Remand in custody is restricted to 21 days at a time pending hearing, and detention of defined duration (which for under-15-year-olds cannot exceed one year) can only be ordered if non-custodial orders have been found inappropriate. This small comparative exercise highlights the punitive effect of immigration detention and the absurdity of maintaining its necessity for removal, admission and deportation. Viable non-custodial options, subject to conditions, can achieve the purpose of ensuring admission, deportation or removal without constituting punishment.

It is hoped that the M276 judgment will examine the practical absence of safeguards which saved the earlier provisions from constitutional invalidity. The Full Federal Court in Al Mosh tested and found wanting the assumption that removal will follow quickly from a written request under s 596 and noted an absence of safeguards in the current legislative regime which saved the sections challenged in Lim from constitutional invalidity. While Al Mosh did not result in a conclusion with respect to the validity of the current provisions, it is hoped that the High Court will conclude, given the absence of safeguards that the provisions are constitutionally invalid.

It is also hoped that the Court will reject the fiction that immigration detention is voluntary. The 'voluntary' characterisation ignores the realities of flight and the lack of control asylum seekers (and especially child asylum seekers) can exercise over their destinies. It overlooks international law and jurisprudence concerning treaty obligations to which Australia has voluntarily submitted. It overlooks the right to seek asylum enshrined in art 14 of the Universal Declaration of Human Rights, which underpins the Refugees Convention and has emerged as a norm of customary international law. Constitutional and legislative interpretation does not occur in a vacuum. While international law is not a direct source of constitutional norms, it forms part of the context in which the Constitution fails to be interpreted. This context is yet to receive appropriate recognition.

Moreover, the 'voluntary' characterisation overlooks the incorporation of the right to seek and to obtain asylum into the Migration Act (albeit in increasingly restricted circumstances) and assumes the detainee is not entitled to assert these rights. In comments made during the M276 hearing, Kirby J likened this fiction to saying you can solve your pain like a dentist and have the tooth out. He continues to say, "Well, you can solve your problem by just going away" is to assume that they have no rights and that all of these claims are completely baseless. That is not the experience of this Court. The fiction of voluntary immigration detention assumes the detainee has no right to seek asylum pending the determination of their right to obtain asylum. It is a nonsensical notion which must be abandoned.

The status of children has taken more than 11 years to take centre stage. Yet in M276, the focus on children alone, in isolation from their parents, might have been viewed as inferring that their parents' detention was endorsed as valid. It also gave rise to the possibility, which appeared to trouble Kirby J and particularly Callinan J, that if the action succeeded the children would be released while their parents remained in detention. Indeed, releasing children while their parents remain in detention would, like the current detention regime, fail to account for children's best interests and developmental needs and vulnerabilities.

In the range of matters presently awaiting determination, the High Court may finally recognise that the detention provisions authorise arbitrary and excessive detention which fails the Lim test. If the Court extends its constitutional focus to the circumstances of detention, it may find that children's developmental needs and vulnerabilities greatly exacerbate the traumatising, punitive effects of detention. But this must not obscure the fact that the detention regime is inherently punitive for all. If such a finding is made and accepted by the Legislature and Executive, a humane solution to this challenging issue will finally be within reach.
JULES ALDOUS addresses the separation of powers based on the preceding article ‘Lim and the “voluntary” immigration detention of children’.

There have been a number of important questions raised by the provisions for mandatory detention in the Migration Act 1958 (Cth). Although the issues are complex, they provide an excellent example of the role of the courts and illustrate the doctrine of the separation of powers. This exercise aims to guide students in their reading of the article ‘The separation of powers — Lim and the “voluntary” immigration detention of children’ by Tania Penovic.

As a starting point, students need to be familiar with some of the key terms used in the article. Some students will find the reading difficult. This exercise is designed so that teachers can read through each section with the class. Students, working in small groups, complete the ‘Understanding the reading’ questions to check their comprehension and reflect on the issues raised by responding to the Reflection questions.

Key terms
Using a dictionary, check your understanding of the following terms:
- Judicial review
- Separation of powers
- Statutory
- Landmark decision
- Respondent
- Punitive
- Impute
- Non-reviewable
- Interlocutory
- Mandamus
- Common law
- Overturn
- Due process
- Retrospective
- Asylum
- Injunction
- Precedent
- Intervener
- Mandatory detention
- Temporal

The beginnings of mandatory detention
Understanding the reading:
1. What changes to the Migration Act were introduced in 1992?
2. According to the Migration Amendment Act 1992, who had the power to decide if asylum seekers could be detained? Could this decision be reviewed?
3. Why were these amendments introduced?
4. What questions were raised in the case of Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (‘Lim’)?
5. What is the role of the High Court? Explain why this case would be heard in the High Court.
6. Explain the doctrine of the separation of powers.
7. Why did the High Court consider the issue of the doctrine of the separation of powers in the case of Lim?
8. The High Court held that the provisions of the Migration Amendment Act 1992 were valid under the ‘aliens power’ in s 51 (b) of the Constitution. Under what circumstances can detention be seen as coming under the ‘aliens power’ in the Constitution?

Reflection
The article states that detention was not limited to one of these alien powers purposes. It would be punitive in character and violate the separation of powers. Why would detention that is ‘punitive in character’ be considered to be a judicial power?

The High Court found that the detention was in essence voluntary.
- How could an asylum seeker bring an end to their detention?
- To what extent do you think that detention was voluntary?

The current detention regime
Understanding the reading:
1. What is the current law for the detention of asylum seekers?
2. What were the facts in the AI Kha case?
3. Why was detention in this case seen as ‘punitive’?

Reflection
How are concepts of human rights and common law rights reflected in the decision in this case?

• Children within the constitutional framework.
1. What action did the government take in response to the decision in the AI Kha case?

Reflection
The article states that members of parliament were concerned that an unaccountable and unelected judiciary does not usurp the role of the elected government. What is the relationship between Parliament and the courts in the law-making process?

So what is the future of judicial review of detention?
Understanding the reading:
1. What are the facts in the case of M276?
2. Outline the key arguments for and against the detention of children raised in this case.
3. What was the decision of the High Court in this case?

Reflection
The author strongly argues against the notion of voluntary immigration detention. Using dot points, present a summary of the arguments presented. Do you agree? Why or why not?

JULES ALDOUS teaches legal studies at Shelford Anglican School in Melbourne and has written several legal studies text books for secondary school students.

Postscript
On 6 August 2004, the High Court delivered judgment in the AI-Kateb, AI-Khafaji and Behrouz matters. In the AI-Kateb and AI Khafaji appeals, the High Court applied the Lim decision and held that the unambiguous wording of s 196 requires detention to continue until removal, deportation or the granting of a visa notwithstanding the fact that no country was likely to permit entry in the reasonably foreseeable future. The High Court in the Behrouz judgment found that the conditions of detention are irrelevant to a consideration of whether detention violates the separation of powers.

The AI-Kateb, AI Khafaji and Behrouz judgments are considered in Matthew Groves’ article ‘Immigration Detention vs Imprisonment: Differences Explored’ in this edition of the Alternative Law Journal (p 228). The AI-Kateb and Behrouz cases are also discussed in Alex Reilly’s brief (p 248).

On 7 October 2004 the High Court dismissed the application in M276. The Lim precedent, which contained no suggestion that detention would take on a different character if it caused hardship on a particular detainee or some class of detainees, was followed and considered fatal to the applicants’ arguments.

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Chapter 3B

Tania Penovic and Adiva Sifris, ‘Like a bird in a cage: children’s voices and challenges to Australia’s immigration detention regime’ (2005) 2(2) International Journal of Equity and Innovation in Early Childhood 32-44
Declaration for Thesis Chapter 3B

Monash University

Chapter 3B: Like a Bird in a Cage: Children's voices and challenges to Australia’s immigration detention regime (2005) 2:2 International Journal of Equity and Innovation in Early Childhood, pp 32-44

Declaration by candidate

In the case of Chapter 3B, the nature and extent of my contribution to the work was the following:

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<th>Nature of contribution</th>
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<td>My contribution included the principal writing, referencing and titles.</td>
<td>90%</td>
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The following co-author contributed to the work:

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<th>Name</th>
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<tr>
<td>Adiva Sifris</td>
<td>My co-author assisted with the writing of the section concerning litigation within the advocacy movements.</td>
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The undersigned hereby certify that the above declaration correctly reflects the nature and extent of the candidate’s and co-authors’ contributions to this work.

Candidate’s Signature

Date

11 January 2014

Main Supervisor’s Signature

Date

13/01/2014
Melbourne Graduate School of Education
Equity and Childhood Program, Youth
Research Centre

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Like a bird in a cage: children's voices and challenges to Australia's immigration detention regime

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Abstract
Since 1992, Australia has maintained a policy requiring the detention of all asylum seekers without valid visa documentation. This paper examines the detention regime in its application to children and examines the social and legal movements calling for the release of children from immigration detention. In the early days of the detention policy there was a low level of public awareness that children were living in prison-like conditions while their claims for protection were being processed. An increase in public awareness and concern has led in more recent times to a wave of advocacy and legal challenges concerned exclusively with children. These challenges have underlined the importance of maintaining efforts to promote the voices of children.
Introduction

I think that children should be free and when they are there for one year or two years they are just wasting their time, they could go to school and they could learn something. They could be free. Instead they are like a bird in a cage.

I often asked myself and so did the others 'why did I come here?'...My parents would regret their decision...I feel like I did something wrong, like I was being punished...Sometimes I feel like the (detention centre) staff treated us like animals. They don't know how much my mother loves me...They yell for us to line up, do this, do that. They call you by your number. (Comments of a 10-year-old Afghan refugee and an unaccompanied minor, Human Rights and Equal Opportunity Commission (HREOC), 2004, pp. 81 & 388).

Children seeking asylum represent one of the most vulnerable and disenfranchised groups within our society. For 13 years, Australian policy has required these children to be locked up until their entitlement to a protection visa has been determined. This paper examines the social and legal movements challenging the policy. These movements have been enlivened by the narratives of children in immigration detention and have, on occasion accommodated children’s voices.

A policy of mandatory detention

Australia’s mandatory detention policy was introduced in 1992. Provisions requiring the detention of all people in Australia’s migration zone without a valid visa were introduced into the Migration Act (Cth) 1958 (‘Migration Act’) in September 1994. These provisions make no distinction between adults and children. All are labelled ‘unlawful non-citizens’. Section 189 provides that all must be detained and section 196 requires that they be kept in detention until granted a valid visa, removed or deported from Australia. Section 198 of the Migration Act sets out the circumstances in which removal from Australia must occur as soon as is reasonably practicable. Such removal must be effected where a visa has been refused and where a detainee has made a written request for removal and thereby abandoned their claim to Australia’s protection.

No allowance is made for individual circumstances such as age, vulnerability, medical condition or flight risk. Despite having committed no crime, all are labelled ‘unlawful’ and presumed unentitled to Australia’s protection unless and until a decision is made to the contrary.

The hurdles to hearing the voices of children in immigration detention are manifold. These children are detained in geographically isolated detention centres and thus segregated from the Australian community. They frequently speak a language other than English. In the detention environment, they are called not by name but by designated identification number. They are issued with bar-coded photographic identification cards. When they are involved in legal proceedings, section 91X of the Migration Act prohibits courts from publishing their names. Again, they are identified by code number. This prohibition on publishing the
names of all asylum seekers involved in litigation has been said to serve a protective role; minimising the possibility that unsuccessful asylum seekers will be persecuted in their home countries as a result of matters raised in Australian court proceedings. But in removing their names, it has reinforced the treatment asylum seekers receive in detention centres. It thus has the effect of dehumanising detainees and stifling their voices.

In 2001, refugee processing became characterised as a matter of border protection (see for example Marr and Wilkinson, 2003). Coinciding with the misinformation and hysteria surrounding the 'Tampa incident' and portrayal of asylum seekers as a threat to Australians’ way of life was an entirely contradictory phenomenon. The stories of child asylum seekers were beginning to be reported to the public. The most notable example of this occurred on 13 August 2001. When the crescendo of hysteria concerning Australia’s perceived invasion by boat arrivals was approaching its peak, the plight of a child in immigration detention reached the nation’s televisions. Ironically, the child in question was so traumatised by his experiences that he had lost his ability to speak. An ABC 4 Corners programme documented the story of 6-year-old Shayan Bedraie. Shayan was reduced by his experiences at the Woomera and Villawood detention centres to a near catatonic state. Further reports began to surface about hunger strikes at the Woomera detention facility in which children protested alongside adults and mimicked adults’ self-destructive behaviour, including the sewing together of lips and food refusal necessitating medical intervention.

Despite widespread community support for the mandatory detention policy, these reports generated considerable shock (Gosden, 2005). The media reports called on members of the public to move beyond their bland acceptance of the policy’s utility and confront the human impact of immigration detention. A large number of Australians were coming to the realisation that the damage done to children placed in the intolerable and punitive conditions of detention was a consequence of Australian policy supported by law (Gosden, 2005). The cruel policy which saw these children exposed to untold horrors and rendered Shayan mute was gaining exposure. These children’s voices had not yet been heard. But the fact that each child detainee had their own story and own voice was becoming all too apparent to a range of Australians who had assumed Australia to be a fair-minded nation committed to human rights.

Advocacy movements
Widespread community antagonism associated with the portrayal of the asylum seeker as ‘other’ thus coincided with a proliferation of a ‘wave of advocacy in terms of the spontaneous response that occurred in multiple sites across the nation’ (Gosden, 2005, p.12). Advocacy for the rights of asylum seekers emanated from a diverse range of groups. These included pre-existing human rights and welfare groups, arts, media and education groups, refugee focus groups and concerned individuals (Gosden, 2005, p.13). Groups such as Real Rights for Refugee Children and ChilOut (Children out of Detention) focussed upon the rights of children.

These groups organised public events and provided detailed information to the public via the Internet (see, for example,
ChiiOut’s website at http://www.chilout.org/). In light of the harmful effects of detention on children and their families, these groups and individuals called the government to account for the needless suffering wrought by its refugee processing laws. Influential individuals played a significant role in the advocacy process. These include media identity Phillip Adams, children’s author Mem Fox, former Prime Minister Malcolm Fraser and cricket hero Ian Chappell. Malcolm Fraser’s lobbying efforts include an online petition intended ‘to end Detention of Children and Separation of Families in Australia’ which called on the Prime Minister and Immigration Minister to amend the Migration Act to ‘put the rights of children first’. A 2003 speaking tour by Ian Chappell sponsored by an NGO entitled ‘A Just Australia’ generated support for the removal of children from immigration detention among older Australians.

Within and outside the advocacy groups were individuals who visited the inhospitable and often remote detention centres. These individuals offered valuable support to detainees. Having heard detainees’ voices, they passed their stories and perspectives to the broader community. In doing so, they challenged the fear and apathy of many Australians and thereby facilitated attitudinal change. While large sectors of society continued to support the mandatory detention regime, others’ opinions were shifting. The advocacy of groups and individuals facilitated further strategies which have in turn fed into reporting of the perspectives of children in detention.

Pressure emanating from advocates concerning the harmful effects of detention on children and families preceded the introduction of a Residential Housing Project available to women and children on a voluntary basis. Instead of razor wire and palisade fencing, residents were subject to an infrared security system, constant surveillance and a curfew which prohibited entry into communal areas and required the locking of all doors and windows after 11pm. The separation of families imposed by a ban on all males over the age of thirteen required volunteers to wrestle with the dilemma of choosing family integrity within a detention centre, or family separation in a less oppressive environment. The residential housing project has been linked with deteriorating mental health of family members; particularly fathers who must remain in detention centres (HREOC, 2004). It has been promoted by DIMIA as a solution to the detention of children tantamount to community release but recognised by advocacy groups as another form of immigration detention.

Litigation within the advocacy movements
Litigation constitutes an important part of the advocacy process. It builds upon the advocacy of individuals and groups and facilitates the telling of stories. Evidence led in the key cases considered below has painted a vivid picture of the damage to children’s welfare and mental health resulting from their detention. This evidence has in turn been reported by news media and summarised in judgments which have been either officially reported or made available on the Internet. Litigation can thus be seen to build on the advocacy of groups and individuals and, in generating information,
may impel further challenges to the detention of children.

**The Bakhtiyari proceedings**

The publicity associated with the persistent attempts of members of the Bakhtiyari family to challenge the justice of Australia's detention policy ensured that the children in at least one family seeking protection were not nameless. Roqia Bakhtiyari arrived in Australia in 2001 with her (then) five children independently of her husband Ali, who had been granted a Temporary Protection Visa which was subsequently withdrawn after doubts were raised as to his nationality. The two eldest boys of the Bakhtiyari family, Alamdar and Muntazar, had their voices heard (and the images of their tearful faces published in numerous newspapers) when they escaped from the Woomera detention facility in June 2002 and unsuccessfully sought asylum from the British consulate in Melbourne.

Shortly after the boys' return to Woomera, the detrimental effects of their detention became the subject of a series of challenges brought before the Family Court of Australia. Release of the boys and their three siblings was sought on the basis that the children's continued detention was undermining their welfare. After the trial judge dismissed the application, a full bench of the Family Court on appeal held that the Court's broad welfare jurisdiction extended to the granting of orders releasing children from immigration detention (B&B Family Court, 2003). Release could be ordered where the detention was considered indefinite and therefore unlawful because the children could not bring their own detention to an end by making a request for removal from Australia under section 198 of the Migration Act. The majority (Nicholson CJ and O'Ryan J) considered that children are entitled to the same rights and protections under the Constitution and general law as adults.

Nicholson CJ and O'Ryan J pointed out that in numerous areas of the law (for example criminal law) special rules have evolved treating children differently from adults. They applied a test approved by the High Court (Marion's Case, 1992), which stipulates that a child's capacity to make decisions (such as opting to seek removal from Australia) must be determined on an individual basis. A child's capacity does not depend on any judicially fixed age but hinges upon the child having sufficient understanding and intelligence. Circumstances impinging upon a child's capacity to end their detention may include language skills, schooling and access to resources. If children are unable to bring their detention to an end, it could be concluded that their detention is indefinite and therefore unlawful.

Their Honours accordingly rejected the contention that the children's detention was not indefinite because their parents could request their removal from Australia. They considered that accepting such an argument would be effectively treating children as chattels.

Following this landmark ruling, an application was also made to the Family Court on the children's behalf for release orders which would operate until such time as the children's refugee status was finally determined. After a single judge rejected the application for release on the basis that release for a finite period would not be in the children's best interests, an appeal was heard by a differently constituted full bench of the Family Court.
The Full Court found that release into the care of strangers would be less damaging than continued incarceration. The children were released into the care of Catholic welfare agency Centacare and began attending school in Adelaide.

The B&B Family Court judgment also spawned a High Court appeal issued by then Immigration Minister Phillip Ruddock. On appeal, the judges of the High Court unanimously concluded that the Family Court had no jurisdiction to order the children’s release (B&B High Court, 2004). The High Court majority concluded that the operation of the Family Court’s welfare power is confined to parental responsibilities of the parties to a marriage for a child of the marriage. It did not extend to orders protecting children from abuse from third parties in the form of immigration detention.

Returning the children to a detention centre would generate considerable publicity at a time when their mother was living under 24-hour guard in an Adelaide hotel room while awaiting the birth of her sixth child. The children were accordingly placed in alternative detention arrangements with their mother. On 30 December 2004, the family members were ushered out of the country in a clandestine, night-time operation which saw them awoken at 1am, placed under guard and escorted to a charter plane which delivered them to Pakistan notwithstanding continued assertions of Afghan origin. The family members were no longer available to test the legal boundaries of immigration detention and occupy space in the nation’s newspapers.

The litigation concerning the release of the Baktiayari children was slow and ultimately unsuccessful. It took some two years from the issue of proceedings in the Family Court until the High Court finally determined that the Family Court could not order release. The Baktiayari litigation detailed a narrative of pain and humiliation. But notwithstanding the difficulties inherent in litigation, media interest generated by the children’s Family Court-ordered release enabled their moving story to be told. Their care by a Catholic welfare agency challenged their perceived ‘otherness’ as Muslims. Their progress at school and failure to abscond from their carers signalled the availability of viable alternatives to detention. Their release enabled their voices to be heard. Their story fuelled outrage at the injustice of Australia’s immigration policy.

The Sakhi proceedings
In the course of the Minister’s appeal against the B&B Family Court decision, McHugh J queried whether any consideration had been given to the constitutional validity of the detention regime insofar as it concerns children. In Re Woolley & Anor; Ex Parte: M276/2003 (2004) (Sakhi proceedings), the High Court was called upon to adjudicate upon this issue. The applicants were four siblings of the Sakhi family brought into Australia from Afghanistan by their parents. Orders were sought that the detention regime was constitutionally invalid insofar as it concerned the children because it contravened the doctrine of the separation of powers between the executive, legislative and the judicial arms of government which underpins Australia’s Constitution. In accordance with this doctrine, the functions and powers of the three arms of government are separate and mutually exclusive. It was contended that the detention regime, which is administered by DIMIA as part of
the executive arm of government, impinges upon the judicial power of the Commonwealth. Under Chapter III of the Constitution, punitive or penal detention falls within the exclusive function of the courts. The effect of the detention provisions upon children was said to alter the character of the power of detention so as to render it punitive and thus within the exclusive power of the courts.

This was not the first time that the High Court had considered whether immigration detention offends the separation of powers. Twelve years earlier, in *Lim v Minister for Immigration (1992)* (*Lim*), the High Court had concluded that while punitive detention could only be ordered by a court, detention by the Executive would not contravene the separation of powers if it fell within the ambit of 'administrative detention'. Such detention must be limited to the legitimate administrative purposes of deportation or enabling an entry permit application to be made and considered.

The *Lim* challenge had been issued on behalf of 35 Cambodian nationals who were detained after arriving in Australia by boat and a child born after his mother's arrival in Australia. The child's status and circumstances were not subject to any independent argument. Little information is available about the infant William Lim and his voice has remained unheard. By 2004, when the *Sakhi* proceeding was heard, advocacy and media reporting focussing on children's stories and perspectives had fed into legal challenges exclusively concerned with children. Nevertheless all members of the High Court in *Sakhi* agreed that there was no suggestion in the *Migration Act* that the detention regime does not extend to children. Furthermore, the constitutional validity of the legislation was not affected by the impact of detention on children, effluxion of time, vulnerability of the detainee, availability of alternatives to detention or the fact that children do not present a flight risk or danger to the community.

In *Lim*, the detainees' ability to bring their detention to an end by requesting removal from Australia was found to be a critical element supporting the constitutional validity of the detention regime. In *Sakhi* it was argued that because a child may not have capacity to end their detention by requesting removal from Australia, the detention prescribed in the *Migration Act* is punitive in its application to children and thus unconstitutional. This contention had been seized upon in *B&B Family Court* to justify and support the Full Family Court's conclusion that detention of children may be unlawful. But the judges of the High Court rejected this argument. Their Honours found that the legitimate purpose of the legislation is not contingent upon a particular unlawful non-citizen having the legal capacity to request removal from Australia. The constitutional validity of the legislation rendered the circumstances and effect of detention irrelevant.

Litigation has in recent years seen children's interests take on greater prominence than ever before. It has not, however, enabled children's voices to be heard. Rather, children's interests have been represented by adults who have spoken for them. Ultimately, court proceedings have failed to attenuate the oppressive operation of the immigration detention provisions of the *Migration Act* insofar as they concern children.
Challenges based on International human rights standards
A range of challenges to the detention of children has been based on the inconsistency of the detention regime with standards of international human rights. Australia has ratified a range of United Nations (UN) human rights treaties in addition to the Refugees Convention and its 1967 Protocol. The term 'unlawful non-citizen' is premised upon illegal presence within the migration zone and is inconsistent with the right to seek asylum enshrined in article 14 of the Universal Declaration of Human Rights. In its exclusive application to those without valid visa documentation, the detention regime is inconsistent with Article 31 of the Refugees Convention which provides that States shall not impose penalties on refugees on account of their illegal entry.

In addition to ratifying the International Covenant on Civil and Political Rights ('ICCPR') and its First Optional Protocol, Australia ratified the Convention on the Rights of the Child ('CROC') two years prior to introducing its immigration detention policy. Both CROC and the ICCPR contain numerous standards with which Australia's detention regime is seriously inconsistent. For example, article 3(1) of CROC emphasises the best interests of the child as a primary consideration in all actions concerning children. Both CROC and the ICCPR prohibit the unlawful or arbitrary deprivation of liberty.

Scrutiny of Australia's compliance with international standards
Unsurprisingly, a number of UN-based bodies have scrutinised Australia's immigration detention regime and expressed concerns about its failure to comply with human rights standards. The UN Human Rights Committee is charged with supervising the implementation of the ICCPR and hearing complaints of Covenant violations under its First Optional Protocol. The Committee has now heard a series of such complaints and concluded with respect to each that Australia's immigration detention policy contravenes ICCPR standards. (Human Rights Committee, 1997, 1999, 2001, 2004). Australia has chosen to reject each of the Committee's findings, the most recent of which concerned breaches of the ICCPR arising from the detention of Roqia Bakhtiyari and her five eldest children.

In November 2001, Australia's HREOC commenced a national enquiry into children in immigration detention. The report of the inquiry was tabled in parliament on 13 May 2004. Drawing its title, 'A last resort?' directly from article 37(b) of CROC, the 900-page report was based on visits by Human Rights Commissioner Dr Sev Ozdowski to all mainland detention centres, written submissions, evidence from 155 witnesses and written and oral evidence from detainees, medical experts and DIMIA (HREOC, 2004). The report succeeded in synthesising public concern, disseminating information and, in calling for public submissions, facilitated the creation of at least one network of activists who pooled resources to create a voluminous response covering health, education and legal issues. The following extract from the submission's introduction traces the genesis of the network as follows:

When HREOC announced its enquiry, we decided to make a submission. We...started to ask around. . Within ten days, we had 40
people meeting at a private home in Melbourne; four weeks later, 70. People from all walks of life came together because they shared a concern about the issue of children in immigration detention. And still the group continued to grow.

The participants are described as ‘teachers, nurses, doctors, psychologists, actors, lawyers, social workers, physiotherapists, psychiatrists, writers, students, and counsellors...working with a sense of urgency’ (Burnside et al, undated).

HREOC’s report made a number of key findings. It concluded that long-term detention creates a heightened risk of serious mental illness. Several findings concerned the inconsistency of the detention regime with Australia’s human rights obligations. A fundamental inconsistency was identified with CROC; including its detention provisions (in article 37) and article 3(1)’s ‘best interests’ consideration. The report concluded that Australia had failed to meet the need to extend appropriate assistance, without distinction, to child asylum seekers and refugees in accordance with article 22(1) and failed to provide an environment which fosters the health, self-respect and dignity of children recovering from torture and trauma (article 39). In describing Dr Ozdowski’s visits to detention centres, the enquiry has breached their walls and enabled the voices of many child detainees to be heard. Statements made by children in detention are quoted throughout the report (see particularly Chapter 3.7). Two such statements appear at the beginning of this paper. In its comprehensive chronicling of the impact of detention through the comments of children, the report has played a critical role in enabling the voices of child detainees to be heard.

The inquiry concluded that Australia’s detention laws should be amended, as a matter of urgency, to comply with CROC. Upon tabling the report, Dr Ozdowski called for the release of all children by 10 June 2004. A joint media release issued by Ministers Vanstone and Ruddock rejected the report’s major findings. The document accuses HREOC of being ‘unbalanced and backward-looking’ and giving weight ‘selectively to interpretation of events, rather than grappling with the complexity of the issues’ (Vanstone & Ruddock, 2004).

**Human rights standards in Australian law**

Under the separation of powers, the ratification of treaties is a function of the Executive arm of government. But international treaty obligations do not form part of Australian law unless and until they have been incorporated by statute. It was accepted in *B&B Family Court* that CROC had to some extent been incorporated into the welfare provisions of Part VII of the *Family Law Act 1975 (Cth)*. But the High Court has overturned the Family Court’s decision and declined to conclude that the *Family Law Act* incorporates CROC’s provisions into Australian law.

Where Parliament has not legislated to incorporate international obligations into domestic law, there operates a presumption that courts will interpret legislation consistently with international standards ratified by the Executive. This presumption gives way when the words of a statute are clear and unambiguous and do not accommodate a reading which
accords with international standards. This presumption has been applied in a range of judgments of Australia's Federal Court and Family Court (such as B&B Family Court and the Full Federal Court judgment in Al Masri (2003)). But the clear and unambiguous wording of the Migration Act led all members of the High Court to the conclusion in B&B High Court and Sakhi that the detention provisions of the Migration Act prevail over Australia's international obligations.

It does not follow that human rights protections are irrelevant in Australia. Human rights represent the collective response of the international community to the need to achieve and protect human dignity. They represent the consensus of a majority of nations in the world. CROC has near universal ratification. Enforcement of international human rights standards is notoriously difficult. Determinations by UN bodies may persuade and shame member states but are not strictly enforceable. But no state would admit to being a human rights violator. In fact, Australia's response to comments by bodies which include the UN Human Rights Committee and the Special Envoy to the UN High Commissioner for Human Rights (Bhagwati, 2002) have all affirmed Australia's commitment to human rights while maintaining the untenable assertion that its detention policy does not violate human rights and that the criticisms are coloured by selective data and misinformation (see, for example, DIMIA joint media release 2002).

Recent developments

By 2005, DIMIA started responding to the intense lobbying and media interest in the immigration detention of children. Following reporting about the story of 3 year-old Naomi Leong who had spent her life in detention, Naomi was released on a bridging visa; but the scrutiny continued. Reports surfaced about the plight of other children born in detention. In light of the arbitrary and wholesale injustice wielded by mandatory detention, a piecemeal and reactive stance was inadequate. Every child released had a journey of psychological healing to embark upon due to the needless suffering occasioned by his or her detention. For every child released, there were others who remained in detention for the simple reason that their story had not be taken up by those who had heard their voices and witnessed their despair.

While recent years have seen an increase in the reporting stories of children in immigration detention, social and legal challenges to the regime have been primarily constituted by adults who have been in contact with detained children speaking on the children's behalf. Notable exceptions include Alamdar and Muntazar Bakhtiyari's attempt to gain asylum from the British consulate and the process which resulted in the chronicling of children's narratives in HREOC's 'A last resort?'.

It is the actions of adults who have heard the voices of children in detention which have fuelled the most recent challenge to the detention regime. The Howard government's members for Kooyong, Cook, Pearce and McMillan had visited Australia's immigration detention centres and heard the voices of the child detainees. They had witnessed the mental deterioration occasioned by their detention. They began making statements in the party room, the House of Representatives and news media about the need to abandon the detention policy. After these efforts failed, the four...
'dissidents' entered negotiations with Prime Minister John Howard with a view to persuading him to abandon the policy. Federal Member for Kooyong, Petro Georgiou, prepared two private members bills for introduction into the House of Representatives on 20 June 2005 in the event that the negotiations failed to yield a satisfactory resolution. The bills sought release of all children and their families from detention unless a court determined that they presented a security or flight risk.

The prospect of a divisive split within a government noted for its internal discipline intensified the negotiations. An agreement was reached on 17 June 2005 and the Migration Amendment (Detention Arrangements) Act (Cth) 2005 passed on 29 June 2005. Moving grudgingly towards acceptance of CROC, section 4AA(1) states that 'the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.'

Introducing the Bill on behalf of Minister Vanstone, the Minister for Citizenship and Multicultural Affairs, Peter McGuaran, stated as follows:

The government's intention is that these amendments will be used to ensure the best interests of minor children are taken into account and that any alternatives ... detention ... are carefully considered.

Where detention of a minor is required under the Act, it is the government's intention that detention should be under the new alternative arrangements wherever and as soon as possible, rather than in detention centres.

On 29 July 2005, all children and their families were released from immigration detention centres. These families have been allowed to live in a 'specified place' within the community subject to conditions, which may include a nightly curfew and regular reporting to DIMIA officials. For the purposes of the legislation, residence in a 'specified place' is deemed to be a form of immigration detention. The right to live in the community is subject to a Ministerial right of revocation based on the public interest.

The release of all children from immigration detention has at last presented an opportunity for the voices of children to be heard within and beyond their residential, kindergarten and school communities. The extent to which their voices will be heard by those around them will impact significantly upon the development of these children and Australia's development as a society.

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Human Rights and Equal Opportunity Act 1986 (Cth)

Family Law Act 1975 (Cth)

International Instruments
Universal Declaration of Human Rights

Convention Relating to the Status of Refugees (Refugees Convention)
Chapter 3C

Declaration for Thesis Chapter 3C

Monash University

Declaration for Thesis Chapter 3C:
Children's Rights Through the Lens of Immigration Detention (2006) 20
Australian Journal of Family Law pp12-44,

Declaration by candidate

In the case of Chapter 3C, the nature and extent of my contribution to the work was the following:

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<td>I was the principal writer of the following sections: Australia's Policy of Immigration Detention, The Policy Framework, The Separation of Powers, Australia's Obligations under International Law (with the exception of the section entitled 'Incorporation of CROC unresolved'), Human Rights in the Political Process and postscript. I co-wrote the introduction and conclusion.</td>
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The following co-author contributed to the work.

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<tr>
<td>Adiva Sifris</td>
<td>Adiva Sifris was the principal author of the following sections: the Bakhtiyari Litigation, Children’s Incapacity, the parens patriae jurisdiction, Incorporation of CROC Unresolved and The Minister's Guardianship and Release from Detention. She co-wrote the introduction and conclusion.</td>
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The undersigned hereby certify that the above declaration correctly reflects the nature and extent of the candidate’s and co-authors’ contributions to this work*.

Candidate’s Signature

Main Supervisor’s Signature

Date
11 January 2014

Date
13/ 01/2014
Articles

Children's rights through the lens of immigration detention

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This paper examines Australia’s immigration detention regime insofar as it concerns children and their families. Challenges to the validity of the regime are examined. These challenges include the series of Family Court proceedings concerning the detention of children of the Bakhtiyari family including the High Court’s ruling on appeal with respect to the Family Court’s jurisdiction to order release. It is argued that the immigration detention regime may be used as a lens through which Australia’s commitment to children’s rights may be gauged. While the most recent challenge to the regime saw the release of all children from immigration detention facilities into the community, legislative amendments which preceded their release have introduced principles of children’s rights as a matter of aspiration as opposed to legal doctrine. It is suggested that a substantive commitment to children’s rights would extend to the incorporation of the Convention on the Rights of the Child into Australian law via domestic legislation, thus facilitating the development of a culture and jurisprudence of children’s rights and averting future institutionalised violations of fundamental human rights.

1 Introduction

As we pass the half way mark of the 21st century’s first decade, it seems remarkable that it is only some 30 years since Hilary Rodham wrote her now famous words; ‘the phrase “children’s rights” is a slogan in search of definition’.1 Over this period, the battle for the recognition of the rights of children has made huge strides; reaching a high water mark in 1989 with the formulation of the Convention on the Rights of the Child 2 (hereafter, CROC). That children have rights is no longer debatable. How these rights are implemented remains problematic.

CROC has near-universal ratification. Its commitment to the inherent dignity of children proceeds on the assumption that children are entitled to special care and assistance by their legal guardians and the state. Underlying CROC are four key principles;3 the prohibition against all forms of discrimination, the best interests of the child, children’s right to survival and

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development and respect for the views of the child (including the right of
children to participate in decision-making processes affecting their lives).
While children are characterised as members of families and communities,
CROC recognises their evolving abilities and assumes that recognition of
children’s inherent dignity calls for due weight to be accorded to children’s
views and the representation of these views in judicial or administrative
proceedings affecting children. It is likewise central to CROC that responsible
adults are required to protect children.

The extent to which a state’s human rights obligations under instruments
such as CROC have been successfully implemented is most readily gauged by
examining the guarantees extended to the most vulnerable members of
society; those with little control over their lives. Asylum seekers, who are
forced to flee conditions of danger, are by definition those who have little
control over their destiny. This lack of control is eloquently described by 18
year old Nooria Wazefadost who arrived in Australia from Afghanistan at the
age of 14 and was placed in detention with her family:

A refugee is a kneeling person, kneeling in front of the captain of a ship to ask for
a reduction in his escape price, kneeling to pirates to ask for mercy, kneeling in front
of an international organisation to ask for its help, kneeling in front of the police to
ask for permission to go to the market, kneeling in front of a foreign delegation to
ask to be accepted in their country.4

Children seeking asylum are a fortiori subject to the decisions of others. Many
have been the helpless victims of their parents’ decisions. Among those who
have arrived as unaccompanied minors are children who have been spirited
away from conditions of danger through the pooled savings of elders.5 Others
have fled conditions of peril in the hope that protection will be granted. All
have been subject to Australia’s regime of immigration detention.

A Australia’s policy of immigration detention

In 1992, two years after ratifying CROC, the Australian government
introduced a policy which challenges the instrument’s key principles and
underlying assumptions. Australia’s mandatory immigration policy requires
the detention of children and adults alike. It requires detention on the basis of
undocumented arrival in Australia and does not accommodate the best
interests of the child; making no allowance for the status, vulnerabilities and
needs of children. There is little room for the views of children in the
administrative processes concerning their detention.

The policy which has seen several thousand such children detained has been the
subject of numerous court challenges and scrutiny by Australia’s Human
Rights and Equal Opportunity Commission (hereafter, HREOC). A large body of
research, including HREOC’s ‘A Last Resort?’ report, has linked

4 N Wazefadost, ‘A young refugee’s plea for a better future’, Sydney Morning Herald, 21 June
2004.
Australian Journal of International Affairs 357.
6 HREOC, A last resort? The National Enquiry into Children in Immigration Detention, April
26 January 2006 considered in Pt 4C below.
immigration detention with serious mental illness. Children and adults have been accommodated together in an environment of uncertainty and hopelessness and have witnessed acts of self-harm by other detainees. While children have most often been detained with parents, it has been reported that children have been separated from parents in order to put pressure on parents to cease hunger strikes. Although families have in many cases remained together, the stress and uncertainty of living in detention has rendered parents incapable of providing a safe, stable and nurturing space for their families.

The detention regime has also been the subject of considerable attention by domestic and international non-governmental organisations (hereafter, NGO's) and United Nations (hereafter, UN) bodies such as the Human Rights Committee and the Working Group on Arbitrary Detention. Notwithstanding the unanimous conclusion that the detention regime violates CROC and other applicable human rights standards, the Australian government has maintained a commitment to the detention regime as a central component of its asylum policy. In mid June 2005, Australia held 927 individuals in privately-operated immigration detention centres pending determination of their entitlement to a protection visa. More than 300 of these individuals had been detained for over a year and some 80 had been detained for more than four years. Sixty-three of these detainees were children, six of whom were born in detention. In the detention environment, these children were called not by name but by designated identification number and issued with bar-coded photographic identification cards. A number of Australia’s immigration detention and processing centres were located in geographically remote areas. Concerns raised about the conditions pertaining in these centres have concerned matters of safety, education and the provision of medical care.

In 2001, a Residential Housing Project was established near the now decommissioned Woomera detention centre and the Federal government has since established residential housing projects at Port Augusta and Port Hedland. Women accompanied by their children (with the exception of boys aged 13 and over), unaccompanied women, female minors and boys under 13 have been eligible to volunteer to be transferred from a secure detention centre to a residential housing project. Instead of razor wire and palisade fencing, detainees have been subject to an infrared detention system and a curfew which prohibits entry into communal areas after 11pm. They have been unable to leave the residential area without being accompanied by a guard. The separation of families imposed by the ban on males over the age of thirteen required families to wrestle with the dilemma of choosing family integrity within a detention centre, or family separation in a less oppressive environment. Alternative detention arrangements have been linked with a deterioration in the mental health of family members; particularly fathers who are required to remain in detention centres.

On 29 July 2005, all children and their families were removed from

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8 Ibid.
9 HREOC, A last resort?, above n 6.
10 Ibid.
detention following negotiations between the Prime Minister and four dissident members of his government and consequent amendments to the Migration Act 1958 (Cth) (hereafter, the Migration Act). While these children and their parents are now residing within the community, they retain the status of administrative detainees.

This paper examines the challenges to Australia's immigration detention policy in the judicial and parliamentary context with reference to the rights and capabilities of children. It first examines whether the immigration detention of children offends the fundamental constitutional doctrine of the separation of powers between the executive, legislature and judiciary? In this context, the inability of children to bring their detention to an end as well as the parens patriae jurisdiction are considered. The article then seeks to determine the nature of Australia's international obligations to children in immigration detention and whether these obligations may serve as a vehicle for the release of children from detention. Thirdly, the article considers whether the Immigration (Guardianship of Children) Act 1946 (Cth) may be utilised to assist the plight of these children. Finally, recent amendments to the detention provisions are considered. These amendments have at last ameliorated the policy's harshness and have, significantly, introduced principles from CROC into the Migration Act. Whether these amendments deliver child asylum seekers and their families the protections sought to be guaranteed by CROC remains questionable.

2 The policy framework

A The legislative framework

Section 189(1) of the Migration Act governs mandatory immigration detention. It provides that if an officer of the Department of Immigration and Multicultural and Indigenous Affairs (hereafter, DIMIA) or a police officer knows or suspects that a person inside Australia's 'migration zone' is an 'unlawful non-citizen', the officer must detain that person. The rhetoric of illegality is thus attached to those who have committed no crime. The duration of their detention is governed by s 196. Section 196(1) provides that an unlawful non-citizen detained under s 189 must be kept in immigration detention until he or she is removed from Australia, deported or granted a visa.

The circumstances in which a detainee must be removed from Australia as soon as reasonably practicable are enumerated in s 198. These include circumstances where a visa has been refused and application finally determined (s 198 (6)) and where a detainee has made a written request for removal pursuant to s 198(1).

B The judicial framework

This article seeks to analyse the High Court decisions in Minister for Immigration and Multicultural and Indigenous Affairs v B (hereafter, MIMA
Prior to launching into a detailed analysis of these cases, the reader is provided with a brief overview of the facts and issues before the court and the outcome of the proceedings.

(a) The Bakhtiyari litigation

The salient facts underlying this series of proceedings are that in July 2002 Roqaiha Bakhtiyari, the mother of two boys, Alamdar and Muntazar aged 14 and 12, applied, as next friend, to the Family Court of Australia for orders that the Minister for Immigration and Multicultural and Indigenous Affairs release them from immigration detention. The ground upon which Alamdar and Muntazar relied was, broadly, that the continuing detention was harmful to their welfare. This application was launched immediately following the boys’ escape from and return to immigration detention. The trial judge, Dawe J, found that the applications were ‘misconceived’ and ‘fatally flawed’ and that the Family Court had no jurisdiction to make orders in respect of children held in immigration detention. Her Honour accordingly dismissed the application. 15

On appeal the majority of the Full Court of the Family Court (Nicholson CJ and O’Ryan J) decided that through the use of its welfare power, the Family Court had jurisdiction to order the release of children of a marriage from immigration detention in the event that the detention was unlawful. 16 According to Nicholson CJ and O’Ryan J, the applicant children were unable to bring their detention to an end of their own accord. Furthermore, their parents’ ability to end the children’s detention by seeking removal from Australia did not make the children’s detention lawful. On 25 August 2003, the Family Court ordered the release of five children of the Bakhtiyari family from immigration detention. 17 The Minister appealed to the High Court against the Family Court’s finding that it had the power to order the release of the children. On appeal, the judges of the High Court unanimously concluded that the Family Court had no jurisdiction to make orders for the release of children from immigration detention. Gleeson CJ and McHugh J (in a joint judgment) and Gummow, Hayne, and Heydon JJ (in a joint judgment) confronted the issue from a procedural perspective and concluded that the operation of the welfare power is confined ‘to the parental responsibilities of the parties to a marriage for a child of the marriage’. 18 Kirby J concentrated on the

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15 Unreported, Family Court of Australia, 9 October 2002, Adelaide.
16 B (Infants) & B (Intervener) v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 192 ALR 684; 30 Fam LR 181 (hereafter, B & B v MIMIA).
On 19 June 2003, the Full Court of the Family Court had remitted the matter to a trial judge for rehearing on the merits. Strickland J found that although the detention was unlawful, to release the children would not be in their best interests. See Minister for Immigration and Multicultural and Indigenous Affairs v B & B (unreported, Family Court of Australia, 5 August 2003).
18 See MIMIA v B, above n 13 at [74]. For a detailed discussion of this decision and the
unequivocal wording in the Migration Act which must be applied even if this resulted in a breach of Australia’s international obligations. Callinan J concluded that the release of children from immigration detention was beyond the constitutional limits of the Family Court. After all but slamming the door on the welfare jurisdiction of the Family Court in relation to children in immigration detention, the High Court was required to consider a different aspect of the legality of immigration detention insofar as it concerns children in the Woolley litigation.

(b) The Woolley litigation

In Woolley, the applicants were four children aged 15, 13, 11 and 7 who were brought into Australia by their parents. Upon arrival in Australia in January 2001 the family was detained at Baxter Immigration Detention Centre. In July 2004 pending the outcome of the father’s application for a protection visa the children were, on 4 July 2004, granted temporary protection visas. Orders were sought on the children’s behalf challenging the lawfulness of their detention. It was argued that the Migration Act did not authorise the indefinite detention of children as they did not have the same capacity as adult asylum seekers to voluntarily bring their detention to an end by seeking removal from Australia. It was also argued that the Migration Act did not authorise their detention as it was beyond the scope of the Australian Constitution’s ‘aliens power’ and because it amounted to punishment without trial which runs contrary to the doctrine of the separation of powers between the executive, legislative and the judicial arms of government. HREOC was given leave to intervene. Despite the evidence which it presented painting a vivid picture of the detrimental and damaging mental health effects of long term detention on children, the validity of the children’s detention was upheld and their application dismissed.

3 Does the detention of children offend the separation of powers?

A The separation of powers

At the kernel of the application before the High Court in Woolley was the entrenched doctrine of the separation of powers. During the course of argument before the High Court in MIMIA v B, McHugh J queried whether any consideration had been given ‘as to whether or not Chapter III of the Constitution prohibits in all circumstances the involuntary detention of children, full stop?’ This probing question set in motion an application to the High Court of Australia to determine this issue conclusively.

decision of the Full Court of the Family Court see A Sifris, ‘Children in Immigration Detention: The Bakhtiyari Family in the Family Court’ (2004) 29 Alt LJ 212; A Sifris and T Penovic, ‘Children in Immigration Detention: The Bakhtiyari Family in the High Court and Beyond’ (2004) 29 Alt LJ 217
20 The Migration Act was enacted pursuant to the aliens power in s 51 (xix) of the Constitution.
21 Woolley, above n 14. The finding of constitutional validity was unanimous.
22 See Transcript of Proceedings, MIMIA v B (High Court of Australia, McHugh J, 30 September 2003).
It was contended on behalf of the children that ss 189 and 196 of the Migration Act were invalid if, and to the extent that, they applied to children. In calling the court to consider the developmental needs and vulnerabilities of children, the applicants sought to apply the separation of powers argument to the effect and circumstances of detention. In this context, the court was required to determine whether the severity of the detention provisions in their application to children alters the character of the power of detention so as to render it punitive and thus within the exclusive judicial power of the Commonwealth.

This was not the first occasion that the High Court had considered whether the notion of immigration detention offends this doctrine, but it had never before deliberated on this issue specifically in relation to children. The question in essence revolves around the extent of the executive power and whether the detention legislation impinges upon the judicial arm of government. As early as 1992 in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (hereafter, *Lim*), the High Court resolved this issue in relation to adults. It concluded that the "limited authority to detain an alien in custody can be conferred on the Executive without infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates". 23

In *Woolley*, all members of the High Court agreed that that there was nothing in the Migration Act that suggests that it is not intended to apply to children. 24 Likewise all judges, with the exception of Kirby J, considered that the effect of the detention on the child applicants was irrelevant and that the criterion of constitutional validity remained the purpose which authorised the detention. 25 Gleeson CJ's judgment centred on the mandatory character of the detention, and found that it was not intended to address the particular circumstances of individual detainees. 26 Hayne J considered that once it was accepted that the aliens and immigration powers support a law directed at excluding a non-citizen from the community by segregating them from the community, that purpose is not altered by factors such as the effluxion of time or vulnerability of the detainee. 27 McHugh J went so far as to say that the legitimacy of the purpose (of making an alien available for deportation or excluding them from the community) was not affected by the availability of alternatives to detention or the fact that children do not present a flight risk or danger to the community. 28

It was accepted by Kirby J that harsh conditions or inordinately prolonged detention may transform administrative detention into punishment. 29 But the limited evidence provided as to the effects of detention on the children was insufficient to persuade his Honour that their detention was sufficiently

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23 (1992) 176 CLR 1 at 32; 110 ALR 97 at 118 (Brennan, Deane and Dawson JJ).
24 See *Woolley*, above n 14 per Gleeson CJ [10], McHugh J [46], Gummow J [129], Kirby J [183], Hayne J (211)-(222) and Callinan J [263].
25 Ibid, Gleeson CJ [211]-[222], McHugh J [106], Callinan J [260].
26 Ibid [29]-[30].
27 Ibid [227].
28 Ibid [106].
29 Ibid [106].
inhumane to offend Ch III of the Constitution.\(^{30}\) In concluding that ss 189 and 196 of the Migration Act clearly apply to children, Kirby J concurred with the other judges of the Court. His Honour characterised the detention policy as 'the product of a deliberate decision of successive governments and the Australian Parliament, enacted and maintained in force under the broad scope of the "aliens" power' and concluded that the policy's application to children is not, therefore, the result of oversight, ignorance, inattention or mistake.\(^{31}\)

The following portion of this article explores two of the arguments raised in Woolley in order to distinguish Woolley from Lim and in an attempt to persuade the High Court that the particular circumstances of childhood gave rise to factors which distinguish children from adults and render their continuing detention unlawful. The first argument concerns the inability of a child to bring their own detention to an end and the second centres upon the relevance of the parens patriae jurisdiction.

### B Children's Incapacity

In Lim, significant emphasis was placed on the ability of the detainee at any point in the proceedings to bring their detention to an end by requesting removal from Australia. This was found in Lim to be a critical element supporting the constitutional validity of the immigration detention regime.\(^{32}\) In Woolley it was argued on behalf of the children that as a child may not have the capacity to request removal from Australia and hence to bring their detention to an end, the detention prescribed in ss 189 and 196 of the Migration Act is, with regard to children, punitive and impinges upon Commonwealth's judicial power.

This was not in itself a novel argument. Nicholson C J and O'Ryan J seized upon it in the Full Court of the Family Court decision of B & B v MIMIA to justify and support their conclusion that mandatory detention of children may be unlawful. Their Honours pointed out that in numerous areas of the law, for example, criminal and contract law, special rules have evolved treating children differently from adults. The stage when a child is capable of making, and is responsible for, their decisions is colloquially known as the 'Gillick Competence', after the English case of Gillick v West Norfolk AHA (hereafter, Gillick's case)\(^{33}\) which sets out the underlying principle for determining whether a child is capable of making its own decisions. According to Lord Scarman in Gillick's case, 'a minor's capacity to make his or her own decision depends upon the minor having sufficient understanding and intelligence to make the decision and is not to be determined by reference to any judicially fixed age limit'.\(^{34}\) This principle was accepted and applied by the High Court of Australia in Marion's case.\(^{35}\) In B & B v MIMIA Nicholson CJ and O'Ryan J concluded that barriers may exist to children exercising these legal rights. The capacity of a child to exercise their legal rights must be determined on an

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30 Ibid [189].
31 Ibid [188].
32 See Lim, above n 23 per Brennan, Deane and Dawson JJ [33]-[34] and McHugh J [72].
33 [1986] AC 112.
34 Ibid, 188.
35 Secretary, Department of Health and Community Services v JWB and SMB (Marion's case) (1992) 175 CLR 218; 106 ALR 385; 15 Fam LR 392.
individual basis and must take into account all the particular factors relevant
to the capacity of that particular child to make a particular decision.
Circumstances which may impinge upon a child's capacity to bring their
detention to an end may include language skills, schooling, access to resources
and administrative barriers to exercising legal rights. Their Honours concluded that 'if children or any of them are unable to bring their detention
to an end, their detention is unlawful'.

In Woolley the members of the High Court were singularly unimpressed
with this argument. Gleeson CJ acknowledged that whether there was a
punitive aspect to the immigration detention of children would largely depend
on the particular child. Not all children under the age of 18 would lack the
legal capacity to request their removal from Australia. According to the Chief
Justice the individual treatment which the Gillick test demands was fatal to its
use in conjunction with the Migration Act. 'The character of the power
conferred by ss 189 and 196 does not vary according to whether a particular
unlawful non-citizen in detention has the legal capacity to request removal
from Australia.'

McHugh J adopted a purposive approach to this legislation. He considered
its underlying purpose. Was this purpose punitive or was the effect of
detention punitive as a consequence of the legislation's application? According to His Honour, the legitimate purpose of ss 189 and 196 was not
to punish but rather to ensure the control and supervision of unlawful
non-citizens pending processing of their applications. His Honour was also
quick to point out that one of the plaintiffs in Lim was an infant child. No
separate argument was advanced in respect of the child. The Court did not
consider the child's status to be different from the adults and did not consider
whether his lack of capacity to request removal might render the legislation
unlawful. Although a child may themselves lack the legal capacity to request
removal, 'this lack of capacity is not itself sufficient to render the detention

37 B & B, above n 16 at [381] (Nicholson CJ and O'Ryan J). The argument that detention is
unlawful where there is no reasonable prospect of bringing it to an end has been considered
in a series of cases. After being refused refugee protection, Akrum Al Masri, a Palestinian
from the Gaza Strip, requested removal from Australia under s 198(1). DIMIA was
frustrated in its attempts to facilitate his removal by the refusal of Israel, Egypt, Syria and
Jordan to permit entry so as to facilitate Al Masri's return to the Gaza Strip. There was
accordingly no reasonable prospect of his removal from Australia. The Full Federal Court
held that unless the power and duty of detention conferred by s 196 was subject to an
implied temporal limit which limited the power to detain to circumstances where there is a
real likelihood or prospect of removal in the reasonably foreseeable future, a serious
question of invalidity would arise: Minister for Immigration and Multicultural and
Indigenous Affairs v Al Masri (2003) 126 FCR 54; 197 ALR 241. The issues raised in
Al Masri were revisited in Minister for Immigration and Multicultural and Indigenous
CLR 562; 208 ALR 124. In both cases, the High Court held that even if deportation was not
possible indefinite detention did not amount to punishment without trial which contravenes
the Constitution. See generally, M Head 'Australia's radical legal shift' (Paper presented at
the University of Western Sydney Law School Symposium, Campbelltown Campus, 15
March 2005).
38 Woolley, above n 14 at [30].
authorised by ss 189 and 196 punitive and therefore unconstitutional'.

Gummow, Hayne and Callinan JJ did not consider the legal capacity of children to bring the detention to an end as a factor of great importance. They pointed out that in reality parents make decisions for children in matters such as this. Gummow J considered that parents making decisions on behalf of children was not only a practical reality but was also a legal truism which, in the context of immigration decisions, the courts had endorsed. Thus the ability of a parent to request removal on a child's behalf means that a child is not deprived of its liberty to any greater extent than an adult in a similar position. Gummow J did not regard the vulnerability of children as sufficient in itself to make their detention unlawful. According to his Honour, the legislation would be open to challenge if it could be shown that 'the class of persons detained is significantly over-inclusive because it authorises the detention of many more people than is reasonably capable of being seen as necessary'. However, according to His Honour, children as a class of persons possess characteristics which make their detention reasonably necessary for the purposes of processing their applications. Hayne and Callinan JJ, like McHugh J, adopted a purposive approach and concluded that the vulnerability of the children was of little consequence when the purpose of the legislation was not punitive but rather, to exclude and segregate certain non-citizens from the community.

Directly related to the vulnerability of children is the parens patriae jurisdiction. The Full Court of the Family Court in B & B v MIMA considered that the 'welfare power' contained in s 67ZC of the Family Law Act 1975 (Cth) (hereafter, Family Law Act) held the key to the ability of the Court to order that children be released from immigration detention. On appeal, however, the High Court concluded that s 67ZC fails to give the Family Court jurisdiction to determine the validity of the detention of an unlawful non-citizen under the Migration Act. With the High Court's conclusive rejection of this interpretation of the Family Court's welfare jurisdiction in MIMA v B, attention once again turned to the ancient parens patriae jurisdiction.

Ibid [102].

Ibid, per Gummow J [153], Hayne J [225]-[227], Callinan J [258] and [266]. Hayne J was more concerned with whether the legislation in itself was punitive and referred to his reasons for judgment in Al-Kateb, above n 37.

Ibid, per Gummow J [155]-[156], [160]. His Honour referred to the cases of Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293; 170 ALR 553 and Re Minister for Immigration and Multicultural and Indigenous Affairs: Ex Parte Applicants S134/2002 (2003) 211 CLR 441; 195 ALR 1. In both these cases the courts accepted that parents/matrons could make decisions on behalf of their children.

Ibid, per Gummow J [163].

Ibid [164]. Gummow J also commented that it was demonstrated that the applicants were seeking release from harsh humane and degrading conditions which the law authorised, this would indicate that the detention went beyond what was permissible. Ibid [167].

Ibid, per Hayne J [227], Callinan J [263].

B & B, above n 16. This welfare jurisdiction of the Family Court was only created in 1983 pursuant to s 64(1) which provided that orders could be made 'in proceedings in relation to the custody, guardianship or welfare of, or access to a child'. Section 67ZC was introduced as part of the Family Law Reform Act 1995 (Cth).

In Marion's case the majority of the High Court regarded the welfare power as conferring
C The parens patriae jurisdiction

The parens patriae (meaning the parent of his country) jurisdiction is the common law jurisdiction used to protect infants and the mentally ill. It is based on the need for the law to take care of those who cannot take care of themselves. While this jurisdiction was initially exercised by the monarch, it eventually devolved upon the Lord Chancellor and was inherited by the superior courts in Australia and, through s 67ZC of the Family Law Act, the Family Court. The Family Court has utilised the welfare power primarily in relation to the authorisation of medical procedures. Even though the Family Court was granted jurisdiction, the superior courts in Australia were not divested of the parens patriae jurisdiction and continue to exercise it concurrently with the Family Court.

In Woolley, the applicant children sought to invoke the assistance of the parens patriae jurisdiction in order to reinforce the argument that the provisions of the Migration Act are punitive in relation to children. It was argued that the special vulnerabilities of children expose them to the punitive effect of the legislation; requiring the courts to exercise this protective jurisdiction. Counsel for the children attempted to demonstrate this susceptibility and vulnerability by proposing that the detention of children is not necessary to process their parents' visa applications, is unnecessary to perform health and other checks and is needless for the welfare and protection of children. Furthermore, children may not have the legal or practical capacity to request their removal.

The utility of the parens patriae jurisdiction to assist children in immigration detention was explored for the first time in depth in B & B.
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v MIMA, but this was not the first occasion that this idea had been raised in Australian courts. In the Full Court of the Federal Court decision of Teoh v Minister of State for Immigration and Ethnic Affairs51 it was submitted that the decision maker in the form of the Commonwealth Crown (or delegate), in the exercise of the parens patriae jurisdiction, had a fiduciary obligation to children to make specific investigations as to the impact of decisions on children. Carr J, confining the parens patriae jurisdiction to the 'inherent jurisdiction of the court in respect of infants and those of unsound mind', doubted that such a fiduciary obligation arose in the circumstances of the case. However, on appeal to the High Court, Gaudron J focussed upon the Australian citizenship of the children concerned and noted the obligations owed 'on the part of the body politic to the individual, especially if the individual is in a position of vulnerability. So much was recognised as the duty of kings, which gave rise to the parens patriae jurisdiction of the courts'.52

However, in Woolley, no High Court judge was persuaded that the parens patriae jurisdiction bore any relevance to the release of children from immigration detention. In fact, some reservations were expressed as to the High Court’s capability in exercising this jurisdiction.53 For all the judges of the High Court, the overarching consideration was the clear and unequivocal language of the Migration Act which prevails over any other powers which the court might enjoy and which are excluded through clear and valid laws to the contrary.54 Callinan J concluded:55

The Act here provides a clear indication of parliament’s intention with regard to unlawful non-citizens, including children, and the exercise of whatever parens patriae jurisdiction exists or remains in the court should not interfere with the implementation of that intention.

4 Australia’s obligations under international law

A The standards

(a) Refugee Convention

Australia has a proud history of involvement in the UN and the development of standards of human rights. In addition to CROC, Australia has ratified a number of key UN human rights instruments in addition to the Convention Relating to the Status of Refugees (hereafter, Refugee Convention) and its 1967 Protocol.56 The term 'unlawful non-citizen' is premised upon illegal entry into the migration zone. The rhetoric emanating from DIMIA in support

51 Teoh v Minister for Immigration and Ethnic Affairs (1994) 49 FCR 409, 434; 121 ALR 436.
52 Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 304; 128 ALR 353 at 375 (hereafter, Teoh).
53 Woolley, above n 14 at [207] (Callinan J); see also [194] (Kirby J). One assumes that this is because the Federal Court and the High Court are creatures of statute.
54 Ibid. Gleeson CJ viewed the vulnerability of children as a question of legislative policy [31]; McHugh J emphasised the purpose of the Act and if it was shown to be punitive there may be some room for the parens patriae jurisdiction [101]; Kirby J [191]-[194], and [211], Callinan J [251], [259] and [267].
55 Ibid [259].
of the policy characterises detention as an appropriate response to unlawful entry and presence in Australia. Yet the right to seek asylum is enshrined in art 14 of the Universal Declaration of Human Rights. The right also underpins the Refugee Convention and its 1967 Protocol and is likely to have emerged as a norm of customary international law. Article 31 of the Refugee Convention provides that States shall not impose penalties on refugees on account of their illegal entry. The Executive Committee of the UN High Commission for Refugees, in advising the High Commissioner, has published a series of conclusions with respect to the implementation of the Refugee Convention and Protocol. In elaborating on art 31, the Committee’s Conclusion No 44 of 1986 provides as follows:

In view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.57

The policy also raises serious concerns with respect to the operation of the non-refoulement obligation in art 33. Non-refoulement underpins the Refugee Convention and lends the force of treaty obligation to the right enshrined in art 14 of the Universal Declaration of Human Rights. It requires that state parties must not return refugees to the frontiers of territories where their freedom or life is threatened. The request for written removal provided for under s 198(1) of the Migration Act affords the possibility of a refugee entitled to protection being returned to conditions of danger in contravention of art 33.

The detention policy has also raised serious questions about Australia’s compliance with CROC and the International Covenant on Civil and Political Rights58 (hereafter, ICCPR).

(b) Best Interests

Australia’s system of immigration detention is mandatory and fails to facilitate an evaluation of individual circumstances, such as children’s vulnerabilities and developmental needs. Yet art 3(1) of CROC emphasises the best interests of the child as a primary consideration in all actions concerning children. Article 3(2) further provides that parties shall adopt appropriate legislative and administrative measures to ensure that children are accorded protection necessary for their well-being, taking into account the rights and duties of parents and legal guardians.

(c) Non-discrimination

The distinction drawn between asylum seekers who arrive with valid papers and those who do not also calls into question Australia’s performance of its

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57 Conclusion of the Executive Committee, UN High Commissioner for Refugees, No 44 (XXXVII)-1986, ‘Detention of Refugees and Asylum Seekers’.

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non-discrimination obligations under a range of international instruments, including the ICCPR and CROC. Article 2(1) of the ICCPR provides that each state party undertakes to respect and ensure to all individuals within its territory the rights recognised in the covenant without distinction of any kind. Article 26 prohibits discrimination on any ground. Article 2(1) of CROC extends states' obligations to respect and ensure convention rights to every child within their jurisdiction without discrimination of any kind irrespective of the child's . . . legal status or that of the child's parent or legal guardian. State parties are called upon by art 2(2) to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status of their parents, legal guardians or family members. Significantly, CROC extends protections, without distinction, to child asylum seekers and children who have been determined to be refugees. Under art 22, children in both categories are to be extended appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in CROC and in other human rights instruments ratified by state parties.

Article 24(1) of the ICCPR provides that every child shall be afforded, without discrimination, such measures of protection as required by his status as a minor, on the part of his family, society and the State. Special protection and assistance is to be extended to unaccompanied minors pursuant to art 20(1) to ensure the enjoyment of all rights under CROC and the right to an appropriate education is to be extended on the basis of equal opportunity in accordance with art 28(1).

(d) Detention

The ICCPR and CROC prohibit arbitrary detention. The ICCPR declares by art 9(1) that 'everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention'. The unlawful or arbitrary deprivation of liberty of children is prohibited by art 37(b) of CROC. The arrest, detention or imprisonment is to be used only 'as a measure of last resort and for the shortest appropriate period of time'. Those deprived of their liberty are entitled to challenge the legality of the deprivation of liberty and to receive a prompt decision by the operation of the ICCPR's art 9(4) and art 37(d) of CROC. Adults and children who are detained are required under art 10(1) of the ICCPR and CROC's art 37(c) are to be treated with humanity and respect for the inherent dignity of the human person. Article 37(c) and the ICCPR's art 10(3) call for children to be separated from adults in detention and treated in a manner which accounts for their age. Article 37(c) requires such separation unless it is considered in the child's best interests not to do so and calls on states to facilitate contact between detained children and their families. Australia's ratification of CROC was subject to a reservation to art 37(c).59 The reservation has been maintained on the basis that detention of

59 The need to detain children and adults together has been maintained on the basis of Australia's demographics and geographic size. Although the supervisory UN Committee on the Rights of the Child has indicated that this reservation may impede Australia's full implementation of the instrument Concluding Observations of the Committee on the Rights of the Child, UN Doc CRC/C/15/Add.79(1997), Pt C, para 8.
children together with adults 'remains necessary because of the demographics, geographic size and isolation of some remote and rural areas of Australia'.60

(e) Comment on International standards

The failure of the detention regime to comply with the standards considered in (a) to (d) above is taken by the authors to be self-evident. But the detention regime goes further than this in subverting the key principles and underlying assumptions of CROC.

The standards contained in CROC assume a triangular relationship between child, family and the state.61 Parents are assumed to have primary responsibility for the upbringing and development of the child, with the state assisting parents in their role and intervening where parents' failure to perform their role may amount to abuse. Immigration detention decimates the triangular relationship between children, parents and the state. Parents place their children and themselves at the mercy of the state; submitting them to the perilous journey to Australia in a quest for the recognition and protection of their human rights. Instead of receiving assistance in their parenting role, parents in immigration detention are denied of autonomy. They have thus experienced a form of de-skilling, and are rendered incapable of making the most basic decisions concerning their children's welfare. These parents and their children are therefore dependent upon the beneficence of the state. Yet the state has adopted a policy which is punitive in its effect and assumes them to be unentitled to protection.

Immigration detention has also subverted CROC's assumptions about children's evolving capacities, as reflected in the discussion in Part 2B above. While CROC calls for parents and the state to nurture and promote children's abilities, the experience of immigration detention has the effect of suppressing these abilities and extinguishing the potential for a future in which the human rights enshrined in CROC and other applicable instruments can be effectively enjoyed.

The harsh conditions prevailing in Australia's immigration detention centres have raised questions about Australia's compliance with a range of international obligations which prohibit torture or other cruel, inhuman or degrading treatment or punishment. These include art 37(a) of CROC, art 7 of the ICCPR and art 2 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter, Torture Convention). They are also unlikely to foster the health, self-respect and dignity required to ensure recovery from past torture and trauma in accordance with art 39 of CROC.

It is also arguable that the prohibition against torture or cruel, inhuman or degrading treatment is infringed by virtue of violations of the economic, social and cultural rights enshrined in CROC as well as the International Covenant on Economic, Social and Cultural Rights (hereafter, ICESCR). CROC

Children's Rights combines civil and political rights, such as rights concerning detention (art 37) and participation (art 12) with the economic and social rights such as the right to the highest attainable standard of health (art 24), a standard of living adequate for their physical, mental, spiritual, moral and social development (art 27) and the right to education (art 28). On the basis of children's heightened vulnerability to deprivations of economic, social and cultural rights, McBride argues that such deprivations may in fact also amount to torture in circumstances where a requisite degree of proximity can be established between the deprivation and the consequent suffering. The need for proximity will be met in circumstances where it can be demonstrated that the suffering experienced by the victim would not have occurred but for a specifically identified act or omission. In determining whether such a 'double-counting' of violations is warranted, McBride considers whether treatment is, 'at the very minimum, a gross form of humiliation, rising to the deliberate infliction of severe mental or physical suffering'. He considers where such violations may occur and speculates that they might extend to 'conditions imposed on those seeking social security benefits which are so humiliating that they operate effectively as a deterrent from seeking them and, therefore, the denial of it to those who ought to receive it ... and inadequate or incompetent care by the very institutions that are supposed to help those who are weak emotionally or mentally could well be degrading, if not worse'.

McBride acknowledges that it may be difficult to establish such a violation, owing to states' duties to progressively realise economic, social and cultural rights in light of available resources and the difficulties experiences by states in regulating the conduct of private actors. These difficulties can be readily answered in the instance of immigration detention. While detention centres have been privately operated since 1998, the private operators were acting as delegates of the government. Furthermore, the operation of immigration detention centres is, without doubt, a drain on Australia's resources. Nevertheless, standards of health care, nutrition and education have been the subject of ongoing concern, as documented in HREOC's A last resort?

Characterising deprivations of economic, social and cultural rights — or,

indeed, other fundamental human rights — as torture in the case of immigration detention of children is not radical. Such an approach is consistent with the acknowledged indivisibility, interdependence and interrelatedness of all human rights.66 It is also consistent with the objectives cited in CROC’s preamble, which makes reference to international instruments concerned with the welfare of children, including the Universal Declaration of Human Rights, the ICCPR and the ICESCR. Evidence which has emerged in court proceedings concerning the detention of children would suggest that McBride’s torture argument is worthy of serious consideration. These proceedings have applied the law of negligence and are considered below.

With reference to children’s vulnerabilities, Tobin advocates a ‘child-centric’ approach to legal discourse concerning torture67 and draws upon the views of the UN Committee on the Rights of the Child that ‘the critical starting point and frame of reference must be the experience of the children themselves’ 68. From this he concludes that many child detainees have experienced cruel, inhuman or degrading treatment if not torture.69 Tobin proffers the prohibition against torture and other cruel inhuman or degrading treatment as a basis upon which to determine the constitutional validity of detention and argues for the recognition of an implied protection against such treatment under the Constitution on the basis that such a prohibition reflects a fundamental value which lies at the heart of any democratic society. A number of judgments are drawn upon in support of Tobin’s argument, including that of Gleeson CJ in Woolley which concedes the possibility that the detention regime may be found unconstitutional if the severity of its operation altered the character of the power of detention. It is suggested that the basis upon which the severity of conditions of detention should be assessed should be the prohibition on torture and cruel, inhuman or degrading treatment.

B UN scrutiny

A number of UN based bodies have scrutinised Australia’s immigration detention regime and expressed concerns about its failure to comply with standards accepted by Australia.70 The ICCPR’s supervisory Human Rights

68 Committee on the Rights of the Child, Discussion day on Violence against Children within the Family and at School, 28th session [704], UN Doc CRC/C/11(2001) cited in J Tobin, ibid.
69 Ibid 167.
70 These bodies include the UN Human Rights Committee, the UN Working Group on Arbitrary Detention and the Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights. One of the applicants in Lim, above n 23, known as ‘A’, submitted a communication under the ICCPR Optional Protocol: A v Australia, Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993 (1997). The Committee concluded that A’s detention for 4 years was arbitrary in accordance with the ICCPR’s article. 

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Committee has now heard a series of communications with respect to immigration detention. In every instance, it has found violations of the ICCPR. In every instance, Australia has chosen to reject the Committee's findings. In its most recent findings concerning the detention of Roqaiha Bakhtiyari and her five eldest children, the Committee concluded that their detention was arbitrary in accordance with art 9(1). The discrimination prohibition contained in art 24(1) was interpreted with reference to CROC and found to have been violated by Australia's detention of the children. The failure to consider whether detention or release were in the children's best interests resulted in the Committee concluding that the paramount 'best interests of the child' principle enshrined in art 3(1) of CROC was violated. On account of Australian courts' lack of discretion to undertake a substantive review of the justification for detention, art 9(4) was found to be violated with respect to Mrs Bakhtiyari and with respect to her children until the Full Family Court made its landmark finding in B & B v MIMIA that it had jurisdiction to order release of the children from detention. The effective remedy in the form of compensation which the Committee found that Australia was obliged to pay the Bakhtiyari family was never provided.

In May-June 2002, the UN Working Group on Arbitrary Detention and Justice P N Bhagwati, Regional Advisor for Asia and the Pacific of the UN High Commissioner for Human Rights, made a joint visit to Australia's immigration detention centres. The Working Group reported to the UN Commission on Human Rights in 2003. It compared the conditions of immigration detention to those of prisons and concluded that immigration detention was, in some respects, less favourable. The Working Group concluded that Australia was in violation of a number of international standards, including arts 2, 9 and 10(1) of the ICCPR and called upon Australia to uphold the principle of pacta sunt servanda, requiring good faith compliance with treaty obligations in accordance with s 26 of the Vienna Convention on the Law of Treaties. In his report to the UN High Commissioner for Human Rights, Justice Bhagwati detailed the prison-like conditions witnessed at Woomera Immigration Reception and Processing Centre. Bhagwati described his distress upon witnessing a 'great human tragedy', with detainees living in prison-like conditions and children living in

9(1) and not subject to proper judicial review (providing for review of A's continued detention and, if appropriate, ordering release).


72 Australia's response to communications under the ICCPR's First Optional Protocol is considered in W Morgan, 'Passive/aggressive: the Australian Government's responses to Optional Protocol communications' (1999) 5 AJHR 55.


an environment which hampered their physical and mental growth. The consequent despair of many was observed to manifest itself in self harm and utter despair. Bhagwati concluded that the detention regime was in violation of Australia's human rights obligations; including its obligations with respect to detention in art 9 of the ICCPR and art 37 of CROC. In a joint media release, Minister Philip Ruddock, together with Foreign Affairs Minister Alexander Downer and Attorney-General Daryl Williams, announced the government's rejection of the Bhagwati report. Bhagwati's criticism is described as emotive and fundamentally flawed. It is alleged that the report failed to comprehend the significant justifications underpinning the policy, notably the detainees' illegal arrival in Australia. The media release affirmed Australia's commitment to human rights standards in the instruments it has ratified. Making no mention of provisions such as art 31 of the Refugee Convention, it maintains that Australia's detention policy is implemented in compliance with international standards.

C Under the spotlight of the Human Rights and Equal Opportunity Commission

HREOC instituted a national inquiry into children in immigration detention in November 2001 which was tabled in parliament on 13 May 2004. Drawing its title, 'A last resort?' directly from art 37(b) of CROC, the 900 page report was based on visits by Human Rights Commissioner Dr Sev Ozdowski, to all mainland detention centres, 346 written submissions, evidence from 155 witnesses and written and oral evidence from detainees, medical experts, DIMIA and Australasian Correctional Management. The report made a number of key findings. These included the conclusion that long-term detention creates a heightened risk of serious mental illness. They also included a range of findings with respect to the inconsistency of the detention regime with Australia's human rights obligations. A fundamental inconsistency was identified with CROC — in particular art 37(b), (c) and (d), the best interests consideration in art 3(1), the need to extend appropriate assistance to child asylum seekers as well as refugees in accordance with art

78 HREOC, above n 6. The phrase 'a last resort' is drawn directly from art 37(b) CROC. An earlier report on the detention of boat arrivals by former Human Rights Commissioner, Chris Sidoti, recommended that detention of asylum seekers be for a minimal period, subject to effective independent review and that children should only be detained in exceptional circumstances: Those who've come across the seas. Detention of unauthorised arrivals, http://www.hreoc.gov.au/human_rights/ (11 May 1998). Notwithstanding the HREOC report, the policy of mandatory detention of all unlawful non-citizens, irrespective of age, and other factors (such as danger to the community or risk of absconding) was maintained.
79 Australasian Correctional Management operated Australia's immigration detention centres pursuant to a commercial agreement with the DIMIA from February 1998 until early 1994, when the management was handed over to Group 4 Falck Global Solutions Pty Ltd, a subsidiary of the Copenhagen-based GSL Corporation.
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22(1) and the obligation to provide an environment which fosters the health, self-respect and dignity of children recovering from torture and trauma in accordance with art 39.

The inquiry concluded that Australia’s detention laws should be amended, as a matter of urgency, to comply with CROC. It was recommended that legislative amendment be effected to introduce a presumption against the immigration detention of children, provision for independent review of detention within 72 hours of any initial detention, prompt and periodic review by a court of the legality of detention, guided by principles derived from CROC and the appointment of an independent guardian for unaccompanied children. Upon tabling the report, Dr Ozdowski called for the release of all children by 10 June 2004. Predictably, a joint media release issued by Ministers Vanstone and Ruddock rejected the report’s major findings. The document accuses HREOC of being ‘unbalanced and backward looking’ and giving weight ‘selectively to interpretations of events, rather than grappling with the complexity of the issues’.

D Incorporating international treaties into Australian law

The resilience of the mandatory detention regime, notwithstanding its contravention of Australia’s international standards, is attributable to the anomalous place occupied by international standards in Australian law. Australia does not have an express Constitutional or statutory Bill of Rights. The consequent dearth of human rights jurisprudence in the interpretation of legislation and the Constitution has facilitated the establishment and maintenance of an increasingly harsh immigration regime and has restricted the judicial review power.

States are able to control the extent to which international law impacts on domestic law. As members of the international community they elect whether or not to bind themselves to an international instrument. Even if they decide to partake, they may reserve their right not to be bound by particular articles. Furthermore it is not unusual for treaties to be deliberately vague and not to prescribe the exact terms of implementation of an obligation leaving the States with a degree of discretion. However, it is a fundamental principle of legal policy that where possible domestic law should accord with international law. Furthermore, in accordance with arts 26 and 31 of the Vienna Convention on the Law of Treaties, treaty obligations shall be performed and interpreted in good faith.

Nevertheless, inconsistency with international standards does not invalidate

81 For example, as referred to in above n 57, Australia is a signatory to CROC but has made a reservation in respect of art 37(c) referring to the deprivation of liberty and the need in this case to separate children and adults.
83 See above n 76.
Australia’s domestic law, which retains a position of dominance. Australia follows a dualist system. International law does not become part of domestic law unless and until a statute has been passed incorporating or transforming it into domestic law. Thus pursuant to the doctrine of separation of powers the Executive may enter into and ratify a treaty but it does not become Australian law until the legislature actively take steps to incorporate it within Australian domestic law, as authorised by the external affairs power in s 51(xxix) of the Constitution. The mere fact that Australia becomes a party to a treaty will not in itself give force to the rights and obligations under the treaty in domestic law. This is ‘designed to ensure that the executive [does] not usurp the role of the legislature, and use treaties as a means to bypass parliament’. Australia’s willingness to enter into international treaties is not necessarily matched by an interest in implementing the treaties it has ratified. For this reason Australia has been described as ‘janus faced . . . the international face smiles and accepts obligations while the domestic-turned face frowns and refrains from giving them legal force’.

Compliance with international obligations assumes that governments will take the appropriate action. This may involve the passing of new legislation. Alternatively it may be decided that treaty obligations are capable of being implemented through existing legislation or a combination of both. A common method of incorporation is for legislation to provide that the particular treaty obligation will have the force of law in Australia. A limited exception to the general principle that treaties have no effect in domestic law unless implemented by statute is the doctrine of legitimate expectation. The doctrine holds that ratification of a treaty gives rise to a legitimate expectation that administrative decision-makers will act in conformity with its standards. The High Court found in Teoh90 that administrative decision-makers were obliged to consider the best interests of the child in the decision-making process as a consequence of Australia’s ratification of CROC.

Australia’s Parliament has incorporated few standards contained in international human rights instruments into domestic law. Exceptions to this tendency include the Racial Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1984 (Cth). Two further exceptions are worth noting.

84 See Lim, above n 23 per McHugh [74]; see also Brennan, Deane and Dawson JJ [38] and Toohey J [52].
85 See Bradley v Commonwealth (1973) 128 CLR 557, esp 582-3 (Barwick CJ and Gibbs J).
88 The Commonwealth Government ratified the ICCPR on the basis that the rights and freedoms contained in this Covenant are already protected in existing Australian law. This led the High Court to chastise the federal government in Dietrich v R (1992) 177 CLR 292 at 305; 109 ALR 385 at 391 (Mason CJ and McHugh J) for exposing Australia to censure by the Human Rights Committee. See R Balkin, ‘International Law and Domestic Law’ in S Bly, R Piotrowicz and B M Tsamenyi (eds), Public International Law: An Australian Perspective, Oxford University Press, Melbourne, 1997, pp 119, 130.
89 See, for example, Diplomatic Privileges and Immunities Act 1967 (Cth).
90 See above n 52. The doctrine of legitimate expectation was called into question, but not overturned, in Re Minister for Immigration and Multicultural Affairs: Ex parte Lam (2003) HCA 6, 195 ALR 502.
91 These acts seek to incorporate the provisions of the International Convention on the
The first is the Human Rights and Equal Opportunity Commission Act 1986 (hereafter, HREOC Act), pursuant to which the ICCPR and CROC are declared instruments. The standards contained in these instruments are accordingly 'human rights' under s 3 of the HREOC Act. The second is the possible incorporation of CROC into Pt VII of the Family Law Act. Whether the HREOC Act or the Family Law Act incorporate the provisions of the international instruments, in whole or in part, remains unresolved.\(^9\)2

The Migration Act, a statute which regulates immigration and is of broad scope, incorporates Australia's obligations under the Refugee Convention, albeit in an unclear and limited manner which subsumes refugee protection within the umbrella of immigration control.\(^9\)3

Australia has gone through the motions of reporting to UN Committees such as the Human Rights Committee, yet chosen to reject its concerns about the detention regime's inconsistency with fundamental human rights standards. The principle of pacta sunt servanda and the expectation in the human rights instruments that ratifying states will implement treaty standards into domestic law has been largely overlooked. Where this leaves the vulnerable and the unpopular is to look increasingly to the judiciary, as the independent third arm of government, to uphold human rights and fundamental freedoms. The next portion of this article examines the approach of the members of the High Court to Australia's international obligations to children in immigration detention.

E The High Court and Australia's international obligations to children

In \(B & B\ v\ MIMA\) the majority of the Full Court of the Family Court had concluded that the children in this case were being held in detention indefinitely and Australia was thus in breach of art 37(b) of CROC which states that 'the ... detention ... of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.\(^9\)4 On appeal, in \(MIMA\ v\ B,\) Kirby J suggested that the lawfulness of the children's detention might be viewed in terms of compliance with Australia's international law obligations.\(^9\)5

His Honour acknowledged that decisions of the UN Human Rights Committee could not be regarded as binding and were only persuasive in

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\(^9\)2 In \(Minogue v Human Rights and Equal Opportunity Commission\) (1999) 84 FCR 438; 166 ALR 129, the Federal Court rejected the incorporation of the ICCPR into Australian law by the HREOC Act. In \(Teoh,\) above n 52 Mason CJ and Deane J accepted that it was common ground that the provisions of CROC were not incorporated via the HREOC Act but were not required to decide the issue. See further Sifris and Penovic, above n 18.

\(^9\)3 See generally S Kneebone, 'What We Have Done with the Refugee Convention: The Australian Way' (2005) 22 Law in Context 83.

\(^9\)4 \(B & B,\) above n 16. For a detailed consideration of this decision, see Sifris and Penovic, above n 18.

\(^9\)5 \(MIMA,\) above n 13 at [139].
Australian domestic law. His Honour emphasised that it was imperative, wherever possible, that the interpretation of Australian legislation comply with its international obligations. According to Kirby J, as Australia had been found to be in breach of the ICCPR, it appears 'strongly arguable' that Australia is in breach of CROC.96 However, his Honour concluded that even though there was an arguable breach of Australia's international obligations, this could not sustain a reading down of the provisions of the Migration Act. Kirby J relied on two indications to refute a reading down of this legislation. First there was no hint in the legislation that children should be treated differently to adults and second the language of the legislation is intractable and cannot be read down to comply with international obligations.97

In Woolley's case the submissions on behalf of the applicants and submissions brought by HREOC as intervener called upon the High Court to consider the applicable standards of international human rights law. These standards were considered in the judgments of Gleeson CJ, McHugh, Kirby and Hayne JJ. All judges concluded that Australia's human rights obligations did not undermine the validity of the detention provisions of the Migration Act. Gleeson CJ concluded that on account of the provision's unambiguous language, any inconsistency with CROC would not justify a refusal by the court to give effect to the legislation.98 McHugh J undertook a consideration of international jurisprudence on the detention of asylum seekers and aliens.99 He concluded that the decisions and statutes referred to indicate that a detention regime such as Australia's may be arbitrary notwithstanding a detainee's power to request removal at any time. But he stressed that the issue before the court is the determination of the purpose of detention, a question not assisted by international jurisprudence or the practice of other states.

Kirby J too indicated that whether or not there is a breach of international law does not affect the validity of the provisions or the duty of the Court to give effect to them. His discussion of the presumption that legislation should be read to conform with international law was somewhat more subdued than that in the previous cases. He stated that it is legitimate for a court to interpret the law, so far as the language permits, to avoid departures from Australia's international obligations in construing any ambiguities in international law. The language of the provisions was 'relevantly clear and valid (and is the result of a deliberately devised and deliberately maintained policy of the parliament)'. The presumption thus gave way.100 Hayne J rejected the relevance of international treaties to the question of validity.101 Heydon J agreed with Hayne J subject to reserving any decision with respect to whether s 196 should be interpreted in a manner consistent with treaties ratified by Australia but not incorporated into Australian law. In light of Hayne J's position on international treaties and Heydon J's concurrence with his judgment, this somewhat cryptic reservation gives little cause to believe that

96 Ibid [153].
97 Ibid [156]-[159].
99 Ibid [107]-[114].
100 Ibid Kirby J [201].
101 Ibid [222].
F Incorporation of CROC unresolved

As an alternative basis for concluding that the Family Court of Australia has jurisdiction to make orders for the release of children from immigration detention the majority in B & B v MIMIA\textsuperscript{102} found that the CROC (or portions of CROC) have been incorporated into the Family Law Act, hence enlivening the external affairs power.\textsuperscript{103} On appeal to the High Court, Callinan J was the only judge to consider this issue and proceeded on the assumption that the welfare of children was capable of falling within the external affairs power. He suggested that clues as to the heads of power on which Parliament sought to rely may be found in the long title and Pt VII of the Family Law Act.\textsuperscript{104} In this case these indicators signified 'parentage and marriage'.

According to his Honour, for Pt VII to incorporate CROC into domestic law, it is necessary to demonstrate a 'clear connexion between the law and the treaty' and the law must have as its 'purpose or object' the implementation of the treaty.\textsuperscript{105} His Honour referred to the Family Law Reform Act 1995 (Cth) and concluded that those changes were aimed at 'the reinforcement of parental responsibility of children'.\textsuperscript{106} According to Callinan J the second reading speech indicated that CROC may have influenced the drafting of this legislation but it fell a long way short of incorporation. 'The parliament did not however intend to implement the Convention by, in some way enlarging or creating an all-embracing welfare jurisdiction.'\textsuperscript{107} His Honour alluded to the possibility that CROC may be aspirational only and commented that the deliberate vagueness and ambiguity of the wording of the Convention left the means of implementation to the discretion of its signatories.

Callinan J noted that whatever relevance CROC may have as a 'declared instrument' under s 47(1) of the HREOC Act, it has not been incorporated into the domestic law relating to the detention of unlawful non-citizens under the Migration Act.\textsuperscript{108} The other six judges failed to address this issue and thus the majority decision of the Full Court in B & B v MIMIA has not been overruled. Kirby J's silence contrasts with his Honour's earlier pronouncements about the place of international treaty obligations in Australian law.\textsuperscript{109} His silence may imply that his Honour considered that CROC had not been incorporated into the Family Law Act but was reluctant to make an express declaration. However, his Honour clearly explained that the question of the incorporation of CROC was ancillary to what he considered to be the essential question before the court — the unlawfulness of the children's detention. Accordingly,
the implementation of CROC would fall to be determined only if the detention of the children could be considered unlawful.\footnote{Ibid, for example, [171].}

It is unclear from \textit{B & B v MIMA} what portions of CROC Nicholson CJ and O'Ryan J considered have been incorporated into the Family Law Act—whether Pt VII in its entirety incorporates CROC or whether the majority judgment was specifically confined to the Family Court's welfare jurisdiction: 'we think that the parliament in passing s 67ZC, has implemented the relevant parts of UNCROC so far as this case is concerned.'\footnote{\textit{B & B}, above n 16 [288].} It remains to be seen whether the Family Court will continue finding for the incorporation of CROC and, if so, to what extent. It would appear that there is a greater likelihood that such reasoning will be dismissed as an innovative attempt to assist vulnerable children.\footnote{\textit{The Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) is currently before Parliament awaiting final assent. This legislation will have a profound effect on decision making relating to children. If and when the legislation receives final assent, the question of whether CROC has been incorporated into the Family Law Act may need reconsideration.}}

\section*{G Human rights and the law of torts}

A further possible vehicle for realising the rights of children in detention is the common law of tort. Proceedings may be brought 'to vindicate the substance of human rights protection'\footnote{C Scott, 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms' in C Scott (ed), \textit{Torture as Tort}, Hart Oxford, 2001, p 62.} by pleading causes of action in tort seeking to address the human rights violations emanating from immigration detention. Craig Scott has divided tort litigation seeking to protect and promote human rights into two categories. 'Instrumental' claims rely on private law causes of action which would instrumentally benefit the protection of a human rights interest while 'surrogate' claims 'come close to capturing, in an intrinsic sense', a human rights norm.\footnote{Ibid, p 166.}

In an action involving two adults seeking transfer from an immigration detention centre to a psychiatric facility, Finn J in the Federal Court of Australia concluded that the Australian government had breached its duty of care owed to the applicants with respect to the provision of appropriate psychiatric services.\footnote{\textit{S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs} (2005) 143 FCR 217; 216 ALR 252.} This duty of care could not be delegated to private contractors or sub-contractors. Although transfers of both men were affected prior to the delivery of the Court's judgment, Finn J found that the government breached its non-delegable duty of care. Allegations concerning the government's non-delegable duty to avoid injury to a child have been put before the Supreme Court of New South Wales in the matter of \textit{Shayan Badraie by his Tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors.}\footnote{\textit{Shayan Badraie by his Tutor Mohammad Saeed Badraie v Commonwealth of Australia} (unreported, NSWSC Common Law Division, Johnson J, 22 November 2005) [28]. See
Shayan Badraie was the subject of a 2002 HREOC finding with respect to human rights violations occasioned by his detention. He was diagnosed with acute/chronic post-traumatic stress disorder after witnessing or experiencing a series of traumatic and aversive events during his detention at Woomera and Villawood over a period of two years, then being separated from his parents and placed in foster care for a further period of five months. At the time proceedings were issued in the Supreme Court of New South Wales, Shayan and his family were living in the community after being granted temporary protection visas. The proceedings issued on Shayan’s behalf seek damages for negligence. It is alleged that the Commonwealth and the detention centre operators breached their duty of care by exposing Shayan to preventable injury and by not providing appropriate psychiatric treatment after becoming aware of his post traumatic stress disorder. In August 2005, the Court accepted, in general terms, the analysis of Finn J in the Federal Court concerning the Commonwealth’s non-delegable duty of care. But the Supreme Court of New South Wales did not ultimately determine whether this duty was breached with respect to Shayan. On 3 March 2006, a settlement of the proceedings was announced pursuant to which the Commonwealth of Australia agreed to pay $400,000 in compensation plus legal costs and to grant permanent residence visas to Shayan and his family. While the Badraie proceedings did not ultimately yield a legal precedent with respect to the contested issue of breach of non-delegable duty of care, it remains clear that the Commonwealth government would not agree to pay public money in the absence of a conclusion that it was exposed to the probability of legal liability. Faced with a strong, arguable claim the Commonwealth chose to settle the proceedings on terms rather than proceed to verdict.

5 The Minister’s guardianship and release of children from detention

Kirby J, at the conclusion of his judgment in Woolley, queried whether the Immigration (Guardianship of Children) Act 1946 (Cth) (hereafter, Guardianship Act) imposed a duty on the Minister ‘as “guardian” of every non-citizen child who arrives in Australia, imposed on the minister fiduciary obligations to act in respect of the applicants in the manner conventionally required by the law of an infant’s legal guardian’. (emphasis added) His Honour suggested that ‘the status of statutory guardian would appear to impose duties of individual decision-making giving explicit attention to the special needs of each particular child’ and may be ‘specially applicable to a minister of the Commonwealth as “guardian” given the ancient functions of the Crown, as predecessor to the minister, as parens patriae in respect of vulnerable children’.

The Guardianship Act was initially introduced when groups of mostly

118 Badraie v Commonwealth, above n 116.
119 Woolley, above n 14, per Kirby J [209].
British unaccompanied minors came to Australia during World War II. The object is to ensure that minors who arrive in Australia unaccompanied have a legal guardian. Minors who fall under this legislation become wards of the Minister for Immigration and Multicultural and Indigenous Affairs. The Minister in turn delegates this function to officers of the child welfare authority in each State and Territory. The guardianship continues until the child turns 18, leaves Australia permanently, becomes an Australian citizen or the Minister directs that the ward no longer be covered by the legislation.

The legislation distinguishes between two types of unaccompanied minors — an 'unaccompanied ward' that is a non-citizen child who does not have a parent or a relative over the age of 21 to take care of them in Australia, as against an 'unaccompanied non ward' that is a non-citizen child who does not have a parent but has either a relative over the age of 21 to care for them in Australia or the child enters Australia in the charge of and under the care of a person who is not less than 21 years of age. In terms of the legislation, the Minister may not be the guardian of an 'unaccompanied non ward'.

In WACB v Minister for Immigration and Multicultural and Indigenous Affairs, the Solicitor-General (after taking instructions from the Minister) confirmed that the Guardianship Act applies to an alien child arriving in Australia as an 'unlawful non citizen'. Thus this legislation applies to a narrow band of children in immigration detention, those who do not have a parent or a relative over the age of 21 in Australia and did not enter Australia under the care or charge of a person 21 years or over.

It is suggested that in Woolley, Kirby J is cautiously proposing that provisions of the Guardianship Act and the Migration Act may be inconsistent and require reconciliation. Significantly Gummow J in Woolley concluded that 'nothing here needs to be said about the scope' of the Guardianship Act and the position of children where the Minister is the guardian. Any inconsistency which may be discerned between the two pieces of legislation revolves around s 7 of the Guardianship Act which specifically directs the Minister to place the child in the custody of a 'suitable' person and, if he


124 WACB v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 210 ALR 190. In this case an illiterate unaccompanied minor made an application out of time to review the decision of the Refugee Review Tribunal. A fax had been sent in English to the Manager of the Curtin Detention Centre with instructions to pass it on to the applicant. The fax included the reasons for the decision as well as setting out the right of review and that the review application had to be lodged within 28 days. Gleeson CJ, McHugh/Gummow and Heydon allowed the appeal Kirby J dissented.

125 Woolley, above n 14, [209]-[210].

126 ibid [161].
considers necessary, to remove the child from the custody of that person. Custody has been held to concern the 'control, and the preservation and care of the child's person, physically, mentally and morally; responsibility for a child in regard to his needs, food, clothing, instruction, and the like'. Thus the Minister (or his delegate) may, pursuant to the Guardianship Act, decide on a case by case basis where, with whom and under what conditions a 'non-citizen child' should reside. Herein lies the inconsistency between the two pieces of legislation. Thus for the narrow group of children who are covered by the Guardianship Act their living conditions will be determined on an individual basis while children who are not unaccompanied minors will generally be placed in a detention centre until the final processing of their applications.

The Guardianship Act is designed to ensure that unaccompanied minors have a legal guardian. The guardianship comes to an end not on the conclusion of the processing of their applications but when the child turns 18. It is suggested that given the vastly different purposes of the legislation one cannot regard the provisions as inconsistent. While guardianship undoubtedly creates fiduciary obligations, the Guardianship Act requires the Minister to exercise those obligations in relation to a specific group of children and with a specific purpose 'to ensure that minors who arrive in Australia unaccompanied have a legal guardian'. The High Court concluded in Woolley that the Migration Act prevails over the common law parens patriae jurisdiction. Given the clear, unambiguous and unequivocal wording of the Migration Act it is highly unlikely that in examining the needs of children in immigration detention, cognizance will be taken of an act designed for a very different purpose. One can thus conclude that for the vast majority of children who are incarcerated in immigration detention the Guardianship Act is of little or no assistance.

6 Human rights in the political process

The executive arm of our federal government enters treaties on Australia's behalf. But in the absence of action by the legislature to incorporate those treaty's obligations into domestic law, the executive is able to act inconsistently with their obligations subject only to a legitimate expectation that it will not do so. In the politicised realm of populist asylum policy, executive action inconsistent with Australia's international obligations has most often been explained as giving effect to the popular will of the electorate.

Pursuant to art 3 of CROC, children have a right to demand that their best interests are a primary consideration in all matters affecting them. Moreover, according to the Family Law Act, when making decisions regarding with whom a child is to live or have contact with, the best interest of the child is

128 See Guardianship Act ss 6, 11.
129 Australian Government, Department of Immigration and Multicultural and Indigenous Affairs, Fact Sheet 84, Caring for Unaccompanied Minors http://www.immi.gov.au/facts/84unaccompanied.htm as 19 July 2005, which states that guardianship may also come to an end when the child becomes an Australian citizen.
the paramount consideration. While on a domestic level the government has legislated to enshrine the 'best interests' of the child as the all important consideration, this responsibility is abdicated in respect of children who accompany their parents into Australia in search of refugee protection. Our High Court has concluded that the wording of the legislation is unambiguous. The Family Court’s welfare jurisdiction does not stretch to releasing children from immigration detention. The overarching common law parens patriae jurisdiction is ineffective against the all empowering Migration Act. The judiciary can do no more than give effect to the unequivocal wording of this legislation, rendering Australia’s international obligations nugatory.

But while the courts have made little impact upon the promotion of human rights of children in detention, there have been some recent signs that public demand for the recognition and enforcement of children’s rights has not gone unnoticed. By 2004, no Australian was able to feign ignorance about the mandatory detention policy or its application to children. The detention regime had been the subject of regular news bulletins and the deterioration in mental health associated with life in detention has been extremely well-documented. There had been regular reports about the suffering of children, some of whom were born in detention, subsequent to which the Minister has used her discretion to release some of these children. But a piecemeal and reactive stance is an unsatisfactory response to a system which violates human rights on a wholesale and systematic basis.

There have been further indications that, as Fortin suggests, the language and rhetoric of rights can be a politically useful tool to achieve goals for children. Advocacy by non-governmental organisations and community groups used the rhetoric of human rights to articulate the problems inherent in the mandatory detention regime. In addition to the work of NGOs such as Amnesty International in lobbying to end the policy, a number of NGOs have been established to focus exclusively on the rights of refugee children. Among them is ChilOut (Children out of Detention) which has prepared a comprehensive report on the effects of immigration detention on children. This report has been available on the internet and has provided a valuable source of information, as has HREOC’s comprehensive ‘A Last Resort’. A large number of concerned individuals had visited detainees and reported on the conditions in which they live. Among them were four members of the Howard government who witnessed detainees ‘falling apart before our eyes’. These four ‘rebel backbenchers’ began lobbying the government to abandon the mandatory detention policy. After their efforts came to nothing,

130 See Family Law Act s 65E.
134 HREOC, above n 6.
135 P Georgiou, J Moylan, R Broadbent and B Baird.
Petro Georgiou MP prepared two private member's bills for introduction into the House of Representatives on 20 June 2005. The bills sought the judicial review of detention arrangements and release of all children and their families from detention unless a court determined that they presented a security or flight risk. The parliamentarians then commenced intense lobbying with the Prime Minister, whose public assertions with respect to the debate reiterated his commitment to the policy on the basis that it is appropriate and supported by the electorate which had returned the government to its fourth term in office some eight months earlier.

The two bills presented the Prime Minister with the danger of embarrassing divisions occurring within Parliament on a policy which polls were revealing was losing public support. The leverage afforded by the impending introduction of the Bills gave rise to an agreement between the Prime Minister and dissident parliamentarians and the introduction of the Migration Amendment (Detention Arrangements) Act 2005 which was passed on 19 June 2005. Section 4AA(1) states that '(t)he Parliament affirms as a principle that a minor shall only be detained as a measure of last resort'. Its wording suggests a grudging acceptance of CROC falling short of its incorporation into Australian law. Introducing the Bill on behalf of Minister Vanstone, the Minister for Citizenship and Multicultural Affairs, Peter McGuaran, stated as follows:

"The government's intention is that these amendments will be used to ensure the best interests of minor children are taken into account and that any alternatives to detaining these children in detention centres are carefully considered in administering the relevant provisions of the act. Where detention of a minor is required under the act, it is the government's intention that detention should be under the new alternative arrangements wherever and as soon as possible, rather than in detention centres."

References to human rights and human dignity were a feature of the parliamentary debates accompanying the introduction of the Bill. Bruce Baird MP noted that people from both sides of the House had expressed their 'strong concern at the way that the whole of the detention policy was being administered and at the serious breach of human rights that was occurring'. The explanatory memorandum states that the purpose of the amendments is to ensure that detention of families with children can take place in the community under conditions that can meet their individual circumstances. The amendments empower the Minister to allow families with children to live in a 'specified place' which could include a residence provided by an NGO, the home of a supporter or a hospital or clinic. Family members may remain in detention centres until their individual circumstances are considered and a determination made as to the appropriate 'specified place'. Children living in offshore detention facilities such as Christmas Island are not subject to the legislative amendments. The legislation directs the Minister to permit families to reside in a specified place but do not direct her to do so. The right to remain living in the community is subject to a Ministerial right of revocation based on the public interest. The legislation does not provide for the

137 Ibid [57]-[58] (Peter McGuaran, Minister for Citizenship and Multicultural Affairs).
138 Ibid [96] (Bruce Baird).
decommissioning of Australia's immigration detention centres. Adults without children remain in detention subject to new review powers which, under Pt 8C, require the Commonwealth Ombudsman to review their circumstances when they have been detained for 2 years or more, and every 6 months thereafter while they remain in detention.

With considerable media coverage, all children and their families were released from immigration detention centres on 29 July 2005. These families are now residing in the community and being supported by NGOs such as the Red Cross. They are still deemed to be in detention for the purposes of the Migration Act and have the legal status of detainees. The parents are not entitled to work and anecdotal evidence suggests that the 'de-skilling' effects of immigration detention have seen some families experience difficulties adjusting to life in the community. Family members may also be experiencing ongoing mental health problems as a result of time spent in detention centres.

Families released from immigration detention have experienced considerable trauma and humiliation. The detention environment from which they have emerged has rendered families unable to function with autonomy and exposed children to traumatic and stressful experiences. In light of the vulnerability of child asylum seekers, it is strongly arguable that their experiences in immigration detention have constituted torture or cruel, inhuman or degrading treatment. In the circumstances, art 39 of CROC requires state parties to take all measures to promote physical and psychological recovery and social integration in an environment which fosters the health, self-respect and dignity of the child. In considering how art 39 may be fulfilled, it is arguable that granting these children and their families permanent protection (and with it the rights which are accorded to Australian citizens) may go some way towards restoring dignity and facilitating recovery from the trauma which has marked their fractured young lives. Such an approach would free these children and their families from the psychosocial damage associated with the uncertainty which results from retaining the status of detainees under the Migration Act, albeit in less oppressive surroundings. Instead, the Australian government has considered that the best interests of these children may be best served by entrusting the restoration of their dignity to NGOs and the local communities. In light of the futile suffering they have experienced in immigration detention, it may indeed be in these children's best interests to be removed from the custody of the government and its delegates.

If Australia's immigration detention laws can be applied as a lens through which the sincerity of Australia's commitment to international rights (including the rights of children) may be gauged, the recent amendments are a welcome move. But they do not bind the Executive to comply with the provisions of CROC nor incorporate the instrument into Australian law. The Migration Amendment (Detention Arrangements) Act 2005 merely introduces the best interests of the child as an aspirational principle and a presumption that children are to be accommodated in environments other than the immigration detention centres they have hitherto inhabited. The legislation does not give the judiciary the means to apply children's rights in the event that they conflict with the clear provisions of the Migration Act. Without the incorporation of children's rights into domestic law, advocates have been
required to resort to exploring the boundaries of the common law. The legislative amendments do not provide any guarantees that children will not be returned to detention centres. It is suggested that a substantive commitment to children's rights would extend to the incorporation of CROC into Australian law via domestic legislation, thus enabling the development of a culture and jurisprudence of children's rights. It is the lack of such a culture and jurisprudence that facilitated the longevity of a policy which has rendered our courts ultimately powerless to uphold fundamental human rights and address institutionalised abuse which, in its impact upon children, may amount to torture.

7 Conclusion

The recent amendments to the Migration Act have qualified the operation of Australia's immigration detention regime. In introducing, as a matter of principle, the presumption that children should not be accommodated in the detention centre environment, these amendments have been significant. They have achieved what a number of UN committees and HREOC have been unable to achieve on account of the Australian government's ability to reject their concerns and ignore its obligations to perform its international legal obligations in good faith. The amendments have achieved what the judiciary has been unable to achieve owing to the clear wording of ss 189 and 196 of the Migration Act, with the result that the impact of the detention on children has been seen as irrelevant owing to the provisions' legitimate administrative purpose. The amendments have seen the language of children's rights appear within an Act of Parliament which has for 13 years served as a vehicle for children's suffering, humiliation and the emergence of preventable mental illness. However, the recent amendments do not incorporate CROC into Australian law. Whether they live up to their promise of a more humane and compassionate regime will rest upon the discretion of the Minister. Yet the suffering wrought by Australia's detention policy is a clear sign that the dignity of children who have made the perilous journey to Australia seeking protection of fundamental human rights is far too important to rest upon Ministerial discretion alone.

Postscript

In a disturbing example of the vulnerability of refugee protection to the dictates of politics, an overhaul of Australia's protection regime was announced as this journal goes to print. The announcement followed a decision made by DIMIA on 23 March 2006 to grant temporary protection visas to 42 West Papuan asylum seekers who had arrived in Australia by boat on 18 January 2006. The West Papuans included in their number a four year old child. The decision to grant them protection provoked a hostile reaction from Indonesia and the recall of Indonesia's ambassador from Canberra. On 13 April 2006, Immigration Minister Amanda Vanstone announced that asylum seekers who arrive in Australia by boat will no longer be processed on Australia's mainland. Instead, they will be processed in offshore centres such
as Nauru. If they are found to be entitled to refugee protection, these people will be resettled in a ‘third country’.

The new policy has been said to take effect immediately, with legislative amendments soon to be introduced into Parliament. The policy will have the consequence that asylum seekers will remain in offshore processing centres until their entitlement to protection is determined. It has clear implications for Australia’s compliance with art 31 of the Refugee Convention (see Part 4A above) and amounts to an attempt to exclude undocumented arrivals from Australia’s refugee protection regime.

In less than nine months since children and their families have been removed from Australia’s immigration detention centres, this radical policy change may again see children and their families living in detention. Offshore detention centres have formed a part of Australia’s refugee regime in conjunction with mainland detention centres since the introduction of the ‘Pacific Solution’ in 2001. The new policy is set to see all undocumented arrivals processed offshore. The hopelessness and uncertainty experienced by detainees in mainland detention centres has been magnified by the experience of isolation and inaccessibility in the offshore processing centres. The government’s reactive policy change betrays the depth of our commitment to securing the rights of children seeking asylum and their families.

139 See, for example transcript from ABC Radio National PM at http://www.abc.net.au/pm/content/2006/s1616160.htm (last accessed 18 April 2006).
Chapter 4

Tania Penovic, ‘Labor’s ‘New Directions in detention’ three years on: plus ça change’ (2011) 36(4) Alternative Law Journal 240-244
LABOR'S 'NEW DIRECTIONS IN DETENTION'-THREE YEARS ON
Plus ça change

TANIA PENOVIC

At least five suicides or undetermined deaths due to external causes have apparently occurred in the last 18 months in the IDC [Immigration Detention Centre] population of about 3,500, making a suicide rate of somewhere between 100 and 200 per 100,000 per year... Self-harm remains endemic... There is at least one serious suicide attempt per day in Woomera IDC, and at the time of writing 60 out of 500 were on suicide watches... Many children are suicidal, and have engaged in a range of seriously life-threatening actions.3

Suicide Prevention Australia submission, 2003

A Sri Lankan man approved as a refugee has committed suicide in immigration detention in Sydney after waiting more than two years for a security clearance... He died from apparent poisoning after midnight. He'd been recognised as a refugee two months ago and was awaiting security clearance from AOSI... It's the sixth suicide in immigration detention in the past year. Four of those deaths have been in Villawood.4

ABC Television, Lateline, 26 October 2011

The failure of the government's recent 'Malaysia Solution' has forced it to confront the reality of processing asylum seekers in Australia and the continuing crisis in immigration detention. As at 30 September 2011, there were 5597 people in immigration detention.5 With increased waiting times, overcrowding and concern about mental health services, there were 9157 incident reports provided to the Department of Immigration and Citizenship between 1 October 2009 and 30 June 2011.6 There have been numerous hunger strikes, acts of self harm and six suicides between August 2010 and October 2011.7

The crisis in the detention network stands in stark contrast with Labor's 2007 election platform and policy unveiled in 2008. Introducing the current policy, then Immigration Minister Chris Evans sought to distance his government from its predecessor's policies, declaring that 'Labor rejects the notion that dehumanising and punishing unauthorised arrivals with long-term detention is an effective or civilised response' and that the 'Howard government's punitive policies did much damage to those individuals detained and brought great shame on Australia'.8 Minister Evans released a set of values which promised to finally reverse the presumption of detention and adopt a risk-based approach whereby only those considered to represent a risk to the Australian community would remain in detention after the completion of screening.

Australia's immigration detention regime is the subject of a current federal government enquiry.9 This is not the first investigation into Immigration detention. Thousands of pages of observations and recommendations have been issued by United Nations (UN) bodies, human rights agencies and federal government committees. Yet the printed word has not translated readily into law reform. This article will examine how detention practice came to depart so dramatically from the government's own policy values and consider the opportunities presented by its grudging retreat from offshore processing and the current enquiry:

Human resilience in the face of policy resilience

By the time of the 2007 election, thousands of children and adults had been detained in Australia's privately operated IDCs. Many faced liability for the costs of their detention. Extensive research has supported the observation by psychiatrist Dr Jon Jureidini that the detention environment is 'almost designed to produce mental illness'.10 The impact of detention is exacerbated by its indeterminate and often prolonged duration, the conditions and remote location of IDCs. Efforts to distance asylum seekers from essential services and infrastructure were radically expanded under the Pacific Solution which saw asylum seekers detained in Papua New Guinea and Nauru and processed outside Australian law and the construction of an IDC at Christmas Island, some 2800 kilometres west of Darwin. The 'mandatory detention' legislation remained impervious to the circumstances faced by those who fell within its ambit. The Australian Constitution's aliens power (s 51(xix)) was found by the High Court to permit the detention of non-citizens without a valid visa ('unlawful non-citizens') irrespective of their welfare needs and age, the conditions in which they are held, or duration of detention. In authorising indefinite detention which may continue for life, the judgment in Al Kateb v Godwin11 highlighted the dispensability of Australia's international human rights obligations and featured prominently in advocacy around a federal bill of rights. Concerns expressed by the Australian Human Rights Commission (AHRC), NGOs and UN organs were routinely ignored by the Howard government.

The creation of a special bridging visa to facilitate the release of asylum seekers who, like Mr Al Kateb, could not be removed from Australia in the reasonably foreseeable future, did not allay concerns about the regime's excesses. The wrongful detention of mentally

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4. Submissions received by the Joint Select Committee on Australia's Immigration Detention Network, DIAC answers to questions on notice.
5. Chris Evans MP, 'New Directions in Detention - Restoring Integrity to Australia's Immigration System' (Speech delivered at Seminar. ANU College of Law. Canberra, 29 July 2008).
7. 7 S Secretary, Department of Immigration and Multicultural and Indigenous Affairs (2005) 143 FCR 217 at [140].
The failure to redefine immigration detention has seen the Minister engage in disingenuous rhetoric and contradict the legislation which lies at the heart of his portfolio.

ill Australian permanent resident Cornelia Rau revealed IDCs as repositories of human suffering which were absorbing vulnerable people to whom the Migration Act 1958 (Cth) did not apply. The Palme Inquiry into Rau's detention revealed deep-seated cultural and attitudinal problems within immigration bureaucracy and, with the Conrie Inquiry into the deportation of Australian citizen Vivian Alvarez Solon, led to the identification of a further 247 detainees who held Australian citizenship, permanent residence or valid visas. These vulnerable people found themselves incarcerated through a combination of mismanagement, process deficiencies, erroneous suppositions and insufficient efforts towards identification.

The foundations of reform
Pressure to abandon the detention regime was galvanised by the AIKateb case, Cornelia Rau's detention and a growing focus on the preventable harms visited upon child detainees. Children are less amenable to demonisation than adults and in 2004, the AHRC's comprehensive report on children in immigration detention* chronicled children's narratives, catalogued the extensive harms emanating from immigration detention and detailed the human rights standards which the regime failed to meet. It highlighted the indivisibility of human rights and the reality that, in the absence of liberty, other human rights become unattainable.

Lobbying efforts by members of the Howard government led to a compromise which maintained immigration detention while ameliorating its harsh impacts. Amendments to the Migration Act affirmed in principle that children shall only be detained as a measure of last resort. While children and families awaiting refugee status determination were deemed to be in immigration detention, they could live in the community pursuant to a Ministerial 'residence determination'. The Commonwealth Ombudsman was charged with reviewing the circumstances of persons detained for more than 2 years, and every six months thereafter. On 29 June 2005, all children and their families were released from IDCs.

Following the reforms, a Senate enquiry into the Migration Act's administration and operation identified three key problems associated with immigration detention: its indeterminate duration, questionable effectiveness and consistency with international law. The disparity between Australia's international human rights obligations and its domestic law was most apparent in the practice of detaining asylum seekers without assessment of their individual circumstances for the duration of the status determination period and the absence of independent review mechanisms.

Some of the Committee's recommendations, including the establishment of regular official visits by the AHRC and Commonwealth Ombudsman, were adopted by the government. Recommendations likely to facilitate more profound change were rejected. These included the return of IDC services to the public sector; an initial period of detention limited to 90 days for screening, identity, security and health checks and continued detention subject to a formal process (such as court approval) on specified grounds and limited to situations where the detainee is likely to evade immigration processes or otherwise pose a danger to the community. While a 30-day cap on initial detention would be preferable to the Committee's recommended limit, a risk-based approach would permit continued detention only where it can be justified in light of an individual's circumstances. Subject to clear definition of risk and effective judicial approval and oversight, this approach would align Australia's domestic law with its international human rights obligations, including the prohibition on arbitrary detention and the obligation to facilitate judicial review to determine the lawfulness of detention in article 9 paragraphs (1) and (4) of the International Covenant on Civil and Political Rights ('ICCPR').

Labor's 'new directions'
The prospect of a more humane approach showed promising early signs. In February 2008, the last remaining asylum seekers detained on Nauru were transferred to Australia, marking the end of the 'Pacific Solution.' A promise to abolish temporary protection visas was acted on, the Ombudsman's oversight role extended and liability for detention debt extinguished.

In a speech delivered on 29 July 2008, then Immigration Minister Chris Evans announced that Cabinet had endorsed seven new 'key immigration values.' While mandatory detention remained an essential component of strong border control (value 1), confinement in IDCs would be used only as a last resort for the shortest practicable time (value 5). A risk-based approach would see detention used to manage risks to the community. Accordingly, people who pass health, identity and security checks would be released into the community unless they present an unacceptable risk or have repeatedly refused to comply with visa.
conditions (value 2). The detention values promised to reverse the presumption of confinement and would require immigration officers to justify any decision to detain, auguring an end to arbitrary detention for the duration of the status determination process. Subject to a transparent and clearly defined risk assessment process, the new values pledged to alleviate the human impact of indefinite detention and significantly reduce public costs.

Children would, where possible, not be detained in an IDC (value 3). Safeguards would be introduced, including the requirement that people be treated fairly and reasonably within the law (value 6). The circumstances of detention were also recognised, with conditions of detention required to ensure detainees' inherent dignity (value 7), indefinite or otherwise arbitrary detention considered unacceptable and the length and conditions of detention (including accommodation and services) subject to regular review (value 4).

In June 2008, an inquiry into immigration detention was commenced by the Joint Standing Committee on Migration ("JSCM"), leading to the release of three separate reports. The first supported the policy values and recommended their enactment into law as a priority, noting their absence from the Migration Act both in substance and spirit. The second report recommended that the bridging visa framework be used pending resolution of immigration status to comprehensively support persons released into the community. Recommendations in the third report included physical changes to IDCs and, wherever possible, the use of detention in immigration residential housing. Like other reports into immigration detention, the three JSCM reports did not facilitate substantive change.

Policy without law

Administrative implementation of the key immigration values is reported to have commenced in June 2008.

One year later, the Migration Amendment (Immigration Detention Reform) Bill 2009 ("Cd") was introduced in accordance with the JSCM's recommendation that the values be enshrined into law. The 2005 reforms, dismissed the previous year as 'superficial and inadequate', were repackaged as 'important steps in liberalising what had become a harsh and inefficient system' that the Bill was 'to build on'.

In giving legislative backing to a range of policy safeguards, the Bill represented an opportunity to advance human rights. Most significantly, it sought to qualify the mandatory operation of detention in accordance with value 2. Rather than requiring detention of all unlawful non-citizens, the duty to detain would be confined to those who have bypassed or been refused immigration clearance, given false information or considered an unacceptable risk to the community. It also sought to impose a duty to make reasonable efforts to ascertain detainees' identity, character concerns, health and security risks and to resolve immigration status, thus going some way towards avoiding the predicament which befell Cornelia Rau and others.

The Bill reflected value 5 by affirming in principle that detention in IDCs is a measure of last resort limited to the shortest practicable time and sought to embed value 3 by providing that if a minor is to be detained, they must not be held in an IDC. The ambit of immigration detention was to be broadened to include 'temporary community access permission'. People held in various settings, including 'community detention' and hostel style 'immigration transit accommodation' would remain in immigration detention. In retaining the definition of immigration detention, the Bill did not seek to address the dissonance between the law and policy, as demonstrated by Minister Evans' statement that:

[w]e have the definitions in the Act which do need changing. People still say to me, 'You've still got children detained'. That is legally true but I would argue they are not really detained if they are in community detention.

The Minister's assertion that accommodation outside the IDC environment is not detention does not stand up to scrutiny. Closed facilities such as Christmas Island's 'Construction Camps' have been packaged as 'alternative temporary detention in the community'. The failure to redefine immigration detention has seen the Minister engage in disingenuous rhetoric and pretend the legislation which lies at the heart of his portfolio. On 18 October 2010, one month after stating 'there's no children in detention centres as such', Evans' successor Chris Bowen announced that he would begin to grant residence determinations to 738 children held in immigration detention and their family members, and hoped that most would be moved into community detention by June 2011.

While Minister Bowen's decision to exercise his discretion soon after assuming his portfolio is laudable, it was observed that '[i]t takes some pretty incredible chutzpah to announce the abolition of a policy you have never actually admitted having'.

The Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee, which ultimately recommended that it be supported subject to amendments which would more closely correspond with the government's values. It has since lapsed. The intervening period has seen a return to the hallmarks of the Howard years: overcrowded IDCs populated by distressed individuals and divisive populism in public discourse around refugee protection. Prospects of the Bill's reintroduction are at best remote.

Privatised detention services: a bad idea from the start

In accordance with the unfortunate global trend towards privatising public utilities, the government announced its decision to outsource detention services in August 1996 as a means of improving efficiency and reducing costs. Australasian Correctional Management ("ACM") was awarded the contract in November 1997. When the profit motive coincides with the detention of vulnerable people in accordance with human rights, the latter will inevitably suffer. Systemic deficiencies in the privatised IDC environment were identified by the Ombudsman. The Flood Inquiry identified further
The government's efforts towards outsourcing its protection obligations to its Asia-Pacific neighbours, including its unsuccessful negotiations with East Timor and ill-fated 'Malaysia Solution' demonstrate how little has changed since the Howard years.

deficiencies in the administration and management of IDCs and a culture of hostility towards detainees. In August 2003, a service contract was concluded with Group 4 Falck Global Solutions ('G4S'). The change of service provider did not facilitate cultural change. In 2005, G4S was fined $500,000 for refusing detainees food, water and access to toilets for the duration of a 7-hour bus trip between IDCs. The Palmer inquiry revealed the services contract to be 'fundamentally flawed' with poorly defined service standards and inadequate governmental oversight. The Independent Roche review recommended that improvements to management and monitoring underpin a re-tender of detention services.

A re-tendering process commenced in March 2006. Describing privatisation as 'a bad idea from the start', then shadow immigration spokesman Tony Burke said of G4S, 'This is a private company that has people coming in the doors with no mental health problems and going out as broken human beings.' Burke's call for immediate action to return detention services to the public sector was reflected in Labor's 2007 platform and promised to be a key component of its humane and transparent approach to refugee processing.

Upon assuming power, the practical immutability of privatisation revealed itself. Minister Evans announced that Labor would not disrupt the tender process during which G4S's contract would be extended. Revealing a culture of secrecy in which incident reports are destroyed and workers are instructed that complaints will not be tolerated.

Crisis — what crisis?

While Labor has sought to distinguish itself from its predecessor, it has relied on the opportunity to effect substantive change. Despite the government's policy values, the reality for most asylum seekers who arrive by boat has remained one of detention as a first resort for the status determination period. A surge in boat arrivals combined with the suspension of processing claims brought by Afghan and Sri Lankan asylum seekers for six and three months respectively from April 2010 saw numbers in detention rise significantly. By June 2010, the number of detainees held on Christmas Island had swollen to more than three times the centre's operational capacity, with many detainees housed in storage and recreation spaces, demountable housing and tents. The scale of operations, with limited services and infrastructure as observed by the Ombudsman in February 2011 was unsustainable, with 'explosive conditions requiring urgent removal of detainees to appropriate mainland facilities, falling which the island might implode, with disastrous consequences'. To address the accommodation shortage on mainland Australia, a number of detention facilities were opened, including Western Australia's notorious Curtin IDC, described by Phillip Ruddock as Australia's most primitive.

Protests from detainees, often in the form of self-harm or voluntary starvation, have become a regular feature of life in Australia's IDCs. Tensions culminated in rioting at the Christmas Island and Villawood IDCs in March and April 2011. The March riots which unfolded over a week on Christmas Island saw the Australian Federal Police use tear gas, batons and modified shotgun rounds. The Villawood riots saw around 100 detainees start a fire which destroyed nine buildings, and hurl building materials and furniture at fire-fighters attempting to extinguish the blaze. Unsurprisingly, this violence and destruction of property generated public outrage and was widely viewed as a criminal attempt
to force outcomes and hold the government to ransom. The prevailing response revisited a sentiment which prevailed during the Howard years — that asylum seekers are not the kind of people we want in Australia with its inference that human rights are not the birthright of all. While the conduct of the rioters cannot be condoned, it should be considered in the context in which it arose.

Darwin IDC has been the site of regular protests, most recently in late August 2011. The rioting and chaos in the detention network has afforded the Coalition ample opportunity to publicise Labor's policy failures. In the tiresome charade of political point scoring around refugee processing, the Coalition is correct in one key respect. The immigration detention regime administered by Labor is in crisis. This crisis has stemmed largely from Labor's timidity and failure to depart in concrete terms from Coalition's policies. The government's response to the riots has been to expand the grounds of visa refusal under the character test to include offences committed while in immigration detention.51 It has once again eschewed an approach which removes people from the toxic IDC environment.

Offshore processing and detention

When Kevin Rudd assumed office, 89 refugees remained in detention in Nauru awaiting resettlement. Despite ending the Pacific Solution, Labor announced Christmas Island as its processing venue of choice for new boat arrivals and retained its predecessor's exclusion policy. Certain Australian territories, including Christmas Island, were thereby excised from Australia's migration zone and classified as 'excised offshore places' with the consequence that asylum seekers processed in such places were barred from making a valid visa application without an exercise of ministerial discretion and denied fair and reasonable treatment within the law as required by value 6.

In a unanimous decision handed down on 11 November 2010, the High Court rejected the Commonwealth's contention that the status determination process applied on Christmas Island was 'non-statutory' and could operate outside the strictures of Australian law and procedural fairness.52 Changes introduced following the judgment have increased transparency and allowed judicial review. They nevertheless fail to address the inherent incompatibility with human rights of maintaining a two-tiered refugee processing regime and indeterminate detention isolated from essential services including mental health care.

Notwithstanding Labor's intense criticism of offshore processing while in opposition, the Gillard government has sought to outsource its protection obligations to its Asia-Pacific neighbours. Its arrangements with Malaysia were determined by the High Court to be incompatible with Australian law53 and the government has subsequently failed to secure the passage of legislation which would validate the arrangement. The government's involuntary retreat from offshore processing may have the fortuitous consequence of aligning immigration practice with the government's policy values. In order to manage Australia's immigration detention network, Minister Bowen has revived the promise of a risk-based approach to immigration detention and announced that new boat arrivals and people currently in detention will, where appropriate, be released into the community pursuant to community detention or bridging visa arrangements. How this policy plays out in practice remains to be seen.

Another opportunity

Australia's immigration detention regime has remained largely immutable, notwithstanding successive government enquiries and policy values which promised to adopt a risk based approach. These values were never enacted into law and have proved dispensable in practice. The committee currently enquiring into Australia's immigration detention network has been presented with an opportunity to make robust recommendations for the enactment of legislation to end the outsourcing of detention services, adopt a rigorously administered risk-based approach to immigration detention and remove vulnerable people from long-term detention. The government has in turn been presented with another opportunity to back up its policy announcements with legislative reform which removes vulnerable people from immigration detention. If history is any guide, the opportunity will not be embraced.

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Chapter 5

Tania Penovic, ‘Privatised immigration detention services: challenges and opportunities for implementing human rights, Law in Context (forthcoming)
Dear Tania,

I understand that you are currently completing a PhD by publication and would like to include your paper for our special issue of Law in Context as a chapter in the thesis.

This note is to confirm acceptance of your paper in our Special Issue of Human Rights in Closed Environments. Referee comments were favourable, recommending publication with minor alterations to the original manuscript.

Kind regards
Paula

Professor Paula Baron
Head of School
Chair of the Common Law
Editor, Law in Context

Law at La Trobe was rated "at world standard" in the Excellence in Research for Australia (ERA) rankings released in January 2011.

La Trobe University - ranked top in Victoria for student satisfaction (Sweeney Uni Student Report, 2009)

CRICOS Provider 00115M
Privatised immigration detention services: challenges and opportunities for implementing human rights

Mandatory immigration detention has underpinned Australia’s refugee processing regime for two decades. Since February 1998, the management of detention services has been outsourced to private contractors under three successive contractual regimes. This paper examines the outsourcing of immigration detention in Australia and explores the opportunities and obstacles presented by privatisation to the realisation of human rights. It considers whether privatisation is intrinsically inconsistent with the realisation of human rights or whether it may in fact create opportunities for promoting the advancement of human rights.

Part 1 considers Australia’s immigration detention policy and provides a brief history of its three phases of privatisation. Australia’s human rights obligations and the question of whether they may be delegated to private actors are examined in Part 2. The international antecedents and the principal challenges and opportunities presented by privatisation are considered in Part 3. The extent to which these challenges and opportunities have manifested themselves in Australia’s immigration detention regime is examined in Part 4 with reference to applicable contractual arrangements and the experience of immigration detention in mainland Australia.¹

Part 1: Immigration Detention in Australia

An interim measure

Australia’s immigration detention policy was introduced by the Keating government in May 1992 following a wave of boat arrivals of Indochinese asylum seekers. Then Immigration Minister Gerry Hand observed that detention of unauthorised boat arrivals for a period

¹ A further example of outsourced detention services which falls outside the ambit of this paper is the ‘offshore processing’ of asylum seekers who have attempted to reach Australia by boat in Nauru and Papua New Guinea (PNG) under the Howard and Gillard governments. Asylum seekers processed in PNG (between 2001 and 2004) and Nauru (between 2001 and 2007) under the Howard government’s Pacific Strategy were held in the custody of the International Organisation for Migration, an inter-governmental organisation which works with governments in the management of migration: see generally Human Rights Watch, “By Invitation Only:” Australian Asylum Policy, Vol 14, No 10(C), December 2002, 71. The current management of the Gillard government’s Regional Processing Centre in Nauru is being undertaken by multinational corporation Transfield Services (responsible for facilities and support services) in conjunction with the Salvation Army (responsible for case management of detainees) and International Health and Medical Services (responsible for medical services). The Manus Island Regional Processing Centre in PNG is currently being managed by G4S.
limited to 273 days was 'only intended to be an interim measure...designed to address only the pressing requirements of the current situation.'\(^2\) Amendments to the *Migration Act 1958* (Cth) (Migration Act) in September 1994 removed the temporal limitation and introduced the requirement in section 189 that any person known or reasonably suspected to be an 'unlawful non-citizen' (a non-citizen without a valid visa)\(^3\) must be detained. Section 196 was introduced, requiring that an unlawful non-citizen be kept in detention until they are granted a visa or removed from Australia. Since 1994, successive federal governments have maintained the detention regime. No detention standards or statements of detainee rights have been introduced into legislation or regulations.

Although section 189 of the Migration Act requires the detention of all unlawful non-citizens, detention practice has been linked to whether a person arrives in Australia with a valid visa. Most detainees have arrived in Australia by boat as unlawful non-citizens. People who arrive in Australia with a valid visa ('lawful non-citizens'\(^4\)) and subsequently claim protection usually travel by air and are routinely granted bridging visas. The grant of bridging visas prevents them from becoming unlawful non-citizens (or remaining unlawful non-citizens if their visa has expired) and allows them to reside in the community while their refugee status remains to be determined. Pursuant to a new policy announced in November 2011, the Gillard government commenced the progressive removal of some detainees into the community. These people are allowed to live in the community while their status remains to be determined pursuant to bridging visas or 'residence determinations' whereby the Minister may permit them to live in a specified place in the community while they remain in detention for the purposes of the Migration Act.\(^5\) In May 2013, Immigration Minister Brendan O'Connor announced that after an initial period of detention in which identity, health and security checks are conducted, families will be eligible for bridging visas or removed from immigration detention facilities into less restrictive environments while still deemed to be in

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\(^3\) Section 14, Migration Act.
\(^4\) Section 13, Migration Act.
detention. As at 31 February 2013, 4849 people remain in immigration detention, 4068 of whom are held in closed facilities.

A short history of privatised immigration detention services

Between May 1992 and December 1997, Australia’s immigration detention facilities were operated by the Department of Immigration in its various iterations with security provided by Australian Protective Services, a federal government agency. Following an announcement in the August 1996 budget that detention services should be contestable, a tender process was commenced. On 27 February 1998, the tender was awarded to Australasian Correctional Services Pty Ltd (ACS), a wholly owned subsidiary of the United States (US) based Wackenhut Corrections Corporation. Service delivery was subcontracted to ACS’ detention services operational arm, Australasian Correctional Management Pty Ltd (ACM). The three year contract was subsequently extended until December 2003.

A re-tendering process saw a 4 year agreement concluded with security provider Group 4 Falck Global Solutions Pty Ltd (G4S) on 27 August 2003. G4S subsequently changed its name to Global Solutions Limited (Australia) Pty Ltd (GSL) and took over the management of detention services between 1 December 2003 and 29 February 2004. In 2006, the Labor opposition lambasted GSL’s performance and the Howard government’s decision to outsource detention services. Then opposition immigration spokesman Tony Burke described privatisation as ‘a bad idea from the start [which] should not have taken place [and] should

6 Brendan O’Connor MP, Minister for Immigration and Citizenship, ‘Bridging visas for IMAs’, Doorstop interview, 7 May 2013.
8 The immigration portfolio fell within the ambit of the Department of Immigration and Ethnic Affairs from 1993 to 1996 and the Department of Immigration and Multicultural Affairs from 1996 to 2001.
10 Flood P, Report of Inquiry into Immigration Detention Procedures 2001 at 4.2; Wackenhut Corrections Corporation changed its name to the GEO Group in 2003: see generally http://www.geogroup.com/history
11 Ibid at 4.2.
12 A corollary of the complex corporate re-structure which saw Wackenhut Corrections Corporation become GEO Group was the renaming of ACM to GEO Group Australia in January 2004.
14 Ibid at 12, 47.
not be continued." Burke's call for the return of detention services to the public sector was reflected in the 2007 Australian Labor Party (ALP) platform and promised to be a key component of its humane approach to refugee processing.

In May 2007, the Howard government released new requests for tender. After the Rudd Government's election in November 2007, the tender process was continued (notwithstanding Labor's 2007 platform) and concluded in 2009 with the health services contract (encompassing general medical and mental health) awarded to International Health and Medical Services (IHMS) in January 2009 and the detention services contract awarded to Serco Australia Pty Ltd (Serco) in June 2009.

Part 2: Human Rights and Immigration Detention

Applicable rights

Concerns about the inconsistency of immigration detention with Australia's international human rights obligations have been expressed regularly by international and domestic human rights bodies. United Nations (UN) committees which supervise the implementation of the core human rights treaties have called for the regime's dismantlement. The Human Rights Committee has found repeatedly that mandatory immigration detention breaches the prohibition on arbitrary detention in article 9(1) of the International Covenant on Civil and Political Rights (ICCPR). Detention is arbitrary if applied to all undocumented arrivals without justification with reference to their individual circumstances and where the aims pursued by the detention are achievable by less restrictive means. The limited opportunities

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15 Jewel Topsfield, 'Labor Breaks Detention Promise', The Age, 20 January 2009
16 Joint Standing Committee on Migration, note 9 above, at [3.39].
18 The UN Human Rights Committee has concluded that Australia's mandatory immigration detention regime is arbitrary in the following communications brought under the ICCPR's First Optional Protocol: A v Australia UN Doc CCPR/C/59/D/560/1993; Mr C v Australia, UN Doc CCPR/C/76/D/900/1999; Baban v Australia, UN Doc CCPR/C/78/D/1014/2001; Bakhtiyari v Australia, UN Doc CCPR/C/79/D/1069/2002; D and E v Australia, UN Doc CCPR/C/87/2/D/1050/2002; Shafiq v Australia, UN Doc CCPR/C/88/D/1324/2004; Shams and ors v Australia, UN Doc CCPR/C/90/D/1255.
for judicial review afforded by sections 189 and 196 of the Migration Act have also breached the right to challenge the legality of detention set out in article 9(4) of the ICCPR.\(^\text{19}\)

Immigration detention has been found to constitute cruel and inhuman treatment as proscribed by the ICCPR\(^\text{20}\) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).\(^\text{21}\) The failure to take steps necessary to ameliorate a man’s mental deterioration in circumstances where his mental illness (triggered by his detention experiences) was known and had reached such a level of severity as to be considered irreversible was found to contravene the prohibition on cruel, inhuman and degrading treatment in article 7 of the ICCPR.\(^\text{22}\) The regime also breaches the right to the highest attainable standard of physical and mental health set out in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 24 of the Convention on the Rights of the Child (CRC), with a significant body of medical research charting the deleterious effect of indeterminate immigration detention on mental health.\(^\text{23}\) The consistency of the detention regime with the CRC more generally is considered in Part 4 below.

Reforms of the detention regime were introduced in 2005 and 2008. Amendments to the Migration Act in 2005 introduced a system of review by the Ombudsman, affirmed in principle that children should only be detained as a measure of last resort\(^\text{24}\) and empowered the Minister to grant ‘residence determinations’ permitting children and families to live in the

\(^\text{19}\) Ibid. The UN Human Rights Committee found a breach of article 9(4) in each of the cases noted at Ibid except D and E v Australia, in which it was not necessary to determine the question.

\(^\text{20}\) Mr C v Australia, Communication No. 900/1999; Baban v Australia, Communication No. 1014/2001.


\(^\text{22}\) Mr C v Australia, note 20 above.


\(^\text{24}\) Article 37(b) provides, among other things, that detention of a child shall be a measure of last resort. The affirmation in principle does not amount to incorporation into the Migration Act.
community (while deemed to be in detention) pending status determination. In 2008, 7 'key immigration detention values' were introduced. Mandatory detention was to be maintained as 'an essential component of strong border control' (value 1) but confined to those who have failed to comply with visa conditions or are deemed an unacceptable risk to the community. All unauthorised arrivals would be detained for health, identity and security screening (value 2). Detainees would be treated fairly and reasonably within the law (value 6) and conditions of detention would ensure human dignity (value 7). The length and conditions of detention would be reviewed, with indefinite and arbitrary detention considered unacceptable (value 4). Detention in Australia's high-security immigration detention centres was a last resort to be used for the shortest practicable time (value 5), and wherever possible not used for children and their families (value 3). These values promised to align detention practice with Australia's human rights obligations, including the right not to be arbitrarily detained, the right to challenge the legality of detention, the right to humane conditions of detention and freedom from cruel, inhuman or degrading treatment or punishment. But the government's failure to enact the values in legislation rendered them vulnerable to non-compliance. A media release announcing the signing of Serco's detention services agreement observed that Serco have 'displayed a strong alignment with the [government's] values.' The experience of immigration detention under Serco's tenure considered in Part 4 below would in fact suggest that irrespective of any such declared alignment, privatised management renders compliance with unenforceable policy values unlikely.

Can international obligations be outsourced?

Nation states must respect, protect and fulfil the realisation of human rights within their jurisdiction. International law operates vertically, with states required to address their own actual or potential violations and horizontally, requiring states to address the actions of private entities insofar as they affect the realisation of human rights. The obligation to respect and ensure the rights in the ICCPR in accordance with article 2(1) has been

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25 Sections 4AA and 486L-Q of the Migration Act, inserted pursuant to the Migration Amendment (Detention Arrangements) Act 2005 (Cth).
26 Article 9(1) ICCPR, article 37(b) CROC.
27 Article 9(4) ICCPR, article 37(d) CROC.
28 Article 19 ICCPR, article 37(c) CROC.
29 Article 7, ICCPR, Article 37(a) CROC, Article 16 CAT.
interpreted by the UN Human Rights Committee to require state parties to respect and ensure the Covenant’s rights to anyone within their power or effective control. The Committee has found that a state party is not absolved of its obligations under the ICCPR ‘when some of its functions are delegated to other autonomous organs’ or ‘core State activities which involve …detention of persons’ are ‘contract[ed] out to the private commercial sector’.

In June 2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights which seek to provide a global standard preventing and addressing human rights abuses linked with business activity. These principles recognise that states’ obligations encompass the protection of individuals against abuses within their territory and/or jurisdiction by third parties, including business enterprises. States’ obligations are not relinquished through privatisation of service delivery.

The International Law Commission’s Articles on Responsibility of States for Intentionally Wrongful Acts further provide for the attribution of non-state actors’ conduct to the state as a subject of international law. Adopted in 2001, the articles have not been adopted in a treaty but may be seen to reflect customary international law. In his commentary on the articles, Crawford observes that ‘[t]he State as a subject of international law is held responsible for the conduct of all of its organs, instrumentalities and officials which form part of its organisation and act in that capacity, whether or not they have separate legal personality under its internal law’.

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32 UN Human Rights Committee, General Comment 31[80], The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13 [10].
38 General Assembly Resolution 59/35, 2 Dec 2000; UN Doc A/RES/59/35, adopted at the 65th plenary meeting of the General Assembly (see UN Doc A/59/SR.65).
Conduct of private actors may be considered an act of state under article 5 if an entity which is not an organ of the state is empowered by the law of that state to exercise elements of governmental authority. Article 8 further provides that the conduct of a person or group shall be considered an act of state under international law if the person or group is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct. Attribution of private conduct to states is established in international jurisprudence. The Australian government remains responsible under international law for the conduct of the non-government entities which have contracted to manage detention facilities on its behalf pursuant to the contractual arrangements examined in Part 4 below.

Part 3: International antecedents

Outsourcing of immigration detention services in some countries, including the United Kingdom (UK), US, Germany and South Africa, has preceded the privatisation of prisons. Prison management companies have been engaged to manage immigration detention facilities by the US Immigration and Naturalization Service (since the 1980's) and the UK Home Office's Immigration and Nationality Directorate (since the 1970's). Bacon suggests that the centrality of private management to the operation of the UK's immigration detention facilities combined with the administrative character of immigration detention and concomitant absence of the legal protections which inhere in criminal justice, have rendered the private operation of UK immigration detention facilities 'practically invisible, even to those working in the area.' The absence of controversy and low profile of outsourced management have facilitated its entrenchment and expansion into private prisons.

Prison privatisation in the UK and US expanded rapidly in the 1980's. The further expansion of immigration detention in these countries was in turn driven by the momentum

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41 Ibid at 110, see for example Lehigh Valley Railroad Company and others (USA) v Germany (Sabotage cases) "Black Tom" and "Kingsland" incidents, R.L.A.A., vol VIII, p 84 (1930), and R.L.A.A. Vol VIII, p 225.
42 Flynn and Cannon, The Privatization of Immigration Detention: Towards a Global View, A Global Detention Project Working Paper, September 2009 at 15, observe that the establishment of prison privatization following the precedent of privatized immigration detention is 'one of the more notable patterns that surfaces when comparing privatization experiences across several countries.
44 Ibid at 3-4; Flynn and Cannon, note 42 above at 11, 15.
of the prison privatisation movement. The decision to outsource the management of Australia’s immigration detention facilities was built upon this international precedent, and motivated by a desire to improve efficiency and reduce costs. It followed a ‘promotional meeting’ with private prison provider Corrections Corporation of America chaired by the then Correctional Services Minister. The Joint Standing Committee on Migration observed that privatisation was ‘favoured in the context of an increasing international and Australian trend for private delivery of government services, particularly in correctional management.’

Perspectives on the merits of outsourcing appear to be coloured by political philosophy concerning the role of the state and the free market. Tony Burke’s characterisation of privatised immigration detention services as a ‘bad idea from the start’ echoed comments by the UK Labour Opposition concerning prison privatisation. In March 1995, then shadow Home Secretary Jack Straw reportedly said ‘[i]t is not appropriate for people to profit out of incarceration. This is surely one area where a free market certainly does not exist...[and therefore] at the expiry of their contracts a Labour government will bring these prisons into proper public control and run them directly as public services.’ Like the ALP’s reversal on outsourcing of immigration detention facilities, the British Labour Party maintained and further expanded prison privatisation while in office between 1997 and 2010.

The major challenges and opportunities associated with privatised incarceration services are considered below. The reality that prison privatisation has attracted considerably more interest than privatisation of immigration detention services is reflected in the focus of the commentaries drawn on below.

Challenges and Opportunities

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46 Bacon, note 43 above, 13; Flynn and Cannon, note 42 above.
47 Joint Standing Committee on Migration, note 9 above, at [3.5].
48 Bacon, note 43 above at 10.
49 Joint Standing Committee on Migration, note 9 above at [3.6].
Deprivation of liberty has traditionally been recognised as a core function of the state.\textsuperscript{51} Coyle observes that 'in the modern era, until fairly recently, the task of depriving citizens of their liberty was ... regarded as a state monopoly...Individual freedom was so sacred that only the state could take it away after due process and only the state could administer the punishment passed by its own courts.\textsuperscript{52} Members of UK think-tank the Adam Smith Institute have reflected on the ‘symbolic political importance’ of their ‘quite...amusing’ victory in facilitating political acceptance of the ‘once zany idea’ of prison privatisation because ‘if you could persuade the government to privatise prisons, you could get them to privatise anything.’\textsuperscript{53}

The mere fact that incarceration has traditionally been a public function is not itself sufficient to rationalise a bar on outsourcing. But the administration of detention services must comprehend the fundamental importance of the right to personal liberty, which has deep common law roots which pre-date UN-based formulations of human rights.\textsuperscript{54} Dilulio argues (in the context of prison privatisation) that jails operate ‘as a public trust to be administered on behalf of the community and in the name of civility and justice’ and incarceration must remain in public hands in order to maintain the legitimacy and moral authority of the justice system.\textsuperscript{55}

It has been alleged that detention companies have exerted influence over government policy. Analogies have been drawn with the ‘military industrial complex’ conception acknowledged by former US President Dwight Eisenhower which saw defence corporations engage with government bodies in the formulation of policy.\textsuperscript{56} A number of commentators have argued that private detention service providers have sought to influence policy in ways that maintain a high detainee population and eschew the pursuit of alternatives to detention.\textsuperscript{57}

\textsuperscript{51} See for example Douglas C McDonald (Ed.), \textit{Private prisons and the Public Interest}, Rutgers University Press 1990 at 185.
\textsuperscript{52} A Coyle, ‘Conclusion’, in Coyle, Campbell and Neufeld, note 45 above, 211-219 at 213.
\textsuperscript{54} The right was recognised in such declarations as the 1215 Magna Carta’s statement that ‘no freeman shall be taken or imprisoned ... but ... by the law of the land’ and also found protection in documents from other jurisdictions such as the French Declaration of the Rights of Man and the Citizen and the US Constitution.
\textsuperscript{57} See for example Bacon note 43 above, 4, 23; Dilulio, note 55 above, 166; Flynn and Cannon, note 42 above, 17.
Cannon argue that ‘it is in the interest of private companies to protect and expand their businesses, and thus to pressure government representatives accordingly, pushing weak regulations and supporting legislation that could improve their share of the market.’

Privatisation has been championed as a tool for achieving efficiency and even a ‘surgical solution,’ facilitating reform where public management has become entrenched, producing ‘wholesale and sudden change.’ Logan argues that outsourcing promotes the development of objective performance measures, observing that a government ‘has little natural incentive to measure objectively the quality of its own performance’ while the availability of alternative providers encourages comparative evaluations and raises standards.

A key rationalisation for outsourcing by corporations and governments is fiscal savings. While fiscal savings have not always materialised, the management of vulnerable people by profit-making enterprises has been observed in a number of detention settings to compromise human rights. Detainees have been vulnerable to cost cutting in pursuit of profit maximisation, with initiatives concerned with advancing human rights eschewed on the basis of expense. Cost cutting in private prisons has been associated with poor conditions and staffing problems, including low wages, inadequate training, understaffing and excessively long shifts. Staff in immigration detention facilities have been deployed from the prison sector and received little training for managing the needs of asylum seekers. In the US, immigration detainees suffering from Hepatitis B were reportedly given paediatric doses of medication in order to reduce costs, while one company allegedly provided insufficient food, leaving detainees to fight for it.

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58 Flynn and Cannon, note 42 above, 17.
60 Ibid 256.
61 Ibid 256-7.
64 See for example Bacon, note 43 above.
Disturbances in detention facilities have allegedly been underreported in order to protect corporate interests, avoid fines and maintain reputation. Gentry warns of the dangers of market failure in the form of ‘hidden delivery’ whereby a contractor profits from providing an inferior service to the ‘unwitting buyer’.

Proponents of privatisation have argued that abuses in detention facilities emanate from the character of those facilities rather than applicable contractual arrangements. But while any prison manager may exploit the potential for abuse, Gentry argues that an enterprise operating for profit is ‘systematically more likely to do so’ than the state, ‘even if one can assume that both entities care equally about serving the public welfare’. This potential for abuse is exacerbated by a lack of transparency and accountability.

Logan posits that accountability is in fact enhanced by outsourcing because ‘market mechanisms of control are added to those of the political process’ with tenderers ‘motivated to supply relevant information to a small number of politically accountable decision-makers’ who can hold contractors accountable for their actions. Because of public suspicion towards those who ‘wield power “for profit”’, Logan argues that public prisons also become more visible and society benefits from public vigilance.

Logan’s contention is premised on the existence of viable avenues of scrutiny and access. In practice, such avenues have been limited. Furthermore commercial confidentiality has been used by industry and governments to keep fundamental information from scrutiny. Confidentiality of contracts, described by bacon as ‘the shroud of ‘commercial-in-confidence’, limited public and media access to detention facilities and insufficient monitoring have compromised transparency. The pulping of a prison inspection report at the behest of the detention services provider and Scottish government due to its disclosure of staffing levels is cited by Nathan as ‘[epitomizing] how ‘commercial confidentiality’,

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68 Ibid.
69 Logan, note 59 above, 256.
70 Logan, note 59 above, 256.
71 Bacon, note 43 above, 23.
72 Nathan, note 45 above, 172.
extensively used by government and the industry to keep fundamental information from scrutiny, overrides the public interest. 73

Bacon argues that Logan fails to account for corporate influence on contractual arrangements and the reliance placed by governments on contractors to maintain their detention regimes. 74 In their comparative study of privatised immigration detention around the world, Flynn and Cannon observe that where service providers have close ties with government, as observed in South Africa, poor service provision may continue unchallenged. 75 They further describe ‘burden sharing’ as a motivation for outsourcing through which nations can diffuse, or in some cases avoid responsibility for enforcing immigration policies and thereby deflect accountability and criticism. 76 While governments cannot outsource their international obligations, contracting relinquishes direct Ministerial control over the operation of detention facilities and obfuscates responsibility. Bacon details ‘a complicated and ever-changing set of intertwined relationships’ with a ‘long list of aliases and subsidiaries used by the various companies, as well as the perpetual mergers, ‘sell-outs’, ‘buy-backs’ and ‘re-branding’ which characterise the industry’ which ‘make it extremely difficult to keep track of exactly which company has a stake’ in managing detention facilities. 77

In order to maintain high standards of service, Flynn and Cannon argue that high degrees of surveillance and oversight (particularly by supra-national bodies such as the Council of Europe’s Committee on the Prevention of Torture) are necessary. 78 Gentry suggests a system of public access to detention facilities combined with fines which require contractors to ensure detainee welfare and ‘consider the societal costs of [contractors’] actions, in effect enlisting the firm as the chief monitor of its own activities’. 79 Firms which do not incur significant fines can maximise profits and position themselves at a competitive advantage in future tendering. The performance and oversight mechanisms operating in Australia’s privatised immigration detention regime are examined below.

73 Ibid.
74 Bacon, note 43 above, p 23.
75 Flynn and Cannon, note 42 above, 16.
76 Flynn and Cannon, note 42 above, 14-15.
77 Bacon, note 43 above, 8.
78 Flynn and Cannon, note 42 above, 16.
79 Gentry, note 67 above, 362.
Part 4: Privatised immigration detention in Australia

This portion of the paper will examine the applicable contractual arrangements and the extent to which Australia's human rights obligations were realised under the three phases of privatised detention services. It will consider the effectiveness of monitoring and oversight mechanisms and common law mechanisms which may address human rights violations within privately operated immigration detention centres.

Phase 1: ACM

The first phase of privatisation of immigration detention is marked by the management of detention services by ACM between February 1998 and December 2003 at a cost of more than half a billion dollars.

Contractual arrangements

The arrangements between the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and ACM were comprised of three separate contracts; a general agreement (providing background to the contractual relationship), an occupational licence agreement (authorising ACM's use of facilities) and a detention services contract. The general agreement's objectives were to deliver quality detention services with ongoing cost reductions. The detention services contract sets out the services to be provided in general terms, with ACM required to comply with legislation, policy, procedures, industry best practice and the service delivery outcomes set out in 13 Immigration Detention Standards (IDS), comprised of 107 sub-standards.

The IDS were designed to set out ACM's obligations to meet detainees' individual care needs in a culturally appropriate way while providing safe and secure detention and included the requirement that each detainee is treated with respect and dignity and that prolonged

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80 ANAO, note 13 above, 12, 46.
81 Ibid 12.
82 The immigration portfolio fell within the ambit of the Department of Immigration, Multicultural and Indigenous Affairs from 2001 – 2006, the Department of Immigration and Multicultural Affairs from 2006 – 2007 and the Department of Immigration and Citizenship since 2007.
83 Joint Standing Committee on Migration, note 9 above, at [3.7].
84 ANAC, note 13 above, at 13.
85 See Ibid. The IDS are reproduced in Appendix 6 at 171-210.
86 Ibid, Standard 2.1.
solitary confinement, and all cruel, inhuman or degrading punishments are not used. The IDS were translated into performance measures, which fed into a performance-linked fee matrix that linked specific performance measures with positive or negative benchmark performance points. Performance points were tallied quarterly and used to calculate the performance fee portion of payment. Three per cent of ACM’s quarterly service fee was performance linked. A default notice could be issued under the general agreement if certain performance breaches were identified, including quantifiable major breaches of the IDS and persistent below-benchmark performance. A cure period was allowed for rectification, failing which DIMIA could take a range of actions, including a fee reduction proportionate to the breach, a deduction of money from a performance security bond provided to ensure service delivery or termination of the service agreement in whole or part.

The contract period
Self-harm, hunger strikes, suicides and rioting were a feature of life in Australia’s immigration detention centres during ACM’s tenure. The UN Working Group on Arbitrary Detention visited Australia in 2002 and observed a range of behavioural anomalies in detainees, including affective regression and infantilism, aggression against other detainees, acts of self-mutilation and suicide.

The AHRC’s national inquiry into children in immigration detention provides the most comprehensive account of conditions of detention during ACM’s tenure. The AHRC heard evidence that self-harm was ‘so prevalent and so pervasive that no child could have avoided seeing adults self-harming’ and children as young as 14 were, like the adults they were detained alongside, engaging in self-harm and hunger strikes. The burden of mental illness

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87 Ibid, Standard 7.8.3.
88 ANAO, note 13 above, at [4.25].
89 Ibid 109 [5.57].
90 ANAO, note 13 above, [4.33].
91 ANAO, note 13 above, [5.69].
92 ANAO, note 13 above, [4.33]; Clause 7.7 general agreement.
95 Human Rights and Equal Opportunity Commission, note 93 above.
96 Ibid at 9.4.3, citing evidence provided to the Commission on 31 May 2002 by Lyn Bender, a psychologist who worked at Woomera in 2002.
was not borne by detainees alone, with post-traumatic stress disorder common among staff. The AHRC’s final report concluded that the detention regime failed to ensure that

- detention is a measure of last resort, for the shortest appropriate period of time and subject to effective independent review (CRC, article 37(b), (d));
- the best interests of the child are a primary consideration in all actions concerning children (CRC, article 3(1));
- children are treated with humanity and respect for their inherent dignity (CRC, article 37(c));
- children seeking asylum receive appropriate assistance (CRC, article 22(1)) to enjoy, 'to the maximum extent possible' their right to development (CRC, article 6(2)) and their right to live in 'an environment which fosters the health, self-respect and dignity' in order to ensure recovery from past torture and trauma (CRC, article 39); and
- people in detention are treated with humanity and respect (article 10 ICCPR, article 37(c) CRC).

The AHRC’s conclusions are largely attributable to the statutory requirement that unlawful non-citizens be detained until their status is determined. ACM is not able to influence Australia’s realisation of its obligations under article 37(b) and (d) of CRC. It is the Commonwealth that detains and determines the duration of detention. The regime itself is inconsistent with Australia’s human rights obligations and remains so irrespective of the institutional character of the detention services provider.

Nevertheless, under the privatised model, the service provider plays a significant role in fulfilling the state’s international obligations. While the detention of children without regard for their personal circumstances and developmental needs is contrary to article 3(1), the best interests of the child remain a primary consideration in all actions concerning children, including ACM’s actions in managing detention facilities. Evidence provided to the AHRC revealed that cost cutting resulted in inadequate education for children, problems with

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counselling, medical treatment, food and hygiene in toilets and shower blocks. The Ombudsman considered that accommodation and monitoring/care arrangements failed to meet minimum standards to protect those at greatest risk from exposure to harm.

Between January and June 2002, '[t]here were 116 alleged, attempted or actual assaults (16 of which involved children, 13 of which involved alleged detainee assaults on staff), 248 self-harm incidents (25 of which involved children) and 52 per cent of incidents involved “contraband, damage to property, disturbances, escapes and protests.” The detention environment was considered unsafe, with children exposed to rioting, hunger strikes, violent acts of self-harm, obtrusive surveillance techniques and the use of tear gas and water cannons.

Former Woomera operations manager Allan Clifton told the AHRC that cost cutting led to insufficient services, with inadequate staff training, staffing levels and ‘fudging’ of staff figures. Problems were identified with staff culture by the Ombudsman and Flood Report, including friction between officers with a correctional background and those without prison experience, with the latter perceived as ‘too soft’ and the former ‘unnecessarily rude and lacking in empathy.’ Flood observed that some officers treated detainees ‘as if they were criminals.”

Batons were regularly used and it was alleged that ACM promoted a culture of hostility towards detainees. Clifton’s efforts to persuade a detainee to start eating after a prolonged hunger strike were investigated because ACM allegedly ‘believed ...

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100 Mr Anthony Hamilton-Smith, Ex-DIMIA Manager from Woomera to the National Inquiry into Children in Immigration Detention, Statutory Declaration provided to the National Inquiry into Children in Immigration Detention, 24 October 2002 at http://www.hreoc.gov.au/Human_Rights/children_detention/statements/hamilton.html
104 Human Rights and Equal Opportunity Commission, note 93 above, at 299.
105 Human Rights and Equal Opportunity Commission, note 93 above, at 8.6.
107 Commonwealth Ombudsman, note 103 above.
109 Phillip Flood, ibid, at [7.4].
should have just left him."\(^{111}\) Clifton also recounted the refusal of ACM head office to release detainees wrongly suspected of involvement in a disturbance from solitary confinement, thus escalating tensions and inciting a riot which "could have been avoided."\(^{112}\)

**Contractual monitoring**

The IDS provided that DIMIA has full access to all relevant data to ensure that monitoring against its standards can occur.\(^{113}\) Incidents which threatened or disrupted security and good order, or the health, safety or welfare of detainees were to be reported to the DIMIA Facility Manager immediately and in writing within 24 hours\(^{114}\) and ACM was required to respond within agreed time frames to requests for information.\(^{115}\)

Logan's observation that outsourcing facilitates the formulation of standards would appear to be borne out by the IDS, which were the "first ever attempt"\(^{116}\) to establish comprehensive standards since the introduction of the mandatory detention policy in 1992. But Logan's assumption that the articulation of standards will facilitate improved performance\(^{117}\) was not realised. The Australian National Audit Office (ANAO) found the IDS unclear, using ambiguous language to define the nature and level of service required. 38 of a total of 197 IDS and sub-standards were not covered by performance measures and a further 37 were only partially covered. Many performance measures did not articulate targets or methods of assessment. DIMIA was therefore unable to effectively monitor ACM's performance against accepted, pre-determined levels of service delivery.\(^{118}\)

The AHRC found that the IDS provided inadequate guidance as to what was required to satisfy the standard of care set out in the CRC and that compliance with the standards may be insufficient to satisfy Australia's human rights obligations.\(^{119}\) Senior DIMIA officials were charged with monitoring ACM's performance through presence at immigration detention


\(^{113}\) 13.1.

\(^{114}\) 13.3.

\(^{115}\) 13.4.

\(^{116}\) Human Rights and Equal Opportunity Commission, note 93 above, at 5.3.3.

\(^{117}\) Logan, note 59 above at 257.

\(^{118}\) ANAO, Management of Detention Centre Contracts-Part B, Audit report no 1 2005-2006, 79.

\(^{119}\) Human Rights and Equal Opportunity Commission, note 93 above, p 117.
facilities and regular telephone contact with ACM managers. These managers lacked experience in child welfare and specific expertise in issues that arise in immigration detention. DIMIA defended its managers' ability to monitor ACM's performance while doubting their judgment.  

The ANAO found that DIMIA's internal arrangements for coordinating detention services were unclear, with a lack of clarity around the roles and responsibilities of key personnel and 'very low levels' of contract management training for DIMIA officers. A manual for DIMIA centre managers was not issued until 2001 and not updated. In the March 2002 and June 2002 quarters, a 'large percentage' of the performance fee was withheld following unspecified breaches. The ANAO observed that breaches were judged on a case-by-case basis with no formal rules or criteria to determine whether an incident was a performance breach that should incur a penalty. The penalty system was considered ineffective for sanctioning persistent below-standard service delivery or rewarding continual high-quality performance, and did not recognise innovations in service delivery. The Ombudsman considered the contractual terms which impose penalties on ACM could produce an incentive to under-reporting negative incidents in detention.

Duty of care

It was acknowledged by DIMIA that there were weaknesses in predicting and preventing human rights violations in immigration detention centres and the AHRC found that DIMIA's systems for identifying, preventing and remedying breaches were inadequate. The IDS stated that ultimate responsibility for the detainees remained with DIMIA at all times but the general agreement provided that ACM would indemnify the Commonwealth against all damages for which the Commonwealth is or may become liable, including the acts or omissions of ACM, its personnel or subcontractors. The Commonwealth was found to owe

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120 ANAO, note 118 above, 123.
121 Ibid. 14.
122 Ibid. 14.
123 Ibid 113.
125 Ibid 82.
126 Ibid 111.
127 Ibid.
128 Commonwealth Ombudsman, note 103 above, 25.
129 Human Rights and Equal Opportunity Commission, note 93 above, [5.3].
130 Human Rights and Equal Opportunity Commission, note 93 above, [5.5].
a common law duty of care to detainees notwithstanding its outsourcing arrangements in Secretary, DIMIA v Mastipour.\textsuperscript{131} Iranian citizen Mohammed Amin Mastipour was detained with his 5 year old daughter at the immigration detention facility at Curtin and subsequently at Baxter pursuant to section 189(1) of the Migration Act. Mastipour alleged that the conditions of his detention at Baxter amounted to torture as defined in article 1(1) of CAT and that the Commonwealth breached its duty of care in the circumstances of his detention.

During his detention at Baxter, Mastipour was placed in the ‘Management Unit’, a solitary confinement facility which was purportedly used to maintain good order, security and safety.\textsuperscript{132} He was held alone in a cell of approximately 3 metres square, which was constantly lit and observed by camera and furnished only with a mattress. Mastipour claimed to have been confined for more than 23 hours each day without any reading or writing material; access to television, radio or other form of entertainment. His first eight days in the Management Unit was punctuated by daily visits by his daughter. The following day, Mastipour was informed that his daughter had been taken shopping. She had in fact been returned to her mother in Iran. Psychological evidence revealed that Mastipour had experienced symptoms of mental illness in Iran which were exacerbated by his detention in Australia. One month after his daughter’s removal to Iran, three psychologists concluded that Mastipour required acute psychiatric treatment and should be transferred to another venue.

The Full Federal Court did not determine the question of whether Mastipour’s detention in the Management Unit amounted to torture. However, it considered that there was a serious question to be tried concerning a continuing breach of the Commonwealth’s duty of care in the actions which led to Mastipour’s placement in the Management Unit, his confinement in the Management Unit in light of its conditions, his daughter’s removal from Australia without notice being given to him and under cover of a lie and keeping Mastipour in Baxter knowing that to do so might cause him mental injury.\textsuperscript{133} The court accordingly granted an injunction which among other things restrained the Commonwealth from keeping Mastipour at Baxter.

Justice Lander noted that the formulation of a duty of care was complicated by the outsourcing of Baxter’s operation to ACM. Nevertheless, he accepted (and the DIMIA

\textsuperscript{131} [2004] FCAFC 93.
\textsuperscript{132} Ibid [15].
\textsuperscript{133} Ibid [40].
Secretary conceded) that the Commonwealth owed a duty to take reasonable care for Mastipour's safety. Justice Selway characterised the Secretary's role under section 189 as 'a power and a duty to detain', 134 thus bringing Mastipour's detention at Baxter within the Secretary's responsibility notwithstanding ACM's management of the facility and apparent responsibility for Mastipour's physical detention. Selway and Finn JJ expressed concern about the legislative and regulatory 'vacuum' concerning the manner and conditions of detention which facilitated a misconception that the power to detain is unqualified, which was 'not conducive to ordered and principled public administration' 135 and carried the risk of possible abuses of power. 136 Justice Selway considered that another manifestation of the regulatory vacuum was the Commonwealth and ACM's willingness to accept the 'convenient fiction' that the Commonwealth is physically detaining Mastipour. 137

Malkin and Voon have observed that marginalised individuals 'may attempt to effect change through tort, one of the few mechanisms in which they could possibly be empowered, using open public processes to subject powerful wrongdoers to judicial scrutiny'. 138 Using 'orthodox grounds in aid of private rights' in tort, 139 Mastipour was able to secure his removal from solitary confinement in the Management Unit and the Baxter facility and thereby effect a change to the conditions of his detention. 140 The threat of further litigation raised the possibility that safeguards would be introduced to fill the regulatory vacuum and promote what Malkin characterises as the educative function of tort law, namely an 'ability to set higher standards of behaviour, with a view to improving conditions of detainment.' 141 The regulatory vacuum highlighted by Selway J could be filled by the introduction of statutory provisions or regulations governing the manner and conditions of detention. No such provisions or regulations have been introduced.

Phace 2: GSL period

134 Ibid [86].
135 Ibid [2] per Finn J.
136 Ibid [8] per Selway J.
137 Ibid [18] per Selway J.
140 The terms of the injunction restrained the Commonwealth from keeping Mastipour at Baxter or removing him to the Port Hedland detention facility where he feared ill-treatment by detainees who were aware of unfounded allegations that he had sexually abused his daughter.
141 I Malkin, 'Tort Law's Role in Preventing Prisoners' Exposure to HIV Infection while in Her Majesty's Custody' (1995) 20 MULR 423 at 475.
Contractual arrangements

After intense criticism and media coverage of disturbances in ACM-operated detention facilities, a detention services contract between DIMIA and G4S commenced on 1 September 2003. G4S' name change to GSL was part of a complex restructure following the takeover of ACM's parent company, WCC. Facilities were transferred from ACM to GSL between 1 December 2003 and 29 February 2004. The contract encompassed detention services as well as general and mental health services. General and mental health services were subcontracted and in October 2006 were removed by DIMIA from the GSL contract. Arrangements were then made for the provision of health services by IHMS and counselling services by Professional Support Services.

The GSL services contract was comprised of a single agreement, with 148 revised IDS (with 243 corresponding performance measures) scheduled to the contract and described as outcome standards concerning the 'quality of care and the quality of life to be expected' in immigration detention. Like the ACM contract, the GSL contract contained default provisions which were subject to a cure period and could result in a fee reduction. Like the ACM contract, the GSL contract provided for incentive points to be paid for superior performance. Nevertheless, nineteen months after the contract was signed, there remained no definition of superior performance or indication as to how it would be rewarded.

The contract period

During GSL's management of Australia's detention network, payments for detention services increased under the contract while the detention population declined slightly. Protest, self-harm and mental ill-health remained features of the system. On several occasions, the AHRC found that acts done by GSL officers led to a breach of human rights by the

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142 Joint Standing Committee on Migration, note 9 above, at [3.23]
143 Flynn and Cannon, note 42 above, at 5.
144 ANAO, note 118 above, 47.
145 Joint Standing Committee on Migration, note 9 above, at [3.24].
146 ANAO, note 118 above, Figure 3.1 p 38, 74 n32.
147 ANAO, note 118 above, 84.
149 ANAO, note 118 above, 84.
150 Senate Legal and Constitutional References Committee, note 147 above, 88.
151 ANAO, note 118 above, 17.
Commonwealth. In September 2004, an assault on a detainee by GSL officers was determined to constitute inhumane treatment and a failure to treat the detainee with humanity and respect, contrary to articles 7 and 10(1) of the ICCPR. Concerns about staff training and culture also arose in the context of the transfer of detainees between facilities.

In February 2005 it emerged that permanent Australian resident Cornelia Rau had been wrongfully detained under section 189 of the Migration Act as an unlawful non-citizen for 10 months during which the manifestations of her serious mental illness were met with punishment rather than treatment. The Palmer Enquiry into Rau’s detention revealed that no systemic attempts were made to identify her, that her erratic behaviour led to periods of solitary confinement and that the DIMIA immigration detention function manifested clear evidence of an ‘assumption culture’ which assumed depression to be a normal part of detention life, therefore ‘normalising abnormal behaviour’ in health assessment. While the IDS required GSL to satisfy itself that a person is lawfully detained, the Palmer Enquiry found that GSL was not responsible for establishing detainees’ identity but that the identification process was frustrated by DIMIA’s contract management. The Palmer Enquiry led to the identification of a further 247 cases of wrongful detention of vulnerable people with Australian citizenship, permanent residence or valid visas between 1997 and 2004.

In June 2005, a coalition of NGOs lodged a complaint against GSL with the Organisation for Economic Cooperation and Development (OECD). The complaint alleged that GSL breached the OECD Guidelines for Multinational Enterprises which provide that enterprises ‘should ... respect the human rights of those affected by their activities consistent with the

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150 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 HREOC Report No. 39 (2007).
151 Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention, HREOC Report No. 25.
152 Knowledge Consulting, Findings and Recommendations from Report of Investigation on behalf of the Department of Immigration and Multicultural and Indigenous affairs concerning allegations of Inappropriate Treatment of Five Detainees during Transfer from Maribyrnong Immigration Detention Centre to Baxter Immigration Detention Centre, Investigating officer, Keith Hamburger AO, Undated.
154 ANAO, note 13 above, 13, 115
156 The International Commission of Jurists, Rights and Accountability in Development, the Human Rights Council of Australia, Children Out of Detention and the Brotherhood of St Laurence.
host government’s international obligations and commitments’ by acquiescing in the Australian government’s violations in administering the regime and ‘placing...people in isolation as a punishment for alleged lapses of behaviour’. The OECD’s Australian National Contact Point declined to rule that GSL had breached the Guidelines and pursued mediation, which resulted in agreement that international human rights standards should provide a framework for GSL’s operations.

While observing serious problems with record-keeping and managing the needs of vulnerable detainees, including children, the Ombudsman has observed some improvements in the management of cases involving children in 2006 supplemented by legislative amendments enacted in 2005 (outlined above) and the placement of children and their families in alternative detention arrangements outside high-security immigration detention centres. Despite such improvements, there is evidence of what Gentry dubbed ‘hidden delivery’ in detention services provided by GSL. A report by the Senate Legal and Constitutional References Committee detailed concerns about ‘poor food’ and GSL impeding ‘access to the outside world’ by lawyers, health professionals and other visitors. Evidence presented to the committee attested to a ‘culture of impunity’ and detailed assaults by GSL officers on detainees, none of which were investigated by police. In one instance, two officers were not disciplined following an assault on a detainee ‘because GSL had failed to train the staff in breach of the contractual obligation to do so.’

The Committee further noted cases of alleged corruption, intimidation and abuse of power which ‘raise significant issues concerning the supervision and accountability of detention

157 Submission to the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises concerning Global Solutions Limited (Australia) Pty Ltd, undated.
158 ANCP’S EVALUATION OF THE GSL SPECIFIC INSTANCE PROCESS, Gerry Antioch Australian National Contact Point, For the OECD Guidelines for Multinational Enterprises, 13 October 2006.
159 Brotherhood of St Laurence, Media Release, Detention centres meet NGO demands, undated.
161 Senate Legal and Constitutional References Committee, note 147 above, at 204-206.
162 Ibid 185-189.
163 Ibid 183.
164 Ibid.
165 Ibid 184.
centre staff. A ‘penal approach to immigration detention’ was observed by some
witnesses. The committee recommended the cessation of ‘behaviour management
techniques’ in management units which ‘are in effect isolation cells...used to punish
detainees.’ The Senate Committee received a ‘significant body of evidence from a wide
range of well-qualified witnesses that the provision of mental health care within immigration
detention centres is systemically flawed and below acceptable community standards.’ With
respect to the detention regime itself, the Committee accepted that prolonged and
indeterminate immigration detention results in an unacceptable rate of psychological harm
and concluded that ‘its abolition should be a priority.’

Detainees were able to perform work normally undertaken by paid employees for the
equivalent of $1 per hour which could be spent at the cafeteria, providing an ‘obvious
financial benefit’ to GSL and sub-contractors. Such arrangements are redolent of Jeremy
Bentham’s plans, pursued unsuccessfully between 1786 and 1813 to operate private prisons
in which prisoner labour would facilitate substantial profit. The Senate Committee noted
that ‘exploitative practices have been allowed to develop’ and that ‘where detainees are
dependent on centre management and have little or no access to cash, the...system is open to
abuse.’ It expressed concern about the ‘level of voluntariness’ associated with participation
and noted the prohibition on compulsory labour under international law and on ‘the use of
detainee labour in private prisons for activities related to running the facility’, observing that
‘immigration detainees are equally vulnerable to exploitation and warrant no less
protection.’

Contractual monitoring

The ANAO observed that DIMIA’s monitoring of GSL’s performance was not proactive but
‘exceptions based’, with satisfactory service delivery assumed unless the reporting of an

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166 Ibid 184.
167 Ibid 178.
168 Ibid 180.
169 Ibid 204.
167 Ibid 204.
170 Ibid 176.
172 Janet Semple, Bentham’s Prison: A Study of the Panopticon Penitentiary (Clarendon Press, Oxford 1993);
Bacon, note 43 above, 16.
173 Senate Legal and Constitutional References Committee, note 147 above, 177.
174 Ibid.
175 Ibid 178.
incident\textsuperscript{176} by GSL or DIMIA personnel highlighted a problem. While the exceptions based approach may identify ‘extremely poor quality service delivery’\textsuperscript{177}, it was unsuitable for assessing whether standards are being met consistently over time.\textsuperscript{178} The ANAO observed that DIMIA officials exercise considerable discretion as to what is reported and cannot conduct an ongoing objective assessment because the IDS’ lacked clarity, rendering DIMIA unable to objectively assess GSL’s ongoing performance.\textsuperscript{179} Reporting by GSL in circumstances where the company may in turn incur fines may foster secrecy and underreporting. The Palmer Report observed that the contract and ‘contract management behaviour’ do not facilitate cooperation and partnership but rather ‘a culture where the specified performance measures become, by default, entrenched as maximum standards because the service provider’s focus is on ensuring compliance so as to avoid financial sanction.’\textsuperscript{180}

The Palmer Report described a ‘master-slave’ relationship between the contracting parties which ‘works against commonsense implementation and penalises initiative.’\textsuperscript{181} An ‘unduly rigid, contract-driven approach’ impeded the achievement of many required outcomes\textsuperscript{182} with a performance management regime which ‘does not manage performance or service quality or risks in any meaningful way.’\textsuperscript{183} The management of policy and direction by DIMIA Canberra left staff at Baxter unable to exercise discretion or control in addressing emerging difficulties, required adherence to inflexible, generic operating procedures\textsuperscript{184} and made it ‘unclear where GSL responsibility ends, and where DIMIA responsibility begins’.\textsuperscript{185}

Both the Palmer Report and the ANAO recommended that the contract be revised in order to improve performance outcomes. An independent contract review by Mick Roche in consultation with the ANAO observed that its incident-based performance management system addresses the symptoms rather than the causes of poor performance\textsuperscript{186} Roche

\textsuperscript{176} ANAO, note 118 above, 16 [28], 83 [5.55].
\textsuperscript{177} Ibid 16.
\textsuperscript{178} Ibid 83.
\textsuperscript{179} Ibid 16[29].
\textsuperscript{180} Palmer, note 153 above, 177-8.
\textsuperscript{181} Ibid 176.
\textsuperscript{182} Ibid 61.
\textsuperscript{183} Ibid 70.
\textsuperscript{184} Ibid 61.
\textsuperscript{185} Ibid 61.
\textsuperscript{186} Roche, note 187 above, 7.
recommended that any new performance management scheme should focus on identifying systemic reasons for poor performance ‘rather than counting infractions against the Standards’ and agree on an approach to rectifying the underlying causes of poor performance.187

A non-delegable duty of care?
The experience of detention during GSL’s contract period raised further questions about the Commonwealth’s tortious liability. Actions were brought alleging false imprisonment on behalf of those wrongfully detained under the Migration Act.188 While DIMIA retained a duty of care to detainees, the contract provided that DIMIA would discharge its duty by relying on GSL’s expertise.189 The IDS and performance measures did not specify actual responsibilities beyond meeting the day-to-day needs of detainees.190 The government’s duty to provide appropriate care for detainees was considered by Finn J in the Federal Court in S v Secretary, DIMIA.191 Two Iranian nationals known as ‘S’ and ‘M’ had been detained in a number of facilities over a five year period and were both diagnosed with major depression. Both sought orders compelling their assessment for admission to a psychiatric health facility. Both were transferred to a psychiatric facility prior to judgment. Justice Finn nevertheless found that S and M had established their case for relief.

At the time of their application, S and M were detained at Baxter, where mental illness was prevalent in the long-term detainee population. While the facility was run by GSL, psychological health services were provided by Professional Support Services and general medical services by IHMS which in turn outsourced services to other providers.192 These included psychiatrist Dr Andrew Frukacz, who visited Baxter for one day every 6-8 weeks, and sometimes less frequently.193

S and M both experienced mental deterioration while detained at Baxter. Both engaged in acts of self-harm, spent time in the Management Unit (in which Mr Mastipour had been held

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187 Ibid.
189 ANAO, note 118 above, 43.
190 Ibid.
192 Ibid [36]-[39].
193 Ibid [45].
by ACM the previous year) and alleged ill-treatment by GSL guards. Both were diagnosed with psychiatric conditions by Dr Frukacz who nevertheless considered hospitalization unnecessary. Two outside psychiatrists recommended their removal to a psychiatric hospital because Baxter was an inappropriate treatment environment given the severity of their illness and conditions at Baxter and the hopelessness they engendered were themselves a cause of S and M’s mental illness.194

Justice Finn concluded that the Commonwealth owed a duty to ensure that reasonable care was taken of the applicants who, by reason of their detention, could not care for themselves. This duty required the Commonwealth to ensure that a level of psychiatric care reasonably designed to meet their needs was made available.195 In light of the prevalence of mental illness in the long-term detainee population, there was an obvious need to provide timely psychiatric care. This need was not met. The outside psychiatrists’ opinions were ‘not unreasonable’ and necessitated independent advice. No such advice was sought, with the consequence that S and M’s conditions were inadequately or inappropriately treated, or exacerbated.196

Justice Finn examined the outsourcing arrangements and concluded that the Commonwealth breached its duty of care which could not be delegated to private contractors or subcontractors. He drew an analogy between the parties’ relationship and two classes of relationship which attract non-delegable duties; namely the relationship of hospital and patient and gaoler and prisoner.197 Like the hospital and patient relationship, the Commonwealth exercised control over people in immigration detention and assumed responsibility for their health care. Like the gaoler-prisoner relationship, immigration detainees are without freedom or capacity to provide for their own needs, experiencing a special dependence which is exacerbated when detainees suffer from mental illness. His Honour found that the Commonwealth’s duty must comprehend this special dependence and account for the present outsourcing arrangements.198

194 Ibid [261].
195 Ibid [257].
196 Ibid [262].
197 Ibid [209].
198 Ibid [210]-[211].
The standard of care ascribed to the relationship is to ensure that reasonable care is taken of those who, by reason of their detention, cannot care for themselves; requiring a level of care reasonably designed to meet their health needs. Where the Commonwealth contracts out service provision, it must ensure that care is taken. The Commonwealth decided to establish and maintain the Baxter facility in a relatively isolated part of Australia and should not require detainees to bear the consequences of its decision insofar as it compromised the availability of medical services to meet detainees' known needs. His Honour concluded that the Australian government breached its non-delegable duty of care to the applicants with respect to the provision of appropriate psychiatric services.

Finns J's analysis was accepted in general terms by Justice Johnson in the New South Wales Supreme Court in the matter of Shayan Badraie by his Tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors. In that proceeding, it was alleged that the Commonwealth and ACM breached their duty of care to a child detainee by exposing him to preventable injury and not providing appropriate psychiatric treatment. In light of the likelihood that a breach would be established, the proceeding settled in March 2006. As outlined below, a number of further proceedings have since settled, frustrating the further development of jurisprudence, and enabling details of human rights abuses to remain suppressed.

Among these legal proceedings concerning detention during GSL’s tenure is an action brought against the Commonwealth on behalf of Cornelia Rau seeking damages for false imprisonment and negligence which settled in March 2008 for a sum of $2.6 million. The claim alleged that the Commonwealth owed a non-delegable duty to take reasonable care to avoid harm to Ms Rau and further and alternatively that the Commonwealth was vicariously liable for the negligence of its contractors. The Statement of Claim set out 54 particulars of breach, including the failure on the part of GSL to ensure adequate health assessment or appropriate surveillance arrangements for women detained at Baxter. Further particulars

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199 Ibid [212].
201 Ibid [213].
202 Ibid [216].
concerned failures emanating from the contractual arrangements put in place by the Commonwealth. These included the Commonwealth purporting to delegate management of Ms Rau’s health issues to GSL despite GSL lacking the required accreditation and the Commonwealth’s failure to react appropriately to a statement by a GSL officer that Ms Rau was an Australian national of German parentage. While the proceedings were ultimately settled, it can be concluded from the particulars of claim in combination with the Palmer Report\(^{205}\) that the outsourced detention service arrangements frustrated the appropriate management of vulnerable people and the establishment of identity, prolonging the unlawful detention of those to whom section 189 of the Migration Act does not apply.

Notwithstanding the complexity added to legal proceedings by the government’s outsourcing arrangements, tort law has the potential to promote a range of rights. The capacity of tort to advance the human right to health is demonstrated by the Full Federal Court’s judgment in \(S v Secretary, DIMIA\). The release of \(S\) and \(M\) into a psychiatric facility predated the judgment but was probably precipitated by the proceedings. The settlement of Shayan Badraie’s proceeding provided monetary compensation and enabled his family to remain in Australia. The compensation paid to Cornelia Rau provided some measure of vindication for the wrongs committed and the extreme injustice and humiliation suffered. But the promise of improved conditions of detention flowing from the threat of further litigation has not materialised.

**The future of contracting**

The second phase of outsourcing saw widespread support for a return to government management. Shadow immigration spokesman Tony Burke described GSL as ‘the private company that has people coming in the doors with no mental health problems and going out as broken human beings’ and declared that ‘there have been enough breaches of this contract for the government to take action to terminate the privatisation of our detention centres’\(^{206}\). The Senate Legal and Constitutional References Committee recommended that direct responsibility for management and service provision should revert to the Commonwealth\(^{207}\) in order to best ‘ensure absolute adherence to its human rights obligations’\(^{208}\). The

\(^{205}\) Palmer Report, note 153 above.
\(^{207}\) Senate Legal and Constitutional References Committee, note 147 above, p 239 [7.112].
\(^{208}\) Ibid 242-243 [7.128].
Committee described the contractual regime as ‘far from transparent’, with the Commonwealth hiding behind its contractors in order to evade its responsibilities.\textsuperscript{209} It accepted that Australia’s human rights obligations ‘cannot be reconciled with the inevitable focus on profitability...that outsourcing brings’.\textsuperscript{210}

Mick Roche’s review of the GSL contract recommended that a new tender be commenced with health and psychological services provided under a separate contract\textsuperscript{211} and improved processes applied to contract management and monitoring.\textsuperscript{212} Having chosen not to implement the Senate Committee’s recommendations, the Howard government accepted Roche’s recommendations and commenced a new tender in May 2007. After the Rudd government’s election, then Immigration Minister Chris Evans revealed a disturbing shrinkage in the public sector’s capacities, acknowledging ‘a lack of alternative public service providers’.\textsuperscript{213} Ten years after outsourcing immigration detention services, the Commonwealth appeared to have lost the necessary knowledge and expertise to manage immigration detention facilities. It had come to depend on private providers in order to implement its detention policy. Bacon has observed that a similar dependence has resulted from the UK government’s outsourcing of, among other things, prison management.\textsuperscript{214}

With re-tendering well advanced, the Minister announced that finalising the tender was ‘the most prudent way forward’ but Labor would impose higher standards and conduct closer monitoring than its predecessor, applying its detention values, noting that ‘[i]t is a question of the values that apply rather than who applies them.’\textsuperscript{215} The extent to which Serco has implemented the detention values will be considered below.

\textbf{Phase 3: Serco}

\begin{footnotesize}
\begin{enumerate}
\item Ibid 242, [7.127].
\item Ibid 242 [7.128].
\item Roche, note 187 above, 8.
\item Ibid 4.
\item Chris Evans MP, New Directions in Detention - Restoring Integrity to Australia’s Immigration System, Australian National University, Canberra, 29 July 2008.
\item Bacon, note 43 above, 19.
\end{enumerate}
\end{footnotesize}
The Commonwealth’s 5 year Detention Services Contract between the Department of Immigration and Citizenship (DIAC) and Serco was concluded in June 2009 at an initial value of around $370 million. Serco is a subsidiary of Serco Limited, a London-based multinational which operates in more than 30 countries and specialises in the delivery of public services in areas which include hospitals, prisons, traffic management, defence logistics, court security and custodial services.

**Contractual arrangements**

The terms of the Commonwealth’s health services contract with IHMS are not publicly available. However, after a request was lodged under the *Freedom of Information Act 1982* (Cth) in December 2010 by journalist Paul Farrell, the Serco contract was released in part in September 2011. Serco exercised its right to block access to certain information, including details of its detention services fee. The portions of the contract obtained by Farrell together with some additional ‘leaked’ portions were published by New Matilda in November 2011.

The contract covers a range of detention services in addition to transport and escort services to people in detention. The Key Immigration Detention Values appear in the ‘People in detention services philosophy’ and are among the contract’s primary objectives. In delivering the contractual services, Serco is required to give effect to the Immigration Detention Values. The contract and its performance management manual set out a detailed regime of financial incentives to reward ‘superior’ performance and abatements in the form of fines to address ‘deficient’ service delivery. Performance is measured and assessed

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216 A further 5 year agreement for the provision of services in detention facilities known as immigration residential housing and immigration transit accommodation was concluded with Serco in December 2009.
220 Ibid.
222 Clause 10.1.
223 Clauses 13.1.
224 Clause 3.2; Schedule 4.1, Performance Management Manual, clause 3.
225 Clause 4; Schedule 4.1, Performance Management Manual, clause 4-5.
via a set of Indicator Metrics focused on key service delivery areas. Incentives and abatements may not exceed 6% and 5% of the services fee respectively.

Publicity and media are to be managed by DIAC, with Serco required to ensure that its personnel do not make public statements or release information to the media. Serco must not provide media access unless approved by DIAC and must immediately terminate any visit if deviation from approved activities occurs.

**Contract period**

At the commencement of Serco’s contract, there were less than 300 people in immigration detention across seven facilities. Within less than 18 months, the detention population had exceeded 6,000 largely due to a rapid increase in boat arrivals. Eleven additional facilities were operationalized and Serco’s contract fee reportedly doubled to allow for the management of the additional facilities and recruitment of staff. While there is no evidence to suggest that any detention service providers exerted an influence on the Commonwealth’s detention policy, the maintenance of mandatory detention in the face of an increase in boat arrivals represented a windfall gain for Serco.

By June 2010, the number of detainees held on Christmas Island had swollen to more than triple the centre’s operational capacity, with many detainees housed in storage and recreation space, demountable housing and tents. The scale of operations, with limited services and infrastructure as observed by the Ombudsman in February 2011 was unsustainable, with ‘explosive’ conditions requiring urgent removal of detainees to appropriate mainland

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226 Clause 54.1.
227 Clause 54.2.
228 Schedule 2, Statement of Work, Section 2.2.1, People in Detention Services, Clause 1.7.12.
229 Joint Select Committee [3.10]. These facilities were Maribyrnong (Melbourne), Northern (Darwin), Villawood (Sydney), Perth and Northwest Point (Christmas Island) IDCs, Phosphate Hill and Construction Camp Alternative Places of Detention (Christmas Island).
229 Hawke report p. 3.
231 Lilac/Aqua IDC (Christmas Island); Adelaide Alternative Place of Detention; Asti Motel Alternative Place of Detention (Darwin); Virginia Palms Motel Alternative Place of Detention (Boondall, Qld); Leonora Lodge and Gwalia Lodge LT Alternative Places of Detention (Leonora, WA); Darwin Airport Lodge LT Alternative Place of Detention (Darwin, NT); Pontville Immigration Detention Centre (Hobart, Tas); Yongah Hill Immigration Detention Centre (Northam, WA); Wickham Point Immigration Detention Centre (Darwin, NT); Curtin Immigration Detention Centre (Derby, WA); and Scherger Immigration Detention Centre (Weipa, Qld).

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facilities, failing which ‘the island might implode, with disastrous consequences’. Tensions culminated in March 2011, with rioting and unrest over a ten day period. Order was restored by the Federal Police through use of tear gas and modified shotgun rounds. Four weeks later, rioting erupted at Villawood IDC, leading to extensive property damage.

Six suicides occurred in immigration detention facilities between August 2010 and October 2011. The AHRC and Ombudsman expressed concern that the government’s detention values were not being met. A report by the Joint Select Committee on Australia’s Immigration Detention Network (JSC) released in March 2012 noted a strong correlation between pressure on the detention network and rising rates of distress and self-harm. Notwithstanding the serious logistical challenges presented by the increase in detainee numbers, the JSC concluded that ‘Serco has not performed to the standard expected’ and there have been ‘too many examples of Serco failing to make the grade.’

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234 See generally Allan Hawke and Helen Williams, Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and the Villawood Immigration Detention Centre (Hawke/Williams Report), 31 August 2011.


239 Ibid [5.122].

240 JSC, note 239 above, at [3.138].

241 JSC, note 239 above, at [3.42].
The government-commissioned Hawke/Williams report into the 2011 riots observed that security at Christmas Island was compromised by inadequate staff numbers. While figures are not available, General Secretary to the Christmas Island Union of Workers, Kaye Bernard, told the JSC that ‘people listed in that period on that roster ...were not on the island’ and that there may have been as few as 8 staff members in the main Christmas Island facility to 2,400 detainees. Further evidence revealed that Serco would not commit to maintaining staffing levels accepted by GSL pursuant to an earlier recommendation by the Industrial Commission. The JSC concluded that inadequate staffing levels have placed detainees and staff at serious risk.

Further concerns have arisen regarding security staffing, with sub-contractors working ‘in all positions’ despite lacking the necessary training. Staff responsible for the general security and safety of detainees may be employed without qualifications but are required to obtain a Certificate Level II in Security operations within 6 months of commencement. The contract recognises the need for detention facilities to provide a safe and secure environment for detainees and staff, ensuring that detainees’ human rights, dignity and well-being is preserved in accordance with the government’s detention values. Serco advised the JSC that all security officers complete a month-long induction program which includes human rights and mental health awareness training while other witnesses testified that some security staff received no training. The JSC concluded that the standard of training may not be high enough to equip officers to perform their duties, especially because no qualification is required prior to commencement.

242 Allan Hawke and Helen Williams, Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and the Villawood Immigration Detention Centre (Hawke/Williams Report), 31 August 2011, 150.
243 Official Committee Hansard, JSC, 6 September 2011, evidence given by Kaye Bernard, General Secretary, Union of Christmas Island Workers.
244 Ibid, evidence given by Gordon Thompson, Shire President and Union President, Union of Christmas Island Workers.
245 JSC, note 239, [3.140].
246 Official Committee Hansard, note 244 above, 18.
247 Schedule 2, Statement of Work, Section 2.2.4, Security Services [1.5]. Staff responsible for managing security must hold at least a Level IV certificate in Security Operations and 5 years’ relevant experience.
248 Schedule 2, Statement of Work, Section 2.2.4, Security Services, clause 1.1
249 JSC, note 239 above, [3.77].
The JSC further found a lack of clarity around Serco’s powers to use force and ensure good order. In March 2012, Serco’s 2010 training manual was published. The manual outlined ‘control and restraint’ techniques, including the targeting of pressure points, ‘compelling compliance’ through the ‘infliction of pain’ and striking techniques which create temporary ‘motor dysfunction’ and ‘muscle impairment’ considered ‘ideal for liability concerns’ because injury is ‘limited normally to bruising.’ The manual was analogous to a prison operations manual and raised further concerns that security staff may not be appropriately trained to deal with the complex needs of detainees.

Mental health awareness remained a persistent concern. The government’s Detention Health Advisory Group and AHRC observed inadequate staff training in mental health awareness and the inappropriate management of people on suicide watch. The JSC considered it ‘alarming’ that ‘a significant proportion of officers on duty in centres are not adequately trained to perform the roles expected of them, in spite of the clear widespread existence of complex mental health issues, and high rates of self-harm.’ A failure to appropriately manage detainee’s needs is also reflected in a Serco memorandum which instructs staff to be alert to use of self-harm as a ‘bargaining tool.’

As with the two earlier phases of privatisation, Serco’s lack of staff training and support rendered staff vulnerable to trauma. Bernard spoke of ‘many, many officers who have broken down in this system’ and called for an independent mental health audit of staff. The JSC observed that Serco staff have high rates of workers compensation claims and recommended ‘improved proactive procedures to support staff following critical incidents.’ A Serco memorandum calling on staff to seek help if necessary was issued after

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250 Ibid [3.113].
252 Ibid.
253 JSC, note 239 above, at [3.85] [3.87]
254 JSC, note 239 above, at [3.141]
256 Official Committee Hansard, note 244 above, at 15
257 JSC, note 239 above, at [3.100]
258 Ibid at [3.104]
the suicide of 28 year old Kieran Webb who had worked at the Curtin facility where he attended the aftermath of a detainee’s suicide. A Serco guard told the ABC that binge drinking among staff is commonplace and that staff routinely report for work intoxicated in order to manage the stress entailed in their work.

**Contract monitoring**

In contrast with the adherence to process revealed by the Palmer Enquiry to characterise GSL’s relationship with DIMIA, the Serco contract was ‘outcomes based’ rather than prescriptive, with DIAC holding Serco accountable for outcomes rather than intervening on matters of detail. But greater autonomy for the service provider did not facilitate improved performance.

As at December 2011, DIAC had imposed abatements every month since the commencement of the abatement period in March 2010. After discerning from DIAC that no details of Serco’s breaches are publicly disclosed, Senator Sarah Hanson-Young responded thus:

> So the contract and the list of requirements that Serco have to fulfil are not publicly disclosed. The possible items that would qualify as breaches are not publicly disclosed. Their service delivery performance, whether they are upholding or breaching, is not publicly disclosed. Where in this process is the public interest and transparency of this contract?

In light of the contract fee and percentage at risk, it may actually be more cost effective for Serco to breach the terms of the contract and incur reductions in the form of abatements.

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261 Mr Andrew Metcalfe, Secretary, DIAC, Committee Hansard, 9 December 2011, p. 34 cited at JSC Report [3.132].
262 Mr John Moorhouse, Deputy Secretary, DIAC, Proof Committee Hansard, 9 December 2011, p. 34 cited in JSC, note 239 above at [3.133].
264 Official Committee Hansard, Senate Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, Evidence of Fiona Lynch-Magar, Acting First Assistant Secretary, Infrastructure and Services Management, DIAC at 33.
Gentry's hope that the prospect of fines may contribute to contractual compliance has not been realised in the context of immigration detention in Australia.

The incentives regime is the principal means of implementing the government’s values, with implementation representing an input component in the incentive regime.\textsuperscript{265} DIAC has made no incentive payments under the contract, demonstrating the reality that the government’s detention values have not been implemented by Serco.

The contract allows DIAC or a nominee to conduct an audit of all or part of the contract at any time.\textsuperscript{266} Officers or delegates of the Ombudsman, ANAO, Privacy Commissioner or AHRC are permitted to audit Serco’s performance\textsuperscript{267} but their findings are not legally binding. The contract does not provide for independent performance audits but gives Serco a significant role in auditing its own performance. A monthly ‘Joint Executive Report’\textsuperscript{268} must be prepared by Serco and DIAC concerning contract management of people in detention, including a brief on ‘high profile or special needs’ detainees. Serco must submit an annual report for each detention facility, setting out key events, lessons learnt and targeted goals for the following year.\textsuperscript{269} The key contractual accountability mechanism is incident reporting\textsuperscript{270}, whereby Serco is required to maintain an accurate and comprehensive record of ‘incidents’ and report all incidents electronically to DIAC.

There are three levels of incidents which must be addressed and reported on to DIAC.\textsuperscript{271} Critical incidents include mass breakouts, bomb, riot and unauthorised media presence.\textsuperscript{272} Major incidents include hazardous waste contamination, epidemic, voluntary starvation by a minor, an incident likely to attract media attention.\textsuperscript{273} Substance abuse, clinical depression, childbirth, use of instruments of restraint and voluntary starvation for under 24 hours are

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{265} Clause 13.2.
\item\textsuperscript{266} Clause 43.
\item\textsuperscript{267} Clause 44.3.
\item\textsuperscript{268} Schedule 4.3-Reporting Requirements, Clause 3.1.
\item\textsuperscript{269} Schedule 4.3-Reporting Requirements, Clause 3.3.
\item\textsuperscript{270} Schedule 4.3-Reporting Requirements, Clause 3.2.
\item\textsuperscript{271} Schedule 2, Statement of Work, Section 2.2.3, Business Services and Continuous Improvement.
\item\textsuperscript{272} Ibid, Annexure B clause 1.
\item\textsuperscript{273} Ibid, Annexure B clause 2.
\end{itemize}
\end{footnotesize}
included within the ambit of minor incidents. While all major and critical incidents require auditing, only 10% of minor incidents require auditing.

The prospect of fines for contractual breaches has allegedly facilitated a culture of secrecy in which incident reports are destroyed and workers instructed that complaints will not be tolerated. Evidence presented to the JSC detailed the routine shredding of incident reports, with the shredder referred to as 'Bin 13': 'Bin 13 is when you have a completely overworked and understaffed facility, because of this client-detainee ratio. You have a huge reporting requirement and paperwork stacked up in boxes under the manager's desk. It was put through a shredder.' The Ombudsman expressed serious concerns about the 'consistency, competency and integrity of incident reporting' after observing inadequacies and omissions in crucial material The JSC recommended that DIAC review the quality and management of incident reporting and assess Serco's capacity to monitor its own compliance with the reporting guidelines.

**Ongoing tort claims**

The 'educative function of tort law' has not been realised. Despite the promise that families will not be held in prolonged immigration detention, the punitive detention regime remains in place notwithstanding ongoing litigation (as well as a number of reports highlighting its inconsistency with human rights). The harms suffered by people held in immigration detention continue to be the subject of litigation and there are a number of cases which have been issued or are under active investigation by lawyers. There were 404 tort claims brought between 1999 and 2011/2012 by people who were held in immigration detention. These matters have usually settled, as exemplified by the actions brought on behalf of Shayan Badraie and Cornelia Rau. Compensation of $23,355,851 has been paid by the

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274 Ibid, Annexure B clause 3.
275 Ibid, Clause 8.7(a)(iii).
278 JSC, note 239 above, at [3.60]-[3.61], also Commonwealth Ombudsman, Submission 13, p. 17.
279 Malkin, note 138 above.
280 See for example Human Rights and Equal Opportunity Commission, note 93 above; Commonwealth Ombudsman, note 103 above; Senate Legal and Constitutional References Committee, note 147 above; JSC, note 239 above.
Commonwealth with respect to these claims.281 293 of these claims concern wrongful imprisonment, with $18,231,835 paid with respect to these actions. Serco is required to maintain insurance which covers, among other things, its liability and DIAC's vicarious liability (and liability as principal arising from a breach of its non-delegable duty of care) for the acts or omissions of Serco and its employees.282 The imperative of maintaining Serco's insurance is not difficult to comprehend.

But tort law alone will not furnish the solution for addressing the harsh detention regime established under the Migration Act. The common law must confine itself to issues raised by litigants and is thus, by its very nature piecemeal in its victories and 'evolutionary rather than revolutionary.'283 Litigation is reactive. It is premised upon harm having occurred in an environment in which harm inevitably flows. The millions of dollars paid by the federal government in settlements highlights the need for harm prevention which should at minimum entail legislation or regulations setting out detainee rights and conditions of detention and at best the abandonment of the mandatory immigration detention.

Conclusion
A return to public management of Australia's immigration detention facilities would not resolve the concerns outlined in this paper. Serious concerns emanate from the nature of the regime in which people seeking protection, who are neither convicted nor charged with any crime, are deprived of their liberty for indeterminate -and often prolonged- periods. The harsh human impact of detention and complexity of the regime are exacerbated by the far-flung and remote location of detention facilities and the vulnerability and diversity of the detainee population. The ill-conceived and punitive detention regime breaches Australia's human rights obligations irrespective of the institutional character of the detention services provider.

But privatised management has exacerbated problems which inhere in the regime. Concerns associated with privatisation relate primarily to cost cutting associated with the profit imperative, the removal of direct Ministerial responsibility, and insufficient transparency and

281 Department of Finance and Regulation, Compensation claims made by immigration detainees between 1999 and 2011, undated.
282 Schedule 13-Insurance
283 J Doyle and B Wells, 'How far can the Common Law go towards protecting Human Rights? in P Alston (Ed.) Towards an Australian Bill of Rights (Australian National University Centre for International and Public Law and HREOC, 1994) at 121.
monitoring. In light of the fundamental importance of personal liberty, privatised detention services must be transparent, subject to well-articulated standards and effective accountability mechanisms. During Australia's three phases of outsourcing, cost cutting has impacted negatively on conditions and treatment of detainees, highlighting the tension between the profit motive and the detention of vulnerable people in accordance with human rights.

Bacon has observed that outsourcing becomes entrenched over time and governments become reliant on contractors to maintain their detention regimes. Australia's reliance on its contractors was manifest in the government's inability to return the detention regime to the public sector in 2007 due in part to an acknowledged lack of public sector service providers. While the Commonwealth government cannot outsource its international human rights obligations or common law duties, the removal of direct Ministerial responsibility over the immigration detention function has obfuscated responsibility for human rights abuses. It has also become a form of 'burden-sharing' which has enabled the government to distance itself from the administration of its own harsh detention policy.284

in distancing itself from the detention regime, the government has failed to implement effective monitoring and oversight mechanisms. In each contract period, the service provider has been required to report on incidents which may disclose a breach of contract and attract a reduction in fees, presenting an obvious disincentive to open reporting and transparency. Efforts to improve outcomes were manifest during the two latter phases of privatised immigration detention. IDS in the GSL contract were clearer and more comprehensive than the vague IDS annexed to the ACM contract. The 'unduly rigid, contract-driven approach' which the Palmer Enquiry found to characterise the DIMIA/GSL relationship285 gave way to an 'outcome based' approach designed to give Serco operational flexibility in performing its contractual obligations. The Serco phase saw the government distance itself further from its immigration detention regime by giving the contractor unprecedented power to monitor its own performance. It would appear that the leeway afforded to Serco facilitated a culture of secrecy and under-reporting, with improved outcomes in the management of detainees failing to materialise.

284 Flynn and Cannon, note 42 above at 16.  
285 Palmer Enquiry, note 153 above, 61
The opportunities associated with privatisation by commentators such as Logan have not been realised. While it cannot be concluded from the Australian experience that privatisation of incarceration services is intrinsically and necessarily inconsistent with the realisation of human rights, it can be concluded that outsourcing creates further challenges for the realisation of human rights. When profit-making enterprises are charged with operating an ill-conceived and punitive regime, it is unsurprising that advancements in human rights implementation have not materialised. Australia’s immigration detention regime is inherently inconsistent with human rights and intrinsically abusive. The lived experience of immigration detention over the past fifteen years demonstrates that privatised management has exacerbated the abuse.
Chapter 6

Declaration for Thesis Chapter 6

Monash University


Declaration by candidate

In the case of Chapter 6, the nature and extent of my contribution to the work was the following:

<table>
<thead>
<tr>
<th>Nature of contribution</th>
<th>Extent of contribution (%)</th>
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<tr>
<td>My contribution included 70% of the writing, structure and referencing. My contribution includes being the principal writer of the following sections: on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Onshore and Offshore Processing Compared, Offshore Processing and Australia's Human Rights Obligations (except the sections on access to legal assistance, merits review and Operation Relex) and 'The Elephant in the Room?' I co-wrote the sections on the evolution of the policy, access to legal assistance, judicial review and the introduction and conclusion.</td>
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The following co-author contributed to the work.

<table>
<thead>
<tr>
<th>Name</th>
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<tr>
<td>Azadeh Dastyari</td>
<td>My co-author was the principal author of the sections concerning offshore processing in the United States, Access to Legal Assistance, Merits Review, the sections of the paper concerning the role of the International Organisation for Migration, the Immigration Advice and Application Assistance Scheme, Operation Relex and the financial cost of offshore processing. She co-wrote the sections on the evolution of the policy, access to legal assistance, judicial review and the introduction and conclusion.</td>
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The undersigned hereby certify that the above declaration correctly reflects the nature and extent of the candidate's and co-authors' contributions to this work*.

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Boatloads of incongruity: the evolution of Australia's offshore processing regime

Tania Penovic* and Azadeh Dastyari**

Almost six years on from the introduction of the Pacific Solution, the commitment of Australia's federal government to the regime of offshore processing of asylum seekers appears undiminished. The offshore processing regime has damaged Australia's international standing and has cost its taxpayers hundreds of millions of dollars. But its highest cost has been in human terms. This article examines the evolution of Australia's offshore processing regime with reference to its objectives, its consequences and its ramifications for Australia's performance of its human rights obligations under international law.

Introduction

Almost six years on from the introduction of the Pacific Solution, Australia's federal government has maintained its commitment to the offshore processing of asylum seekers. This commitment appears undiminished, despite a failed attempt in 2006 to extend offshore processing to all asylum seekers who arrive in Australia by boat. The processing centre on Nauru is currently accommodating seven Burmese and 83 Sri Lankan asylum seekers who arrived in Australian waters in August 2006 and February 2007, respectively. On 30 March 2007, the Minister for Immigration and Citizenship, Kevin Andrews, announced plans to extend the Pacific Solution to Indonesia, which would entail the processing of asylum seekers interdicted on the high seas around Australia (Hart 2007). Australia's commitment to offshore processing was further confirmed with the news on 18 April 2007 that Australia would be swapping some refugees processed in Nauru under the Pacific Solution with refugees processed by the United States at its naval base in Guantánamo Bay, Cuba. This article will examine the phenomenon of offshore processing with reference to its objectives, its consequences and its ramifications for Australia's performance of its human rights obligations under international law.

In the arena of refugee processing, nomenclature has assumed particular importance. Debates about border protection and the need for a tough stance on asylum seekers

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The authors are grateful to Jessie Taylor for her research assistance.
saw individuals possessed of a legal right to seek asylum described in terms including 'illegals', 'illegal immigrants' and 'queue-jumpers'. The response to the arrival of these people by boat was the introduction of the Pacific Solution, a term which assumed that spontaneous boat arrivals represented a problem which required resolution. This inference is not unprecedented.

Since 1981, the US has maintained a policy of interdicting asylum seekers on the high seas (Legomsky 2006; Dastyari 2007). The policy was introduced in response to an influx of asylum seekers arriving in the US by boat from countries including Haiti and Cuba. Kneebone, McDowell and Morrell note that both the US policy and the Pacific Solution have been rationalised on the basis of safety, security and cost and the objective of deterring boat arrivals (Kneebone, McDowell and Morrell 2006). The approach taken by both nations has incorporated disincentives to refugees who do not in fact have many options available to them. The US policy has involved the offshore 'processing' of asylum seekers at Guantanamo Bay and the screening of asylum seekers on Coast Guard vessels. In April 2007, the Australian Government announced a scheme whereby asylum seekers interdicted by the US and processed in Guantanamo Bay would be brought to Australia. In exchange, up to 200 refugees processed in Nauru would be taken to the US for settlement. The scheme demonstrates the federal government's continuing commitment to offshore processing and highlights the parallels between US and Australian refugee policies. The degraded procedures employed by the US and Australia have reduced the likelihood of successful applications for refugee status, thus minimising the number of individuals granted refugee protection. Offshore processing has the effect of removing asylum seekers from the protections offered by Australia's legal system and has proved to be costly in human and economic terms while calling into question Australia's compliance with its international treaty obligations.

The evolution of offshore processing in Australia

Australia has a long history of using regional agreements to stop the flow of asylum seekers to its shores. But offshore processing represents a radical departure from Australia's traditional approach to the processing of refugees. In the late 1980s, Australia negotiated inter-country agreements, most notably with China, to stem the flow of asylum seekers at its source. These agreements were successful at curbing new arrivals until the late 1990s, when a new group of people seeking protection began arriving in Australia (Crock, Saul and Dastyari 2006, 112). These asylum seekers were predominantly from Central Asia and the Middle East, and used Indonesia as a transit point.

Australia and Indonesia developed a Regional Cooperation Arrangement in 2000 as a response to asylum seekers transiting through Indonesia. Under the agreement,
Indonesia is paid to intercept asylum seekers before they can travel to Australia. Indonesia also allows Australia to intercept boats and force them to return to Indonesia. This agreement was able to stop 3930 people from reaching Australia from its inception to May 2004.\(^1\)

Individuals returned to Indonesia are kept in the custody of the International Organisation for Migration (IOM). IOM is not and has never been part of the United Nations (UN) system and it does not have a protection or humanitarian mandate. IOM’s role is dictated by its 120 member governments which include Australia in their number. An additional 19 states have observer status within IOM (IOM Constitution). Only the member states and with it the sponsors control the work of IOM. The organisation has received funding from Australia for the purpose of assisting returned asylum seekers to Indonesia. People who have a refugee claim are referred by IOM to the United Nations High Commissioner for Refugees (UNHCR).

The agreement with Indonesia did not stop all boats from arriving in Australian territorial waters. In late August 2001, the Norwegian registered container ship MV Tampa rescued 433 asylum seekers on the verge of sinking in ocean 75 nautical miles north of Christmas Island. The federal government undertook vigorous efforts to prevent the Tampa from entering Australian territorial waters. These included arrangements for the ship to be boarded by 45 SAS troops and the signing of hasty agreements with Australia’s Pacific neighbours. The governments of Nauru and New Zealand agreed to host the Tampa asylum seekers.

The Tampa affair led to radical and unprecedented measures to stop the flow of boats to Australia and marked the beginning of the Pacific Solution.\(^2\) The aim of the Pacific Solution is to ensure that certain asylum seekers are not processed in Australia and do not have the same rights as those who are processed in Australia. To meet this aim, the Pacific Solution is based on four strategies. First, a minister can now declare that certain Australian territory is no longer part of the migration zone or is an ‘excised offshore place’ (Migration Act 1958 (Cth), s 5(1)). Second, a new category of ‘offshore entry person’ was created to catch all asylum seekers who land without a valid visa or other authority on an excised territory (Migration Act, s 198A). Third, ‘offshore entry persons’ can be taken to a ‘declared country’ (Migration Act, s 198A). Finally, asylum seekers who do not land in ‘excised territory’ may still be processed

\(^1\) A reference to the agreement can be found in Millar 2004. However, the agreement itself does not appear to be available to the public.

\(^2\) There is extensive literature on the Tampa and the genesis of the Pacific Solution. See, for example, Taylor 2005; Magner 2004; Crock 2003; Flynn and Laforgia 2002; and Della Torre 2002.
outside Australia. Australia launched a naval interdiction program called Operation Relex on 3 September 2001. Operation Relex I was superseded by Operation Relex II on 14 March 2002 (Department of Defence 2002-03). At the time of writing, Operation Relex II remains in force.

The Pacific Solution allows for the deflection of asylum seekers before they reach Australian soil. It also allows Australia to expel asylum seekers even when they have reached Australian territory and would ordinarily be subject to Australian law. The initial reluctance of Pacific states to participate in the Pacific Solution has been eased by financial incentives.

Nauru acceded to Australia's request for the establishment of a processing centre in exchange for a pledge of $30 million in desperately needed aid. According to the Australian Democrats, Nauru was also granted aid packages of $41.5 million for 2001-03 and $22.5 million for 2003-05 (Australian Democrats 2004). Nauru had been scheduled to receive a mere $3.4 million in aid from Australia in 2001-02 (Oxfam Community Aid Abroad 2002a). In fact, the pledge of $30 million exceeded the total AusAID funding provided to Nauru between 1993 and 2001, and represents 18 per cent of the total AusAID budget to the Pacific Islands in 2001-02 ($164.6 million).

On 12 October 2001, Australia and Papua New Guinea signed a Memorandum of Understanding (MOU) allowing for the provision of a detention centre on PNG shores in exchange for $1 million. The initial agreement guaranteed that all persons brought to PNG for processing would leave after six months of entering, or in as short a time as was reasonably necessary. An agreement was also signed with IOM to provide security, water, sanitation, power generation, health and medical services for the duration of the stay of the asylum seekers at offshore facilities and to coordinate the return of asylum seekers to their home countries.3

The Pacific Solution has led to difficulties for the countries involved. A Senate Committee found in 2002 that the Pacific Solution 'accentuates the perception that Australia tends to take advantage of Pacific island countries' (Senate Foreign Affairs, Defence and Trade Committee 2003). In 2002, the then Nauruan President, Rene Harris, called the Pacific Solution a 'Pacific nightmare' (Dodson and Douez 2002). It has also been argued that the Pacific Solution has adversely impacted upon Australia's image and reputation within the region by fuelling the perception that Australia's domestic political considerations are accorded greater priority than

3. The agreement with IOM is not available to the public. Reference to the agreement can be found at IOM 2001.
broader regional issues (Oxfam Community Aid Abroad 2002b). In March 2002, the Secretary-General of the Pacific Islands Forum Secretariat, speaking at the Commonwealth Heads of Government Meeting, made the following remarks concerning the political tension caused by Australia's policy of offshore processing:

The political fabric of many of our countries is pretty fragile. If you allow these people to stay longer, under the Convention ... the state is obligated to give them services and the services would not be in proportion to what they give to its own people. And then you are likely to create a situation where the people become restless and complain that as taxpayers, they're not being looked after by their governments. [ABC Radio Australia News 2002.]

The federal government has not recognised offshore processing as a source of diplomatic tension. Rather, it has sought to extend the regime to all asylum seekers who arrive in Australia by boat without valid authority in an attempt to resolve political tensions. In March 2006, a decision was made by the Department of Immigration and Multicultural Affairs (DIMA) to grant temporary protection visas to 42 of 43 West Papuan asylum seekers who arrived in Australia by boat in January 2006. The diplomatic tensions which followed between Australia and Indonesia saw the recall of Indonesia's ambassador to Australia and the introduction into Parliament of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 on 11 May 2006.

**Migration Amendment (Designated Unauthorised Arrivals) Bill 2006**

The Bill intended to give legal effect to the policy of extending offshore processing to all asylum seekers who arrive in Australia by boat without valid authority. In his Second Reading speech concerning the Bill, the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, Andrew Robb, made the following statement:

It seems incongruous that an unauthorised boat arrival at an excised offshore place is subject to offshore processing arrangements, while an unauthorised boat arrival travelling, in some cases, only a few kilometres further to the Australian mainland is able to access the onshore protection arrangements, with the consequential opportunities for protracted merits review and litigation processes. The landing on mainland Australia of a group of unauthorised boat arrivals from Indonesia in January 2006 highlighted this incongruous outcome.

The essence of this bill therefore is to broaden the group of people to whom offshore processing arrangements will apply. This expanded group, referred to as 'designated unauthorised arrivals', will include the existing group of people who arrive unauthorised by boat on the Australian mainland. [Robb 2006.]

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The Bill was the subject of an enquiry by the Senate Legal and Constitutional Legislation Committee (the Senate Committee), which received 136 submissions. With the exception of the submission by DIMA, all submissions opposed the Bill. On 13 June 2006, the bipartisan Senate Committee released its report, which described the Bill as representing flawed domestic policy; deficient foreign policy in terms of a perceived attempt to appease Indonesia over the situation in West Papua; and a breach of Australia's obligations under international law. The Committee's key recommendation was that the Bill should not proceed (Senate Legal and Constitutional Legislation Committee 2006a). In separate reports within the Senate Committee report, Democrats Senator Andrew Bartlett and Greens Senator Kerry Nettle took a broader view. They recommended the outright reversal of the Bill and also the abandonment of the offshore processing system which the Bill sought to extend (Senate Legal and Constitutional Legislation Committee 2006a).

The Bill passed the House of Representatives on 10 August 2006 with 78 votes in support and 62 votes against its introduction. Liberal members Petro Georgiou, Russell Broadbent and Judi Moylan sided with the Labor opposition in voting against the Bill. Liberal member Bruce Baird was joined by Nationals MP John Forrest in abstaining from the vote. Forrest also resigned from his position as the National Party's chief whip, owing to a belief that an abstention would be incompatible with his position as whip.

The government's position within the Senate was more precarious. With a majority of only one senator, the passing of the Bill would require the support of all key coalition senators (including Judith Troeth and Barnaby Joyce). If coalition members voted against or abstained from supporting the Bill, the support of Family First Senator Steven Fielding would also be required. Senators Troeth and Fielding declared their intention to vote against the Bill prior to its scheduled debate on 14 August 2006. Nationals Senator Barnaby Joyce proposed an amendment to the Bill which would have afforded the Senate the opportunity to disallow a decision made by the Immigration Minister when exercising the power of ministerial discretion. In the face of imminent defeat in the Senate, the Prime Minister withdrew the Bill.

The failure of the Bill to pass had the effect of frustrating the government's policy of deflecting all asylum seekers who arrive in Australia by boat for processing offshore. Nevertheless, the policy of offshore processing continues with respect to asylum seekers who land in areas designated by the Migration Act as 'excised offshore territory', such as Christmas Island and Ashmore Reef (Migration Amendment (Excision from Migration Zone) Act 2001 (Cth)). Asylum seekers who land in these excised places fall outside Australia's refugee protection regime and are taken to Nauru or PNG for processing. The federal government's negotiations towards...
extending the Pacific Solution to Indonesia; its decision to transfer the most recently arrived Sri Lankan asylum seekers from Christmas Island to Nauru; and its recent exchange agreement with the US clearly demonstrate that despite the appointment of a new minister and the introduction of a re-packaged Department of Immigration and Citizenship, offshore processing remains a key policy.

Onshore and offshore processing compared
The gulf between the treatment of asylum seekers processed onshore and that of those processed offshore has widened since 2005 on account of significant advances made in addressing the needs of asylum seekers processed in Australia.

The changes made to onshore processing followed intense lobbying and media interest in immigration detention. After the High Court decided that s 196 of the Migration Act authorises indefinite detention of an unlawful non-citizen (Ali Kateh v Godwin, 2004), even if the detention continues for life, the Migration Regulations 1994 (Cth) were amended in May 2005 to create the Removal Pending Bridging Visa (Subclasses 070 (Bridging (Removal Pending)), Migration Regulations, Sch 1, Pt 3, 130(3)). The visa applies where the Immigration Minister believes that removal is not reasonably practicable and the detainee agrees in writing to cooperate fully with arrangements for their eventual removal from Australia.

The Migration Amendment (Detention Arrangements) Act 2005 (Cth) was passed on 19 June 2005. The Commonwealth Ombudsman was empowered to review the circumstances of detainees who have remained in detention for two years or more, with review to continue every six months thereafter. The minister was given a discretion to allow families with children to live in a ‘specified place’ in the community while their entitlement to protection is being determined and the principle affirmed in s 4AA(1) that ‘a minor shall only be detained as a measure of last resort’. On 29 July 2005, all children and their families were released from onshore detention centres. Since then, with the exception of ‘illegal foreign fishers’ held at the Northern Immigration Detention Facility in Darwin (HREOC 2007), child asylum seekers and their family members have been accommodated in the community. Other individuals awaiting status determination have been granted bridging visas, which enable them to reside in the community subject to a variety of conditions.

Recommendations made by the Palmer Inquiry (Palmer 2005) concerning the detention of Cornelia Rau and the Comrie Inquiry (Comrie 2005) concerning Vivian Alvarez resulted in a number of policy initiatives by the Department of Immigration and Citizenship. These include the conduct of an independent review into the system
for identifying and managing detainees who are at risk of suicide or self-harm and the active case management of all persons held in detention for more than 14 days or those deemed vulnerable on account of age or health status.

The advances made in the processing of asylum seekers in mainland Australia have not been extended to the processing of asylum seekers in offshore facilities. Offshore detention is not subject to scrutiny by the Ombudsman. Adults and children are detained in confined areas and subject to curfews and to regular and intrusive security checks. Bridging visas do not operate offshore and there is no access to migration advice and lawyers. There is no entitlement to merits review, no scope for the exercise of ministerial discretion to substitute a more favourable decision under s 417 of the *Migration Act*, and no right to judicial review. People processed offshore fall outside the protection of Australian law.

**Offshore processing and Australia’s human rights obligations**

Offshore processing not only compromises Australia’s relationship with its Pacific neighbours, but also erodes Australia’s commitment to human rights. It undermines the universal operation of human rights standards by setting a concerning precedent for other states which might be contemplating similar policies. It is contrary to the constructive role played by Australia in the formulation and ratification of UN human rights instruments. Our executive has, on Australia’s behalf, ratified the UN Convention Relating to the Status of Refugees 1951 (the *Refugee Convention*), making Australia the Convention’s sixth ratifying nation. In 1973, Australia acceded to the Protocol Relating to the Status of Refugees 1967 (the *Refugee Protocol*), which removed the Refugee Convention’s geographic and temporal limitations. The Refugee Convention characterises refugee protection as achievable only by international burden sharing.

Additional international instruments ratified by Australia include the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the Convention on the Rights of the Child (CRC). Central to all of the above treaties is an understanding that all individuals are entitled, without discrimination, to a common core of human dignity. These instruments seek to provide guarantees to all individuals within the state party’s territory and subject to its jurisdiction (see, for example, Art 2(1) of CRC and Art 2(1) of the ICCPR). A state party may not divest itself of obligations under these instruments by forcibly removing individuals from its jurisdiction. The Vienna Convention on the Law of
Treaties seek to codify customary international law pertaining to the performance of states' treaty obligations. Underpinning the Convention is Art 26 and the principle of _pacta sunt servanda_, or good faith performance of states' treaty obligations. States are furthermore prohibited by Art 27 from invoking domestic law to justify a failure to perform treaty obligations. Some of the key rights enshrined in international human rights treaties which Australia has ratified are examined below with reference to the offshore processing of asylum seekers.

**The right to personal liberty**

Personal liberty has been described as the most elementary and important of common law rights (Re Patterson; _Ex parte Taylor_, 2001, per McHugh J at [12]; _Al Kateb v Godwin_, 2004, per Gleeson CJ at [19]). It is also one of the most fundamental human rights under international law. Arbitrary detention is prohibited by the ICCPR and CROC. Article 9(1) of the ICCPR states: 'Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention.' Article 37(b) of CROC prohibits the unlawful or arbitrary deprivation of liberty of children and stipulates that arrest, detention or imprisonment of a child must be 'a measure of last resort and for the shortest appropriate period of time'. Subsection 4AA(1) of the Migration Act has to some extent applied the protections of Art 37(b) to children processed in Australia but does not extend to those processed offshore. Offshore processing requires children and adults to be detained until their status is determined and arrangements are made for their settlement or removal.

Australia's onshore detention regime was introduced in 1992 and has been the subject of considerable international scrutiny. The UN Human Rights Committee has scrutinised the regime in its consideration of Australia's periodic reporting concerning its implementation of the ICCPR and under its First Optional Protocol. Australia ratified the Protocol on 13 August 1980, thereby recognising the Committee's competence to consider written communications brought by alleged victims of ICCPR violations and to determine whether such violations have occurred. In its first finding with respect to Australia's immigration detention policy (_A v Australia_, 1993), the Committee found that the detention of a Cambodian asylum seeker who had arrived in Australia by boat was arbitrary on the basis that it was not necessary in the circumstances and was disproportionate to the aims of the policy, which might include prevention of flight or interference with evidence. The Committee further found that every decision to detain must be open to periodic review in accordance with Art 9(4) of the ICCPR and that no review of the detention arrangements under consideration was available. The Committee has made consistent findings concerning immigration detention on five further occasions (_Mr C v Australia_, 1999; _Babam v Australia_, 2001; _Bakhtiyari v Australia_, 2002; _D and E v Australia_, 2002; and _Danyal Shafiq v Australia_, 2004).
Persons processed offshore are apprehended and transferred by force to offshore processing centres (Migration Act, s 198A). Asylum seekers held in Nauru have been accommodated in a confined area in which they can move during the day. They are subject to regular scrutiny by security guards and a strict 7 pm curfew. The ocean surrounding the island continent of Nauru eliminates any opportunity to leave. In Ruhani v Director of Police (No 2), an asylum seeker held on Nauru was refused habeas corpus by the High Court on account of lawful justification, but the court nevertheless considered that the applicant was deprived of liberty while held in Nauru. Refugees detained on Manus Island in PNG have been subject to similar restrictions. Yet DIMA maintained that offshore processing does not amount to detention. In his appearance before the Senate Committee in relation to the Bill, DIMA's Deputy Secretary, Bob Correll, stated that ‘[o]ffshore processing centres are not detention centres, and conditions of movement are determined by the respective governments of Nauru and PNG’ (Senate Legal and Constitutional Legislation Committee 2006b).

Mr Correll's assertion is itself incongruous. Although detention of asylum seekers is not defined by the ICCPR or CROC, it has been defined by UNHCR. It is described as confinement within a narrowly bounded or restricted location — including prisons, closed camps, detention facilities or airport transit zones — where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory (UNHCR 1999; see also Ammur v France, 1996). A similar definition is employed by Goodwin-Gill, characterising detention as confinement in prison, closed camp or other restricted area such as a 'reception' or 'holding area' (Goodwin-Gill 2003). In determining whether an asylum seeker is being detained, the UNHCR guidelines indicate that the cumulative impact of the degree and intensity of restrictions should be considered and that asylum seekers should not be detained.

The right to health

Article 12 of the ICESCR and Art 24 of CROC enshrine the right to enjoy the highest attainable standard of physical and mental health. The detention environment has emerged as a vehicle for preventable mental illness in individuals who have experienced trauma in their countries of origin, and consequently submitted themselves to the perils of travelling by boat to Australia. Immigration detention has been associated with high rates of anxiety, depression, self-harm, suicidal ideation and post-traumatic stress disorder.

The human impact of immigration detention has been scrutinised by medical professionals and a preponderance of clinical evidence has revealed a link between
immigration detention and serious mental illness. On Australia’s mainland, the adverse impact of immigration detention on mental health has been exacerbated by the geographic remoteness of centres such as the facility located at Baxter, South Australia. Isolation from the Australian community impedes the provision of timely and appropriate services (Palmer 2005) and reinforces detainees’ sense of isolation and abandonment, with limited opportunities for access by community visitors, lawyers or members of the media. The hopelessness and isolation felt by mainland detainees in remote centres is magnified in the context of offshore processing. The despair experienced by detainees on Nauru has led to frequent hunger strikes and acts of self-harm (Crock, Saul and Dastyari 2006).

In his appearance before the Senate Committee Inquiry, Mr Correll conceded that the detainee population of Nauru suffered high rates of mental illness. Reference was made to numerous acts of self-harm, suicide attempts, moderate and severe depression, acute stress reaction, adjustment disorder and anxiety disorder in children (Senate Legal and Constitutional Legislation Committee 2006b). The mental health problems associated with offshore processing are not unique to Nauru. DIMA also reported incidents of self-harm, threats of suicide and three attempted suicides in PNG among the detainee population between October 2001 and December 2002 (Senate Legal and Constitutional Legislation Committee 2006b). While maintaining that persons processed offshore who suffered from a mental illness have often experienced ‘highly traumatised previous life circumstances and there are many factors contributing to their mental health condition’, Mr Correll conceded that ‘individual circumstances that may relate to a person’s presence in Nauru may contribute in one case to an assessment of mental health considerations’ (Senate Legal and Constitutional Legislation Committee 2006b, 58). Indeed, experiences of prior trauma would appear to be exacerbated by the experience of offshore detention, thus occasioning preventable psychiatric illness.

The experience of Dutch psychiatrist Dr Maarten Dormaar serves to illuminate the impact of offshore detention on mental health. Dr Dormaar was employed by IOM to work in Nauru in mid 2002 (Harding-Pink 2004, 398-400) after practising medicine since the late 1960s and psychiatry since 1975 (Colvin and Fowler 2003). In a report to Nauru camp managers in October 2002, he reported that:

> I seldom or never encounter an asylum seeker who still sleeps soundly and is able to enjoy life. Mental health, or psychiatry for that matter, is basically not equipped to improve their situation in any essential respect. [Colvin and Fowler 2003.]

Dr Dormaar has claimed that he provided many reports on the severity of mental illness of detainees on Nauru, and that IOM officials ‘received it but they didn’t react
to it, they didn’t react to all my extensive reports’ (Colvin and Fowler 2003). DIMA has denied that Dr Dormaar’s concerns had been ignored, and asserted that Nauru had ‘comprehensive mental health services in the centres to improve the residents’ psychological wellbeing’ (Colvin and Fowler 2003). In November 2002, Dr Dormaar resigned in protest over the conditions in the camp and consistent disregard for his professional clinical opinion (Colvin and Fowler 2003).

Children’s rights

Children seeking asylum have suffered trauma prior to their arrival in Australia (Crock 2006, 128). When subjected to the uncertainty and anxiety of the detention environment, these children have been exposed to acts of self-harm and suicide by adult detainees. Due to children’s developmental needs and heightened vulnerabilities, the impact of detention on the human rights of children has been of particular concern.

The damaging impact of detention on child asylum seekers is heightened by the use of remote detention facilities under the Pacific Solution. A study of unaccompanied child asylum seekers has found the physical, financial and emotional impact of offshore processing to be ‘disastrous’ for unaccompanied children seeking protection from Australia (Crock 2006, 128).

The inconsistency of the detention environment with a range of CROC’s provisions may be seen to amount to a repudiation of Australia’s obligations under the Convention. In light of the prior trauma suffered by children seeking refugee protection, their accommodation in the detention environment fails to take appropriate measures to promote physical and psychological recovery of those who have suffered neglect, abuse, exploitation or torture as required by Art 39. Children have been detained alongside adults in offshore centres. Article 37(c) of CROC requires children and adults to be separated unless it is considered in the child’s best interests not to do so, and calls on states to facilitate contact between detained children and their families. Australia’s ratification of CROC was subject to a reservation to Art 37(c). The reservation has been maintained on the basis that detention of children together with adults ‘remains necessary because of the demographics, geographic size and isolation of some remote and rural areas of Australia’ (Australia’s Combined Second and Third Reports under the Convention on the Rights of the Child 2003). Although Australia is not bound by Art 37(c), the detention of children together with adults raises concerns in relation to other articles in CROC.

4. See, for example, Silove and Steel 2006; Silove and Steel 1998; Steel et al 2004; Steel et al 2006.
Children’s exposure to acts of suicide and self-harm by adult detainees compromises their right to be protected from physical and mental violence in Art 19(1).

The detention of children, including unaccompanied children, in offshore facilities fails to facilitate an evaluation of individual circumstances, such as children’s vulnerabilities and developmental needs (Crock 2006). Such arrangements fly in the face of Art 3(1) of CROC, which enshrines the best interests of the child as primary consideration in all actions concerning children, and Art 3(2), which provides that parties shall adopt appropriate legislative and administrative measures to ensure that children are accorded protection necessary for their well-being, taking into account the rights and duties of parents and legal guardians. In allowing the Minister for Immigration and Citizenship to permit families with children to live in the community while they await refugee status determination, the Migration Amendment (Detention Arrangements) Act has moved towards an acceptance of Art 3 with respect to child asylum seekers in Australia but not to children processed offshore.

The conditions of detention call into question Australia’s compliance with a range of economic and social rights enshrined in CROC, in addition to the right to the highest attainable standard of health. Children detained in offshore processing centres are unlikely to fully enjoy the right to education in Art 28. The Seeking Asylum Alone project has found that although children have had access to education on Nauru, the schooling provided was inadequate and the teachers were rarely paid (Crock 2006, 190).

Child asylum seekers processed offshore are also unlikely to enjoy a standard of living adequate for their physical, mental, spiritual, moral and social development in accordance with Art 27. Jeremy McBride has argued that deprivations of such rights may amount to torture in circumstances where treatment is, ‘at the very minimum, a gross form of humiliation, rising to the deliberate infliction of severe mental or physical suffering’ (McBride 1998, 109). In light of children’s needs and vulnerabilities, their arbitrary detention arguably may amount to torture or to cruel, inhuman or degrading treatment in violation of Art 37(a) of CROC, Art 7 of the ICCPR and Art 1 or 16 of CAT.

Non-refoulement

Article 33 underpins the Refugee Convention. It prohibits the expulsion or return (refoulement) of a refugee to the frontiers of a place where their life or freedom may be threatened on grounds of race, religion, nationality, membership of a social group or political opinion. Under Art 32, expulsion is only authorised in exceptional circumstances where national security or public order is at risk. The Convention’s
prohibition on expulsion or refoulement is not confined to the return to a refugee’s country of origin, but extends to any state where they may be subjected to persecution (UNESCO 2006).

Asylum seekers have been processed offshore in PNG and Nauru. PNG is a party to the Refugee Convention, subject to seven reservations (Arts 17(1), 21, 22(1), 26, 31, 32 and 34). Nauru is not a party to the Convention. Nauru is consequently not obliged to refrain from refoulement, with the possible result that refugees may be returned to a place of persecution.

Concerns about such indirect or ‘chain’ refoulement, namely indirect return to a country of origin, would appear to be addressed in an MOU between the governments of Australia and Nauru. The document provides that any asylum seekers awaiting determination of their status will not be returned by Nauru to a country in which they fear persecution, nor before a place of settlement is identified (the MOU is cited in Ruhani v Director of Police (No 2), 2005). However, the document is of uncertain legal effect and does not adequately address concerns about Australia’s ability to monitor and regulate offshore facilities in other nations. It also fails to impose any obligations upon Nauru to comply with international law.

Senator Vanstone made the following comments in May 2006: ‘We can’t make rules in relation to facilities in other countries. We can influence them but we can’t make rules ... I am saying that in Australian territory the arrangements we made last year apply ... but Nauru is another country’ (SBS Australia 2006). The former minister’s comments concerning Australia’s limited ability to monitor offshore facilities in the sovereign state of Nauru would suggest that offshore processing is not regarded by her as extraterritorial processing. It is instead the deflection of those who seek Australia’s protection to a state which does not owe protection obligations under the Refugee Convention, thus heightening the risk of chain refoulement. The likelihood must therefore be confronted that some of the 420 unsuccessful asylum seekers removed by Nauru (Kneebone 2006) were refugees who may have been returned to situations of danger.

The continuation of Operation Relex II brings with it the danger of direct refoulement by Australia. Like its predecessor, Operation Relex II aims to deter and deny the access of asylum seekers to Australia. Some methods adopted under Operation Relex I include surveillance and response operations in order to deter unauthorised boat arrivals, including the return of asylum seekers to Indonesia (see Marr and Wilkinson 2003). It is feared that this may constitute refoulement, particularly if Operation Relex II sees asylum seekers who have fled Indonesia being returned to Indonesia without proper assessment of their refugee status.
Non-refoulement obligations may also be breached if a nation has inadequate refugee assessment procedures that result in the return of genuine refugees to countries where they have a well-founded fear of persecution. There is evidence of systematic problems in Australia’s processing of asylum seekers detained in Nauru. Migration Agent Marion Le, who was the agent/advocate for all detainees on Nauru as at December 2003, has identified several issues of concern in the processing of asylum claims on Nauru. These include:

- the merging of more than one applicant in certain written decisions, which featured the names of different applicants in different parts of the decisions;
- the confusion of applicants’ identities based on similarities of name — for example, a decision in one applicant’s case was issued to a different applicant with a similar name;
- written decisions were expressed in almost identical words to other decisions which rested on different facts;
- decisions based on a wrong finding of nationality were later amended without any reassessment in light of the new accurate information;
- a lack of understanding and knowledge about Afghan political groups — for example, the existence of a political party was denied even though it could be verified by an internet check or a DIMA database search;
- decisions which ignored documentation held by the applicants which gave rise to serious concerns for their safety in the event of their return; and
- failure to add relevant information provided by advocates to files (Le 2006).

Le also found serious inequities and discrepancies between the decisions being handed down for asylum seekers processed onshore and those processed offshore (Le 2006). The above evidence suggests that asylum seekers in offshore facilities may suffer a wrong status determination decision because of flawed practices in offshore facilities, a danger characterised by Kneebone as ‘constructive refoulement through processing errors’ (Kneebone 2006). The risk of refoulement in offshore facilities is further increased by the lack of legal assistance and review of primary decision making. Offshore processing severely limits Australia’s ability to abide by its obligation under the Refugee Convention and places asylum seekers at risk of return to situations of danger, in breach of its non-refoulement obligations.

Access to legal assistance

Offshore processing has the result that asylum seekers’ claims are processed without the benefit of migration advice. Once admitted into the onshore processing regime in mainland Australia, most asylum seekers in detention (as well as some applying from within the community) are given access to government-funded assistance if
they sign a form requesting such help. The Immigration Advice and Application Assistance Scheme (IAAAS) allocates funded migration agents (some of whom are lawyers) to onshore asylum seekers.

In 2003-04 the IAAAS program assisted 288 protection-visa applicants in immigration detention and 456 disadvantaged-visa applicants in the community (Department of Immigration and Citizenship 2007). The IAAAS program does not extend to judicial review for asylum seekers onshore. However, in practice, government-funded legal assistance may be provided for court actions, either directly from Legal Aid offices or from lawyers funded by Legal Aid in circumstances where the law is unsettled or where the proceedings challenge the lawfulness of detention. Furthermore, many law societies and courts have set up pro-bono legal schemes for asylum seekers wishing to challenge visa refusals in the courts.

Offshore asylum seekers have no access to government-funded immigration or legal advice. The Department of Immigration and Citizenship has noted that it has no objection to lawyers advising clients in offshore facilities (Senate Legal and Constitutional Legislation Committee 2006c). Nevertheless, the experience of offshore processing has been that no asylum seeker received legal assistance until 2003. It is difficult if not impossible for pro-bono lawyers to access clients in Nauru in order to receive instructions. Putting to one side the financial burden on pro-bono lawyers travelling to Nauru, lawyers have been refused visas and have been barred from accessing offshore facilities in the past. According to the submission to the Senate Committee by Australian Lawyers for Human Rights, between August 2001 and March 2003 a number of lawyers volunteered to travel to Nauru to provide legal assistance to asylum seekers detained there. Their visa applications were refused by Nauru twice, notwithstanding support from UNHCR. No reasons were offered for the refusals (Australian Lawyers for Human Rights 2006).

The lack of funding and the difficulty of accessing clients in offshore facilities deprive many, if not all, asylum seekers in offshore facilities of legal assistance or migration advice. This is extremely concerning in light of the complex nature of asylum law and the danger of refoulement. Lack of access to legal assistance for offshore asylum seekers is a stark incongruity in Australia's processing of all asylum seekers seeking its protection.

**Discrimination**

The differential treatment of asylum seekers processed offshore has been contingent upon the happenstance of the geographic location of their arrival. These individuals have simply not managed to reach Australia's mainland. In his Second Reading
speech concerning the Migration Amendment (Designated Unauthorised Arrivals) Bill, Mr Robb acknowledged the 'incongruity' of this differential treatment. The unsuccessful Bill was proposed as the solution to this incongruous situation. Yet the Bill would have operated with the result that all asylum seekers who arrived in Australia by boat would be denied a range of rights concomitant with onshore refugee processing. Under the withdrawn Bill, these rights would still have been accessed by asylum seekers who arrived in Australia by plane, a group which is statistically less likely to constitute refugees. In the six-year period between July 1999 and June 2005, DIMA approved, at the first instance, a mere 2 per cent of initial visa applications lodged by unauthorised air arrivals as compared with some 79 per cent of applications lodged by unauthorised boat arrivals (Senate Legal and Constitutional Legislation Committee 2006b).

The distinction drawn between asylum seekers who arrive on Australia’s mainland and those who do not calls into question Australia’s performance of its non-discrimination obligations under a range of international instruments, including the ICCPR (Art 2(1)) and CROC (Art 2(1)). Article 2 of the ICCPR calls on state parties to apply the rights enshrined in the Covenant ‘without distinction of any kind’ to ‘all individuals in its territory and subject to its jurisdiction’. Article 26 states that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law’ and prohibits discrimination on grounds including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. CROC’s Art 2(1) calls upon state parties to respect and ensure its rights to every child within their jurisdiction without discrimination of any kind, irrespective of the legal status of the child or of the child’s parent or legal guardian. Appropriate measures are required by Art 2(2) to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status of the child’s parents, legal guardians or family members. Children seeking asylum and children determined to be refugees are entitled, under Art 22, to appropriate protection and humanitarian assistance in the enjoyment of CROC rights and rights in other treaties ratified by a state party.

Article 3 of the Refugee Convention calls upon state parties to apply the Convention without discrimination as to race, religion or country of origin. Forcible deportation and detention of boat arrivals may also constitute a penalty in contravention of Art 31(1), which states that:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization.
The conditions in which asylum seekers are held in offshore centres, combined with the denial of the rights outlined above, contrast markedly with the entitlements of persons processed in Australia and may be seen to amount to a penalty within the meaning of Art 31.

**Merits review**

An important right enjoyed by asylum seekers processed in Australia is the right to merits and judicial review of their asylum decision. There is no right to merits review at the Refugee Review Tribunal (RRT) for applicants who are processed outside Australia (*Migration Act 1958*, s 411(2)(a)). Applicants processed offshore do have a right to have Department of Immigration and Citizenship decisions reviewed by the department. There is, however, no provision for independent review of departmental decisions. The independence of the RRT is an important safeguard against the influence of political constraints that may affect a government department. The removal of an independent reviewer may give rise to allegations of political intervention in refugee decision making and create a risk of refoulement of genuine refugees.

The RRT has played a significant role in ensuring procedural fairness for asylum seekers. Between 1 July 1993 and 28 February 2006, the RRT overturned 7885 cases decided by DIMA (as it then was). The department has erred most extensively in its decisions involving Iraqi and Afghan asylum seekers. Between 1 July 2005 and 28 February 2006, the RRT set aside 144, or 95 per cent, of all decisions on Afghan asylum seekers and 373, or 97 per cent, of all departmental decisions involving Iraqi asylum seekers.

Merits review allows a re-assessment of the facts by an independent tribunal. In light of the concerns about offshore processing identified by Marion Le and other submissions to the Senate inquiry, it is clear that denial of the rights to merits review exposes asylum seekers processed offshore to a high danger of refoulement. In denying the protections of the Australian legal system, Australia's offshore processing regime is inconsistent with the prohibition on discrimination considered above and denies equal protection of the law to persons processed offshore.

5. Although the supervisory UN Committee on the Rights of the Child has indicated that this reservation may impede Australia's full implementation of the instrument: Concluding Observations of the Committee on the Rights of the Child 1997, Pt C, para 8.
Judicial review

In theory, the right to judicial review of decisions by Commonwealth officers is protected under ss 75(v) of the Australian Constitution. This right ensures that Commonwealth officers are prevented from exceeding their power, and encourages adherence to the rule of law (per Brennan J in Church of Scientology v Woodward, 1982, at 70).

In practice, however, lack of access to legal advice and assistance frustrates the fulfilment of this right. Few cases brought on behalf of applicants held on Nauru have been judicially determined (See Ruhani v Director of Police, 2005 and Ruhani v Director of Police (No 2), 2005). Decisions which are not made by Commonwealth officers will not be subject to judicial review under ss 75(v) of the Constitution. This may include decisions made by UNHCR officials or IOM.

Furthermore, judicial review for asylum seekers processed offshore may be futile because it would not guarantee a re-hearing of their claims by a decision maker. In making refugee status determinations, a Commonwealth officer processing claims outside Australia would be applying the Refugee Convention, rather than any specific section in the Migration Act (Horan 2003, 551-72). There is no legislative regime that compels the hearing of an asylum claim by a Commonwealth officer in offshore facilities. According to Chris Horan, the absence of an enforceable duty to hear an asylum claim by a Commonwealth officer is fatal to the application for a re-hearing. In the event of a successful judicial review decision, Horan believes the High Court would be unlikely to make an order compelling the Commonwealth to make a fresh determination in relation to a particular asylum seeker (Horan 2003, 551-72).

Should a judicial review application from an asylum seeker processed offshore be successful and a re-hearing granted by the High Court, the asylum seeker may nevertheless be refused an Australian visa. A successful refugee application in an offshore facility does not guarantee the right of resettlement in Australia. An applicant who is successful in his or her refugee application must await resettlement in a third country. The right to apply for an Australian visa is a non-delegable and non-compellable discretionary power that cannot be subject to judicial review (Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants, 2003, at 12 per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

Lack of legal assistance or migration advice, difficulties in processing claims offshore and the removal of independent review create an environment in which refugees may be vulnerable to political decision making and human error.
Financial cost of offshore processing

Offshore processing is costly in terms of its psychological impact on asylum seekers and Australia's ability to adhere to its international obligations and consequent international standing. It also represents a high cost for the Australian taxpayer. The running of offshore processing centres alone by IOM cost the Australian Government $119,463,592.51 between 2002 and 2005 (Senate Supplementary Budget Estimates Hearing 2005). This does not include associated costs, such as the transport of asylum seekers to offshore processing centres. In 2002-03, $90 million was spent on offshore asylum seeker management. In comparison, only $5 million was spent on administering the entry of 4000 refugees under the offshore humanitarian program (assisted passage and medical clearance costs) in that year (Crock, Saul and Dastyari 2003, 73). In August 2006, despite the availability of processing facilities on Christmas Island, eight Burmese asylum seekers were transferred to Nauru at a cost of $225,000 (Crock, Saul and Dastyari 2003). The annual cost of maintaining detention facilities at Nauru and Manus Island is around $24 million and $3 million respectively.

The costs of running detention centres on remote Australian Islands such as Christmas and Cocos Islands are also high. Megan Saunders of *The Australian* reports that, according to the government's own figures, the cost of detaining boat people on temporary facilities at Christmas and Cocos Islands is between $200 and $300 per day. This is more than double the expense of keeping them on the mainland (Saunders 2002). The construction of a new detention facility on Christmas Island is nearing completion. The centre will have the capacity to accommodate 800 people. It is expected to commence operation in mid 2007 and its construction costs are approaching $400 million (ABC Lateline 2007; Snowdon 2006).

The high cost of detention outside Australia, even when the number of detainees is low, was clearly demonstrated by the case of Aladdin Maysara Salem Sisalem. Mr Sisalem spent more than 18 months in detention on Manus Island, PNG, and was the sole detainee on the island for 10 months. His solitary detention cost the Australian taxpayer more than $216,666 dollars per month. An estimated total of $1.3 million was spent accommodating, feeding and caring for Mr Sisalem. Overall costs — including power, water and maintenance projects which benefited the local community, along with some back pay — add up to more than $4 million (Jackson 2004). Detention of Mr Sisalem in Australia would have saved the Australian taxpayer an average of $211,866 per month, with detention in the Australian mainland costing approximately $4800 per person per month (Jackson 2004).
An elephant in the room?

Given the enormous cost and dubious gains of offshore processing, one may be forgiven for questioning the motives underpinning the maintenance of the system. In the hearing of the Senate Committee on 26 May 2006, Senator Brett Mason made the following comments in his questioning of Brian Walters SC, President of Liberty Victoria:

As a politician, one of the big issues for us in not only domestic political concerns but also broader foreign policy interests. I suspect that there is the elephant in the room that we have not discussed and perhaps it is not an issue that is easy for discussion.

Mr Walters's prescient response was that the offshore arrangements are Australia's responsibility. He then commented as follows:

The fact is that in our region we should be upholding the rule of law. If ever there was a region where we ought to be doing that, it is here. It is in the Pacific. It is Australia's responsibility as a powerful country, and a country which has these people seeking asylum on its shores and within its jurisdiction, to act in accordance with its legal, democratic and convention obligations. [Senate Legal and Constitutional Legislation Committee 2006c.]

Senator Mason has suggested that the elephant in the room is Australia's broader foreign policy interests. The Refugee Convention calls on state parties to recognise the social and humanitarian nature of the problem of refugee flows and to do everything within their power to prevent this problem from becoming a source of tension between states (Preamble to the Refugee Convention). Within the realm of realpolitik, such tensions may nevertheless on occasion arise. But reactive laws which subordinate humanitarian concerns in order to ease political tensions will not generate respect for Australia's sovereignty or foster enduring mutual respect between nations.

In acceding to the UN's constitutional document, the UN Charter, Australia recognised the link between the conditions of stability and well-being which are necessary for peaceful and friendly relations among nations and respect for human rights (see, for example, Arts 1(2) and 55). The link between human rights, peace and stability within the Asia-Pacific region has been recognised in the emergence of the state of East Timor and with respect to its current security and humanitarian situation. As a leader in our region, it is incumbent upon Australia to set a positive example by performing its proper role as a fair-minded and principled power within its region, committed to upholding fundamental human rights and maintaining international peace and security. Australia's flawed and costly offshore processing regime is antithetical to this proper role.
Conclusion

The Immigration Minister's parliamentary secretary identified an incongruity inherent in the differential treatment of asylum seekers processed offshore when compared to those processed in Australia. But the federal government has chosen to overlook the flaws inherent in the offshore processing regime which has spawned the situation of incongruity — flaws which were highlighted in 135 submissions to the Senate Committee in the context of its enquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. The government's commitment to offshore processing is itself incongruous and highly costly in a nation which has voluntarily signed up to human rights obligations under international law and maintained that these obligations are valued and upheld.

The high cost of offshore processing includes the inevitable doubt cast over the sincerity of Australia's commitment to human rights and concomitant damage to our international standing. Australia's stance undermines the universal application of human rights by setting a disturbing precedent for burden sharing in the Asia-Pacific region and beyond. The offshore system has cost Australian taxpayers hundreds of millions of dollars in circumstances where operational mainland facilities have been readily available at a significantly lower cost. But the regime's highest costs have been in human terms, including its deleterious effect on mental health and its denial of the fundamental rights required to secure human dignity. Offshore processing has exacted an unacceptably high cost and should be abandoned.

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Chapter 7

INTRODUCTION

[14.10] The appearance of boats laden with asylum seekers in Australian territorial waters is rarely far from news headlines and it would seem that few Australians lack an opinion about the protections which should follow their arrival. Rather than addressing public fear and hostility within a framework of human rights, successive governments have characterised "boat people" as an unwelcome incursion into Australia's territorial sovereignty. The consequent demonisation of irregular maritime arrivals (IMAs) has underpinned policies which undermine the rule of law and subvert the proper understanding of Australia's human rights obligations under international law.

This chapter examines the treatment of IMAs with reference to human rights guarantees undertaken by Australia. After considering the relationship between sovereignty and refugee rights, the structure of Australia's humanitarian program and applicable international standards, the chapter explores the implications of two key policies: the enduring immigration detention regime and the various manifestations of offshore processing from the Pacific Strategy and beyond. These policies have seen successive Australian governments fail to meet their obligations under the Refugee Convention and other core human rights instruments.

Sovereignty

[14.20] Unlike other areas of treaty implementation in which obligations are characterised by reciprocity, human rights obligations are at times portrayed by governments as an incursion into national sovereignty. In no

1 I am grateful to Professor Susan Kneebone and Adam Fletcher for their valuable comments on an earlier draft of this chapter.

2 For a comprehensive discussion of Australians' attitudes to asylum seekers see Chapter 21, by Kevin Dunn, Do Australians Care about Human Rights? Awareness, Hierarchies of Sympathy and Universality?

3 This has been the Federal Government's epithet of choice with respect to asylum seekers who arrive or attempt to arrive in Australia by boat.
policy area is the sovereignty objection more strongly and repeatedly asserted than in relation to the admission and subsequent treatment of asylum seekers. In seeking to assert control over the movement of people who have fallen victim to circumstance, former Prime Minister John Howard’s declaration that “[w]e will decide who comes to this country and the circumstances in which they ‘come’”4 captures the essence of his Government’s policy and that of successive federal governments. Such assertions of control appear to hold great popular appeal.5 While various rationalisations have been proffered for Australia’s policies regarding IMAs, the real explanation lies in the “determination to appear to the domestic constituency to be in full control of Australia’s borders”.6

A confluence of historical, legal and geographic influences has facilitated a strong culture of immigration control7 and concomitant preference for selecting refugees from overseas. These influences include Australia’s settler history and “self-consciously selected” immigrant population,8 restrictions on non-white settlement which operated to varying degrees until 1973, the breadth of the Constitutional powers with respect to immigration,9 and aliens,10 and Australia’s relative geographic isolation and absence of land borders. The Executive’s power to exclude or prevent the entry of non-citizens is an attribute of Australia’s territorial sovereignty.11 This power is qualified by customary international law and the Executive’s ratification of international treaties which set minimum standards for the reception and treatment of asylum seekers.12 These

9 Australian Constitution, s 51(xvii).
10 Australian Constitution, s 51(xix).
12 See for example, Plaintiff M70/2001 v Minister for Immigration and Citizenship; Plaintiff M106 of 2001 v Minister for Immigration and Citizenship (2011) 244 CLR 144 which is considered from [14.160] below.
standards are premised on an understanding that protecting and ensuring human dignity necessarily qualifies the sovereignty of states.

Humanitarian program

[14.30] Australia’s Refugee and Humanitarian Program comprises two constituent elements: onshore protection and offshore resettlement. The onshore program concerns asylum seekers who arrive in Australia with or without a valid visa and claim refugee protection. Asylum seekers who arrive with visas have usually travelled by air and have a low success rate in establishing refugee status. Most asylum seekers who attempt to arrive in Australia without a visa have travelled by boat. Historically, an overwhelming majority of these IMAs establish that they are refugees. Despite being consistently outnumbered by air arrivals, IMAs have been the subject of harsh policies aimed at deterring and obstructing entry. These policies are examined in this chapter.

Offshore resettlement under the humanitarian program is granted to people outside Australia, usually in camps and settlements in developing countries. Visas are granted to refugees and people who are accorded special humanitarian protection due to the danger of substantial discrimination amounting to a gross violation of their human rights in their home country. In 2010-2011, 54,396 applications were received under the offshore resettlement program and 8,971 visas granted. This compares to 4,828 visas granted under the onshore program.

13 Since 23 March 2012, protection visas have also been granted to people who do not meet the criteria for refugee status but are entitled to “complementary protection” in accordance with the Migration Amendment (Complementary Protection) Act 2011 (Cth) because there is a real risk that return to their home country would result in specified harms which engage Australia’s non-refoulement obligations. Non-refoulement is examined below at [14.50].

14 See generally Janet Phillips, Asylum Seekers and Refugees, What are the facts? Background note, Parliamentary Library (Canberra, January 2011) 9.

15 See generally Janet Phillips, Asylum Seekers and Refugees, What are the facts? Background note, Parliamentary Library (Canberra, January 2011) 8: Over the past 14 years, between 70 and 97 per cent of IMAs have been found to be refugees.

16 Because applicants’ mode of arrival is not mentioned in the available data, a precise calculation is not possible. While the proportions of IMAs have increased in recent years, they currently comprise less than half of the onshore applications and have historically made up an estimated 1-4 per cent: see Janet Phillips, Asylum Seekers and Refugees, What are the facts? Background note, Parliamentary Library (Canberra, January 2011) 6; also Elibritt Karlsen, Janet Phillips and Elsa Koleth, Seeking Asylum: Australia’s Humanitarian Response to a Global Challenge, Background note, Parliamentary Library (Canberra, January 2011).

Since July 1996, the onshore and offshore quotas have been linked. Accordingly, every visa granted under the onshore program has effected a commensurate reduction in resettlement places. Offshore resettlement has since been portrayed by successive federal governments as the proper trajectory for protection in Australia. IMAs have thus been characterised as “queue-jumpers” who bypass the proper process and usurp places from refugees in camps overseas. The notional queue of the government’s own creation has fuelled the misconception that IMAs are unlawfully present in Australia and accordingly not entitled to protection. People who arrive in Australian territory engage our protection obligations under the Refugee Convention. Such engagement has been circumvented by a range of measures introduced under the Pacific Strategy and considered below. While onshore protection is a corollary of Australia’s international obligations, offshore resettlement is a voluntary humanitarian scheme which contributes significantly to the United Nations High Commissioner for Refugees’ (UNHCR) mandate of finding durable solutions for refugees. Obtaining a visa under the offshore resettlement program is analogous to winning a lottery. The numerical linkage of the two programs has reduced much-needed resettlement places, laid the blame on asylum seekers and provided a rationalisation for policies of deterrence which breach Australia’s international obligations.

INTERNATIONAL HUMAN RIGHTS STANDARDS

Implementation

[14.40] In conjunction with the panoply of obligations assumed by Australia in the core United Nations (UN) human rights treaties, the Refugee Convention provides a legal framework for protection of refugees and asylum seekers. As the sixth state party to the Convention, Australia’s ratification brought it into operation under international law. Its

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19 See, for example, ABC *Lateline*, “Howard Looks Back without Regrets”, interview with Tony Jones on 7 September 2011 at [http://www.abc.net.au/lateline](http://www.abc.net.au/lateline). When questioned about the reference to IMAs as “queue jumpers” by members of the Gillard Government, former Prime Minister John Howard said “that was a description I used 10 years ago ... and they are queue-jumpers because there is a queue and the queue are the people who’ve waited for years in refugee camps around South-East Asia and they’re selected by the United Nations process.” See also ABC *Four Corners*, “The Queue Jumpers” (16 October 2000), transcript at [http://www.abc.net.au/4corners](http://www.abc.net.au/4corners); SBS *World News*, “Auskar Surbakti interview with former Immigration Minister Phillip Ruddock” (16 June 2011), at [http://www.youtube.com](http://www.youtube.com).

20 Article 43 provides that “[t]his Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession of the Convention”. 
operation was originally limited to persons who had become refugees before 1 January 1951, and subject to an optional geographic limitation confining states’ obligations to events which occurred in Europe. The 1967 Protocol removed these temporal and geographic limitations.

Australia’s obligations to refugees and asylum seekers under the Refugee Convention and other instruments are subject to a requirement of good faith implementation. Article 26 of the Vienna Convention on the Law of Treaties requires states to perform their treaty obligations in good faith and Art 27 provides that states may not invoke the provisions of their domestic law to justify non-compliance. The obligation of good faith is breached where the practical effect of the acts or omissions is to defeat the treaty’s object and purpose or render fulfilment of treaty obligations obsolete.

Effective implementation in accordance with the rule of law requires treaty obligations to be embedded into domestic law, as reflected in instruments such as the International Covenant on Civil and Political Rights (ICCPR). Article 2(2) of the ICCPR provides that:

[where not already provided for by existing legislative or other measures, each State Party ... 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.]

The UN Human Rights Committee has observed that the obligation in Art 2(2) requires State Parties to make such changes to domestic laws and practices as are necessary to ensure conformity with the Covenant.

The Vienna Convention on the Law of Treaties further requires good faith interpretation of a treaty in light of its object and purpose and in accordance with the ordinary meaning of its terms in their context (Art 31(1)). The High Court’s judgments in 2010 and 2011, concerning arrangements for processing IMAs (at Christmas Island and Malaysia respectively) exemplify good faith interpretation of Australia’s obligations under the Refugee Convention. These judgments are examined at [14.150] and [14.160] below. It is generally accepted that good faith interpretation of the Refugee Convention must take place within a human rights

21 Article 1A(2).
22 Article 1B(1) and (2).
framework. For example, the meaning of "persecution" for the purpose of determining refugee status may be assessed with reference to applicable human rights instruments such as the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR). Nevertheless, treaty obligations do not automatically become part of Australian law upon ratification by the Executive. Legislative incorporation or "transformation" is required.

Refugee Convention

[14:50] The Convention defines a refugee in Art 1A(2) as a person outside their home country who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion is unwilling or unable to return. Section 36(2) of the Migration Act 1958 (Cth) (Migration Act) incorporates the definition by reference. It provides that a criterion for the grant of a visa, known as a "protection visa", is the Minister's satisfaction that a non-citizen applicant (or member of the same family unit) is a person to whom Australia has protection obligations under the Refugee Convention.

The right to seek asylum from persecution is enshrined in Art 14 of the Universal Declaration of Human Rights (UDHR) and reaffirmed in a range of resolutions of the UN General Assembly and conclusions issued by UNHCR's Executive Committee. The express right is absent from the Refugee Convention but underpins its articles, particularly the non-refoulement obligation in Art 33 which prohibits expulsion or return of a refugee to the frontiers of territories where their life or freedom would be threatened. Where there is a real risk that denial of entry may result in persecution, such consequence can only be averted by admission for status determination, elevating Art 33 to a duty "not to obstruct the individual's right to seek asylum"30 or "de facto duty to admit".31

Non-refoulement is generally recognised as a principle of customary international law32 and extends to the broader human rights rubric.

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28 See, for example, Michelle Foster, International Refugee Law and Socio-Economic Rights: Refuge from Deprivation (Cambridge University Press 2007).
Article 3 of the Convention against Torture (CAT) expressly prohibits the return of a person to another state where there are substantial grounds for believing that they would be in danger of being subjected to torture. The ICCPR and Convention on the Rights of the Child (CRC) prohibit expulsion or return of a person to a place where they are in danger of torture or cruel, inhuman or degrading treatment (ICCPR, Art 7 and CRC, Art 37(a)) or their right to life (Art 6 of both instruments) is threatened. A similar prohibition may be implied from the right to security of person and protection against bodily harm in Art 5(b) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

Another key provision in the Refugee Convention which emanates from the right to seek asylum is the obligation not to apply unnecessary restrictions on refugees' movements (Art 31(2)) or impose penalties on account of illegal entry or presence of refugees coming directly from a territory where their life or freedom was threatened, provided that good cause can be shown for illegal entry or presence (Art 31(1)). Article 31 is premised on an understanding that those who flee their homeland are unlikely to be equipped to secure the necessary legal permission to enter a country in which they seek asylum. Paragraph (1)'s reference to "coming directly" does not require direct travel from country of origin but "good cause" for onward flight must be demonstrable by reference to the situations pertaining in transit countries, including threats to life or freedom or refusal to consider protection claims. Most countries transited by asylum seekers en route to Australia are not parties to the Refugee Convention and lack domestic mechanisms for refugee status determination and protection. The policies examined in this chapter have been applied to IMAs irrespective of their trajectories and have sought to deter them from making the onward journey to Australia.


33 UN Human Rights Committee, General Comment 20: Art 7, UN Doc HRI/GEN/1/Rev.7. 10/03/1992.


35 The main transit countries for IMAs coming to Australia are Indonesia and Malaysia. For transit routes of IMAs related back to source countries, see generally UN Office on Drugs and Crime, Issue Paper, Smuggling of Migrants by Sea (2011) 18-9, at http://www.unodc.org; Susan Kneebone, "Controlling Migration by Sea – the Australian case", in Bernard Ryan and Valsamis Mitsilegas (eds), Extraterritorial Immigration Control: Legal Challenges (Martinus Niijhoff, 2010) 353-4.
Articles 31 and 33 are expressed with reference to refugees but extend to putative or "presumptive" refugees due to the declaratory nature of refugee status determination which does not transform an asylum seeker into a refugee but rather "declares him to be one". The following additional Refugee Convention rights are among those widely accepted as applicable to asylum seekers. Article 3 requires the Convention's provisions to be applied without discrimination as to race, religion or country of origin. The Convention's first preambular paragraph notes the UDHR's affirmation that human beings shall enjoy fundamental rights and freedoms without discrimination. The non-discrimination principle is reflected in the core human rights instruments, including the ICCPR. The right of access to courts and freedom of religion in Arts 16 and 4 respectively (of the Refugee Convention) are reflected in Arts 14 and 18 of the ICCPR. Article 22's obligation to accord refugees the same treatment as nationals with respect to elementary education and the right to employment and housing in Arts 17 and 21 are reflected in Arts 13, 6 and 11 of ICESCR.

**Core human rights treaties**

Refugees are subject to a range of further protections in the core human rights treaties, including the ICCPR, ICESCR, CRC and CAT. These include the right to personal liberty (ICCPR, Art 9; CRC, Art 37(b)), the right to the highest standard of physical and mental health (ICESCR, Art 12; CRC, Art 24), the right to humane treatment in detention (ICCPR, Art 10; CRC, Art 37(c)) and the prohibition on torture and other forms of cruel, inhuman or degrading treatment (CAT, Arts 2 and 16; ICCPR, Art 7; CRC, Art 37(a)).

The CRC enshrines a range of additional rights of importance in the context of refugee processing. These include the right of child asylum seekers and refugees to appropriate protection and humanitarian assistance

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37 An asylum seeker is a person who is seeking protection as a refugee (as defined in Art 1A(2) of the Refugee Convention) but has not yet had their status determined.


39 ICCPR, Articles 2(1) and 26.
in their enjoyment of human rights (Art 22), the requirement that the best interests of the child is the primary consideration in all actions of administrative and other authorities concerning children (Art 3(1)), the obligation to provide an environment which fosters the health, self-respect and dignity of children recovering from torture and trauma (Art 39); and a number of further limitations on the detention of children. To this end, detention must be used only as a measure of last resort and for the shortest appropriate period of time (Art 37(b)). In addition to requiring humane and age-appropriate treatment and respect for the inherent dignity of child detainees, Art 37(c) contains the further requirement that children in detention must be separated from adults unless it is considered in the children’s best interest not to do so. Australia’s ratification of CRC was subject to a reservation to this portion of Art 37(c).

IMMIGRATION DETENTION

Foundations of mandatory detention

[14.70] Australia has maintained a regime of mandatory immigration detention since May 1992. In Lim v Minister for Immigration (Lim)40 the High Court found that such a regime would be unconstitutional if applied to Australian citizens because its penal or punitive character would bring it within the exclusive power of the courts. However, the position of non-citizens is different. Involuntary detention of non-citizens for the purposes of admission, exclusion or deportation is an incident of the aliens’ power in s 51(xix) of the Constitution. The provisions which authorised detention took their character from the administrative purpose of the detention and remained valid as long as the detention was limited to what was reasonably necessary to achieve the purpose.41

Since September 1994, the Migration Act has required the detention of all unlawful non-citizens, namely non-citizens without a valid visa.42 Section 189 requires an officer of the federal or State police or the Department of Immigration and Citizenship (DIAC) to detain any person known or reasonably suspected to be an unlawful non-citizen. An unlawful non-citizen must be kept in immigration detention pursuant to s 196 until they are granted a visa or removed from Australia.

Although the Migration Act requires the detention of all unlawful non-citizens, the practice has been to detain those who arrive in Australia without a valid visa, most of whom arrive by boat. People who arrive with valid visas and subsequently claim protection are usually granted bridging

40 Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, 32 per Brennan, Deane and Dawson JJ.
42 Migration Act 1958 (Cth), s 14.
visas which prevent them from becoming unlawful non-citizens (or remaining unlawful non-citizens if their primary visa has expired) and facilitate their residence within the community. They have not generated public hostility or concern largely because they are not routinely detained. Detention insinuates criminal guilt. Australia’s immigration detention facilities house IMAs together with others who have breached Australian law, such as visa over-stayers, and IMAs are widely perceived as law-breakers themselves. The UN Working Group on Arbitrary Detention considered that immigration detention creates a presumption that each unlawful non-citizen presents a danger to the community. The experience of closed detention has provided further rationalisation for the continued demonisation of IMAs. Rioting and destruction perpetrated by some has been widely perceived as proof of bad character and lack of entitlement to protection. Immigration detention has thus generated and perpetuated public perceptions antithetical to the realisation of human rights.

43 See generally, Janet Phillips and Harriet Spinks, Immigration Detention in Australia, Background note, Parliamentary Library (January 2012), Appendix B: Immigration detainees by category.

44 Terminology associated with law-breaking has been regularly invoked in the media (and iterated by the general public) with respect to IMAs, notwithstanding the right to seek asylum outlined in [14.40]-[14.60] of this chapter. IMAs have been described as “illegals”, “illegal immigrants” and even “illegal asylum seekers”: see generally ABC Media Watch, “The Problem with “Illegals”” (27 April 2009), transcript at http://www.abc.net.au/mediawatch/transcripts/s2553917.htm.


The guideline notes that terms such as “illegals” and “illegal immigrants” may breach the council’s standards of practice and are “likely to be inaccurate or unfair” in relation to at least some IMAs and can “reasonably be interpreted as implying criminality or other serious misbehaviour on the part of all or many people who arrive in this manner.” The Australian Press Council has issued a number of “adjudications” which conclude that using “illegal immigrants” as a generic description to describe all IMAs is inaccurate and unfair: Adjudication No 1525: Adam Black/The Advertiser (April 2012), Adjudication No 1498: Sharp/Auz (June 2011), Adjudication No 1430: Just Auz/Australian (July 2009), Adjudication No 1260 (adjudicated October 2004; re-issued December 2008) [2004] APC 35.


46 With reference to rioting at the Villawood detention facility in April 2011, Paul Kelly (editor-at-large of The Australian) observed that “it is hard to imagine an event guaranteed to make the Australian public more hostile to boatpeople”: “Refugee Riot Highlights a Dilemma”, The Australian (23 April 2011), at http://www.theaustralian.com.au; Andrew Bolt declared “[w]hat kind of people are behind such mayhem, and why on earth should we let them in?”, Herald Sun (blog) “Detention Riots: We Shouldnt be Dealing with Such Mayhem Anyway” (30 November 2011), at http://wwwblogs.news.com.au/heraldsun/andrewbolt. The depth of public hostility towards IMAs following the Villawood riots was reflected in calls to talkback radio and online comments. Comments posted in response to
An all-encompassing administrative purpose

[14.80] Upon introducing the mandatory detention regime in 1992, the then Immigration Minister Gerry Hand noted that a 273-day time limit demonstrated that “[t]he Government has no wish to keep people in custody indefinitely and I could not expect the Parliament to support such a suggestion.” 47 The time limit was removed in 1994 and indefinite detention became a reality. In Al-Kateb v Godwin (Al-Kateb), 48 the High Court found that the Migration Act authorised indefinite detention which may continue for life. 49 Ahmed Ali Al-Kateb was a stateless Palestinian from Kuwait who requested removal from Australia pursuant to s 198(1) which requires removal as soon as reasonably practicable. Al-Kateb remained in detention because his removal could not be effected in the reasonably foreseeable future due to a lack of international co-operation. McHugh, Callinan and Hayne JJ (with Heydon J concurring) found that the Migration Act’s detention provisions were unambiguous and required that an unlawful non-citizen be kept in detention notwithstanding the prospects of removal.

Principles of human rights had no bearing on the majority judgments but influenced the dissenting judgments of Gleeson CJ and Kirby J. The Chief Justice did not consider Australia’s international obligations. His Honour nevertheless applied the principle that courts do not impute to parliament an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) in the absence of unambiguous language which indicates that the legislature has directed its attention to the rights and freedoms in question and decided upon abrogation or curtailment. 50 The mutually referential judgments of McHugh and Kirby JJ are devoted in part to refuting each other’s views about the applicability of human rights in domestic jurisprudence. Kirby J stood alone in invoking the principle that, so far as the language of a statute permits, legislation should be interpreted in conformity with the established rules of international law. 51 McHugh J considered that the modern legislative process does not comprehend the myriad rules of international law and it is not for courts to determine whether the “course taken by Parliament is

49 Al-Kateb v Godwin (2004) 219 CLR 562, [268] per Hayne J, see also McHugh J at [31].
50 This longstanding principle of legality was reaffirmed in Coco v The Queen (1994) 179 CLR 427; Plaintiff 5157/2002 v The Commonwealth (2003) 211 CLR 476, 492 [30].
51 This principle was recognised in Polites v The Commonwealth (1945) 70 CLR 60, 68-9, 77, 80-1 and affirmed in Minister for Immigration and Ethnic Affairs v Toh (1995) 183 CLR 273, 287.
unjust or contrary to basic human rights." McHugh J did not consider the principle of legality applied by the Chief Justice which addresses itself to fundamental rights which exist in domestic law. In his bold exposition concerning the anachronistic and unworkable nature of the principle applied by Kirby J, McHugh J noted the widespread sources of international law but did not examine the applicable human rights obligations undertaken by the Executive on Australia's behalf. Modern legislation is vigorously debated and scrutinised. McHugh J's suggestion that human rights norms may have no bearing on the modern legislative process is cause for deep concern.

The majority revisited the constitutional question considered in Lim with reference to indefinite detention, once again upholding the validity of the detention. McHugh and Hayne JJ made reference to the administrative purpose of preventing entry into the Australian community, notwithstanding that deportation is not feasible in the reasonably foreseeable future. Additional purposes were suggested by Callinan J, including preventing aliens from entering the general community, working or otherwise enjoying the benefits that Australian citizens enjoy. His Honour even suggested that legislation to "deter entry by persons without valid claims to entry either as punishment or as a deterrent would be permissible, bearing in mind that a penalty imposed as a deterrent or as a disciplinary measure is not always to be regarded as punishment imposable only by a court".

These broad formulations of executive power fail to recognise the effect of detention or operation of human rights norms and make it difficult to countenance circumstances in which administrative detention could ever be ruled invalid. The court adopted the same approach in determining challenges focussing on intolerable conditions of detention and the effect of detention on children. Detention could continue for life irrespective of individual circumstances and in the absence of conviction or even suspicion of criminal conduct. Such laws are not readily associated with liberal democracies.

Inconsistency with human rights

[14.90] The prohibition on arbitrary detention in Art 9(1) of the ICCPR has been invoked repeatedly in the context of Australia's immigration

52 Al-Kateb v Godwin (2004) 219 CLR 562 per McHugh J at [74].
54 Al-Kateb v Godwin (2004) 219 CLR 562 per McHugh J at [49]; Hayne J at [266]-[268].
57 Behroz v Secretary of Department of Immigration and Multicultural and Indigenous Affairs (2004) 219 CLR 486 (Behroz).
detention regime. The UN Human Rights Committee has found that immigration detention is not intrinsically arbitrary and may be necessary to facilitate screening and identity checks. But detention is arbitrary if applied to all IMAs without justification with reference to their individual circumstances, and where the aims pursued by detention are achievable by less restrictive means. The limited opportunities for judicial review of detention afforded by ss 189 and 196 of the Migration Act have been found to breach Art 9(4)’s right to challenge the legality of detention. With respect to the Australian Government’s failure to accommodate Art 9 in its administration of the detention regime, the UN Working Group on Arbitrary Detention asked:

[can it be considered that the “good faith” requirement of this article is respected when a State ratifies a convention, notably in the field of human rights, refrains for 21-years from adapting its domestic legislation, and then takes advantage of this legal void, for which it is responsible, to evade its obligations?]

The answer is clear.

While mandatory immigration detention breaches human rights, IMAs in detention are unable to enjoy a range of other human rights. Mandatory immigration detention operates on the basis that there is no enforceable right to seek asylum under international law and breaches Art 31 of the Refugee Convention. Administrative detention which lacks safeguards such as limits on duration or review of individual circumstances is an unnecessary restriction which contravenes para (2) of Art 31 and may constitute a penalty premised upon unauthorised entry as proscribed by para (1). The term “penalty”, as expressed in the English text of the Convention is not limited to criminal penalties. UNHCR guidelines provide that Art 31 only permits recourse to detention in cases of necessity. Asylum seekers should only be detained in exceptional circumstances, namely to verify identity and facilitate initial screening and in cases where they have sought to mislead or refused to co-operate with authorities or

59 The UN Human Rights Committee has concluded that Australia’s mandatory immigration detention regime is arbitrary in the following communications brought under the ICCPR’s First Optional Protocol: A v Australia UN Doc CCPR/C/59/D/560/1993; Mr C v Australia, UN Doc CCPR/C/76/D/900/1999; Baban v Australia, UN Doc CCPR/C/78/D/1014/2001; Bakhtiyari v Australia, UN Doc CCPR/C/79/D/1069/2002; D and E v Australia, UN Doc CCPR/C/87/2D/1050/2002; Shafiq v Australia, UN Doc CCPR/C/88/D/1224/2004; Shams and ors v Australia, UN Doc CCPR/C/90/D/1255.

60 The Al-Kateb judgment, and the judgments in Behroz and Woolley demonstrate the difficulties inherent in challenging the lawfulness of immigration detention.

61 The UN Human Rights Committee found a breach of Art 9(4) in each of the cases (A v Australia; Mr C v Australia; Baban v Australia; Bakhtiyari v Australia; Shafiq v Australia and, Shams and ors v Australia) except D and E v Australia, in which it was not necessary to determine the question.

where there is evidence to show criminal conduct or affiliations. Detention will amount to a penalty if it is arbitrary, discriminatory or a breach of human rights law. Immigration detention in Australia meets all three of these criteria for the reasons outlined above (with respect to arbitrariness) and below.

Subjecting IMAs to differential treatment from those who arrive with visas may also amount to discrimination in contravention of Art 3 of the Refugee Convention. A preponderance of IMAs come from countries where Australian visas are practically unattainable. It is thus strongly arguable that the detention regime discriminates against refugees on the basis of country of origin. In the source countries in question, there is a coincidence of nationality, race and religion. For example, Afghan Hazaras are overwhelmingly Shi’a Muslims. An argument can accordingly be made that the detention regime also discriminates on the basis of race or religion.

The conclusion that the detention regime is discriminatory finds support in the core human rights instruments. Differential treatment of people in similar circumstances will not constitute discrimination if it serves a legitimate aim, can be justified with reference to reasonable and objective criteria and is proportionate to the aim pursued. Discrimination is prohibited under Art 26 of the ICCPR on grounds including “other status” which encompasses citizenship or nationality. Restrictions based on national or ethnic origin are included within the ambit of racial discrimination in Art 1(1) of CERD and proscribed by Art 2. Restrictions in the form of detention may arguably serve the legitimate aims of facilitating immigration control, ensuring availability for processing or possibly even deterrence. Immigration detention is wholly disproportionate and ill-adapted to the pursuit of such aims and cannot be justified with reference to reasonable and objective criteria. Detention operates subject to an arbitrary distinction between asylum seekers who arrive with a valid visa

and those who do not. It is neither an essential concomitant of immigration control nor an effective deterrent to desperate people.

The experience of closed detention has imposed the significant burden of mental illness on vulnerable people seeking Australia's protection. By 2002, a significant body of medical research had established the deleterious effect of immigration detention on mental health. The UN Working Group on Arbitrary Detention concluded that the legal framework supporting mandatory detention was contributing to "collective depression syndrome." This conclusion was reached after observing behavioural anomalies including affective regression and infantilism, aggression against other detainees, acts of self-mutilation and suicide. Article 12 of ICESCR requires State Parties to take steps to achieve the highest attainable standard of physical and mental health. States are required to fulfil the right to health by adopting measures against environmental hazards and any health threat as demonstrated by epidemiological data. Australia’s failure to remove vulnerable people from detention facilities in the face of significant epidemiological data breaches Art 12. Furthermore, the continued detention of a man whose mental illness, which was triggered by his detention experiences, had reached such a level of severity as to be considered irreversible was found to contravene the prohibition on cruel, inhuman and degrading treatment in Art 7 of the ICCPR.

There are a range of alternatives to detention which serve the same purposes: see generally Robyn Sampson, Grant Mitchell and Lucy Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (Melbourne: The International Detention Coalition (Melbourne, Australia 2011), at http://idcoalition.org/cap.


Mr C v Australia, Communication No 908/1999.
The effects of detention on the mental health, well-being and development of children have been especially devastating. Australia has maintained its reservation to Art 37(c) of CRC insofar as it requires children to be detained separately from adults, and has detained children alongside adults. Exposure to acts of violence and self-harm has seen children emulate adults' self-destructive behaviour. For the reasons outlined above, the right to health enshrined in Art 24 of CRC and Art 39's obligation to provide victims of torture and trauma with an environment which fosters health and dignity have been breached. Contrary to Art 37(b)'s specification that detention be a last resort, all child IMAs were detained until amendments to the Migration Act in 2005, outlined below, empowered the Minister to permit children and their families to live in a specified place in the community. No determination was made as to their best interests as required by Art 3(1) of CRC. The pernicious effects of detention on children were chronicled in the Australian Human Rights Commission's (AHRC) comprehensive report on children in immigration detention which noted a fundamental inconsistency between the detention regime and CRC.

Human rights and the body politic

In addition to the UN Human Rights Committee's repeated findings that mandatory immigration detention breaches the ICCPR, the core treaty bodies have called repeatedly for the regime's abandonment.

75 See Committee on the Rights of the Child, Concluding Observations: Australia, 20 October 2005, UN Doc CRC/C/15/Add.268, [64].
76 Migration Amendment (Detention Arrangements) Act 2005 (Cth).
78 Human Rights and Equal Opportunity Commission (now AHRC), A Last Resort? The National Enquiry into Children in Immigration Detention (April 2004). In its "Major finding 1", the Commission concluded that the detention regime fails to comply with the following obligations in CRC:

- Article 37(b)'s requirement that detention is a measure of last resort, for the shortest appropriate period of time
- Article 37(d)'s obligation to provide effective independent review of detention
- Article 3(1)'s requirement that the best interests of the child be a primary consideration in all actions concerning children
- The obligation in Art 37(c) to treat children with humanity and respect for their inherent dignity
- The obligation to extend appropriate assistance to children seeking asylum in accordance with Art 22(1))
- The obligation to ensure to the maximum extent possible the survival and development of the child in Art 6(2)
- The obligation to take appropriate measures to promote recovery from past torture and trauma in an environment which fosters the health, self-respect and dignity of children in order in Art 39.
Former Prime Minister, John Howard characterised the committees' work as an intrusion into Australia's sovereignty:

I think a lot of Australians take the view that these issues should be resolved by Australians through Australian institutions in Australia... It's not really the business of a UN committee to come along and say "We think that's wrong, even though your parliament has agreed to it and we think you ought to change it."

The treaty bodies' findings at the international level were echoed by the AHRC and civil society. Human rights rhetoric became a powerful lobbying tool and was harnessed by existing human rights groups and new groups constituted in response to the detention regime. Al-Kateb featured prominently in advocacy calling for an end to immigration detention and the introduction of a federal Bill of Rights. Much of the advocacy focussed on the detention of children with respect to whom the excesses of the regime were most readily appreciated. The conclusion that IMAs are nefarious queue-jumpers is less readily drawn in relation to children. Their preventable mental anguish does not lend itself to easy rationalisation.

The dispensability of human rights guarantees was highlighted dramatically in February 2005 by revelations about the wrongful detention of Cornelia Rau, an Australian permanent resident suffering from a mental illness. Rau was detained under s 189 of the Migration Act and held at the Brisbane Women's Correctional Centre for six months and subsequently the Baxter Immigration Detention Centre for four months. A Government-
commissioned enquiry into Rau’s detention revealed that no systemic attempts were made to identify her, that her erratic behaviour led to periods of solitary confinement and that immigration officers were “authorised to exercise exceptional, even 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 ...” Following the enquiry into Rau’s detention, a further 247 cases emerged of immigration detention of vulnerable people with Australian citizenship, permanent residence or valid visas between 1997 and 2004. Their unlawful detention resulted from a combination of mismanagement, process deficiencies, erroneous suppositions and insufficient efforts towards identification.

Aspirations towards implementing human rights guarantees have rarely been prioritised by politicians in government, resting largely in the domain of aspiring governments for whom these aspirations tend to fade in office. An exception to this tendency manifested itself in the efforts of four members of the former Howard Government who negotiated amendments to the Migration Act in June 2005 using the leverage offered by two draft bills which, if introduced, threatened to expose embarrassing political division around an increasingly contentious policy. The ensuing amendments affirmed the principle that detention of children is a measure of last resort, introduced a system of review by the Commonwealth Ombudsman and empowered the Minister to grant “residence determinations” permitting children and families to live in the community (while deemed to be in detention) pending status determination. While the reforms ameliorated some of the regime’s excesses, the Howard Government concluded its fourth term in 2007, with an extant regime of mandatory immigration detention which remained fundamentally inconsistent with human rights.

88 Petro Georgiou, Judi Moylan, Russell Broadbent and Bruce Baird.
89 Sections 4AA, 197AA – AG and 486L – Q of the Migration Act 1958 (Cth), inserted pursuant to the Migration Amendment (Detention Arrangements) Act 2005 (Cth).
Labor's "new directions"

[14.110] By 2007, it seemed that the currency of vilification had expired. The Rudd Government was elected on a platform of more humane treatment of asylum seekers. In July 2008, then Immigration Minister Chris Evans affirmed that:

Labor rejects the notion that dehumanising and punishing unauthorised arrivals with long-term detention is an effective or civilised response. Desperate people are not deterred by the threat of harsh detention - they are often fleeing much worse circumstances. The Howard Government's punitive policies did much damage to those individuals detained and brought great shame on Australia. 90

Citing Government-commissioned research charting the deleterious health impact of long-term detention, the Minister announced seven "key immigration detention values", namely that:

1. Mandatory detention is an essential component of strong border control.
2. To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:
   a. all unauthorised arrivals, for management of health, identity and security risks to the community
   b. unlawful non-citizens who present unacceptable risks to the community and
   c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).
4. 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.
5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
6. People in detention will be treated fairly and reasonably within the law.
7. Conditions of detention will ensure the inherent dignity of the human person. 91

These values promised to align Australia's policy with key human rights guarantees, including the right not to be arbitrarily detained 92, the right to challenge the legality of detention, 93 the right to humane conditions of

90 Chris Evans MP, New Directions in Detention - Restoring Integrity to Australia's Immigration System (Australian National University, 29 July 2008).
91 Chris Evans MP, New Directions in Detention - Restoring Integrity to Australia's Immigration System (Australian National University, 29 July 2008); see also DIAC, Managing Australia's Borders, at http://www.immi.gov.au.
92 ICCPR, Art 9(1); CRC, Art 37(b).
93 ICCPR, Art 9(4); CRC, Art 37(d).
detention\textsuperscript{94} and freedom from cruel, inhuman or degrading treatment or
punishment.\textsuperscript{95} A bill seeking to enact the values into law\textsuperscript{96} lapsed and was
not re-introduced, rendering the values vulnerable to non-compliance. Implementation of the values was further frustrated by a steep rise in
asylum seeker boats and the decision to process future IMAs at Christmas
Island.

The maximum-security Christmas Island Immigration Detention Centre
was built by the Howard Government at a cost of approximately $396 million\textsuperscript{97} amidst concerns about the mismanagement of public
funds.\textsuperscript{98} The AHRC admonished the Government against using the facility
for refugee processing, expressing deep concern at the prospect of people
being detained at a venue which "feels like a high-security prison" for any
period of time.\textsuperscript{99} The AHRC subsequently identified the island's geographic
remoteness,\textsuperscript{100} small population, limited communications infrastructure,
ininfrequent flights and prohibitive costs as impediments to accessing basic
support and essential services.\textsuperscript{101} A range of UN treaty bodies have also
recommended the cessation of processing on Christmas Island.\textsuperscript{102} After
visiting Australia, the UN Special Rapporteur on the right to health
considered that the high-security environment, detention of individuals
with mental health problems or a history of torture and trauma in closed
facilities and the lack of local specialist mental health services are

\textsuperscript{94} ICCPR, Art 16; CRC, Art 37(c).
\textsuperscript{95} ICCPR, Art 7; CRC, Art 37(a); CAT, Art 16.
\textsuperscript{96} Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), Senate Legal and
Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment
\textsuperscript{97} AHRC 2008 Immigration Detention Report: Summary of Observations following Visits to
\textsuperscript{98} Joint Committee of Public Accounts and Audit, Audit Report No 43 2008-09, Construction
of the Christmas Island Immigration Detention Centre, [8.15].
\textsuperscript{99} Australian Human Rights Commission: New Christmas Island Immigration Detention Centre
\textsuperscript{100} Christmas Island is located 2,800 kilometres west of Darwin and 360 kilometres south of
Java.
\textsuperscript{101} AHRC, 2009 Immigration Detention and Offshore Processing on Christmas Island, at
\textsuperscript{102} UN Human Rights Committee, Concluding observations of the Human Rights Committee:
Australia, UN Doc. CCPR/C/AUS/CO/5 (2009) [23]; UN Committee on Economic, Social
and Cultural Rights, Concluding observations of the Committee on Economic, Social and
Cultural Rights: Australia, UN Doc. E/C.12/AUS/CO/4 (2009) [25]; UN Committee
against Torture, Concluding Observations of the Committee against Torture, UN Doc
CAT/C/AUS/CO/3 (2008) [12], Concluding Observations of the CERD Committee:
Australia, UN Doc CERD/C/AUS/CO/15-17 [24].
exacerbating factors for poor mental health. He called upon the Government to reconsider the facility's appropriateness as a matter of priority.

In late 2009, a steep rise in boat arrivals saw Christmas Island's detainee population exceed the facility's operational capacity of 744. By February 2011, the figure had risen to 2,757. Detainees were accommodated in spaces initially earmarked for storage, recreation and other purposes. Many were housed in tents and demountable homes sourced from Alice Springs amidst claims that they were needed to address a housing shortage in the Northern Territory. To address the overcrowding, detainees were transferred to mainland facilities, some of which were commissioned for the purpose. Children were accommodated in closed facilities with delusive names like "alternative places of detention in the community."

In April 2010, overcrowding and delays were exacerbated by the suspension of processing of claims brought by Sri Lankan and Afghan asylum seekers for three and six months respectively. The suspension was rationalised by changing circumstances in the home countries resulting in reduced protection needs but was in breach of the Refugee Convention's prohibition on discrimination based on country of origin (Art 3). By mid-2010, Australia's detention facilities once again became a vehicle for large-scale despair, hopelessness and preventable mental illness. Concerns that the Government's immigration values were not being implemented were raised repeatedly by the AHRC and office of the Commonwealth Ombudsman. Suicide attempts and acts of self-harm became commonplace and there were six suicides between August 2010 and

109 Commonwealth Ombudsman, Media Release, "Govt Breaches its Own Care Principles?"
October 2011. Protests and rioting broke out in the detention network in 2011, most dramatically at Christmas Island and Villawood, fuelling public animosity and a widespread perception that IMAs, rather than the detention regime itself, are inherently reprehensible.

Of the 6,809 people in immigration detention as at 31 July 2012, 14 per cent had been detained for more than 12 months. Prolonged and indefinite detention has remained a reality notwithstanding the stipulation in the Government's detention values that detention be used as a last resort, and that indefinite detention is "not acceptable". An exercise of Ministerial discretion remains the only means for securing release from detention for stateless persons who are not recognised as refugees. Indefinite detention has also resulted from adverse security assessments of IMAs who have been recognised as refugees. Screening of refugees by the Australian Security Intelligence Organisation (ASIO) is conducted prior to release from detention. Long delays in the finalisation of assessments have seen refugees remain in prolonged detention. Refugees who receive an adverse assessment remain in detention indefinitely. Reasons for ASIO's determinations are not given and security assessments are not open to appeal. As at 18 May 2012, there were 48 adult refugees in indefinite detention following adverse security assessments, some of whom were detained together with their children.

In June 2011, the Joint Select Committee on Australia’s Immigration Detention Network was established. The committee undertook a comprehensive enquiry into Australia’s immigration detention regime and


See generally, Allan Hawke and Helen Williams AM, Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre (31 August 2011).


released its final report in March 2012. The Committee found that pressure on the detention network was "strongly correlated" with pressure on detainees and rising rates of distress and self-harm. One study cited in submissions to the enquiry revealed clinically significant symptoms of depression in 86 per cent of detainees. Another study of 20 children found that after two years in detention, all were diagnosed with at least one psychiatric disorder and 80 per cent diagnosed with multiple disorders. The Committee recommended that all asylum seekers who pass identity, health and security checks be released immediately on a bridging visa or "community detention" and that all reasonable steps be taken to limit detention to a maximum of 90 days. Recommended reforms to the security assessment process included the establishment of a right of appeal before the Administrative Appeals Tribunal and periodic internal reviews of ASIO security assessments. The Committee further recommended that the Government adhere to the commitment articulated in its policy values of only detaining IMAs as a last resort, for the shortest practicable time and subject to an assessment of non-compliance and risk factors.

In November 2011, prior to the report’s release, the Gillard Government commenced the progressive removal of some detainees into the community under bridging visas and residence determinations. The policy change was driven primarily by the collapse of the “Malaysian Solution” outlined below, the continued overcrowding and delays in immigration detention facilities and the financial costs entailed in administering the detention regime. The release of detainees into the community was not backed by law and rested on Ministerial discretion, with no clear, published guidelines. For the beneficiaries of the Minister’s beneficence, the policy represented a significant advance in human rights protection. For those who remained in

118 AIDN, Final Report (March 2012) [5.122].
119 AIDN, Final Report (March 2012) [5.5].
120 AIDN, Final Report (March 2012) [5.97].
125 Immigration Minister Chris Bowen, Bridging Visas to be Issued for Boat Arrivals (25 November 2011), at http://www.minister.immi.gov.au. The Minister did not indicate the number of detainees to be released. DIAC Deputy Secretary Jackie Wilson is reported to have said that by 2012-13, 30 per cent of IMAs would be released on bridging visas and 20 per cent would be in community detention Kirsty Needham, “A Third of Asylum Seekers to Live Outside Detention”, Brisbane Times (14 February 2012), at http://www.brisbanetimes.com.au.
126 AIDN, Final Report (March 2012) [7.15]-[7.16].
detention, overcrowding and lengthy delays were alleviated, but their detention remained in breach of the human rights norms outlined above.

Whether the Government will accept the broader recommendations of the Joint Select Committee remains to be seen. A dissenting report from Coalition committee members within the Joint Standing Committee’s report stated that “Coalition policy is for mandatory detention to be observed for all IMAs until their status is determined ... [and] all new IMA’s (sic) would be processed offshore at Nauru.” This combination of immigration detention and offshore processing characterised the Howard Government’s refugee policy. Offshore processing, examined below, now underpins the Government’s and Coalition’s refugee policy and shares some key characteristics with immigration detention. Both regimes deny fundamental human rights guarantees while distancing asylum seekers from legal advisors, other sources of services and support and the operation of the rule of law.

OFFSHORE PROCESSING

The Pacific Strategy

[14.120] The events which followed the rescue of 433 asylum seekers by the MV Tampa on 26 August 2001 have been well ventilated elsewhere. The extreme measures employed to prevent the ship from entering Australian territorial waters and disembarking in the Australian Territory of Christmas Island were designed to ensure that the rescuees did not enliven Australia’s obligations under the Refugee Convention. In the immediate aftermath of the Tampa affair, six Acts were passed which formed the basis of the “Pacific Strategy”, known colloquially as the “Pacific Solution”. The strategy introduced a number of measures which sought to absolve Australia of its processing obligations under the Refugee Convention with respect to IMAs. Its underpinning legislation validated the measures taken during the Tampa stand-off and empowered the Minister to declare certain Australian territories to be “excised offshore places”. Some 4,891 territories, including the Territory of Christmas Island, were declared to be excised offshore places. Persons who arrived in these places were deemed to be outside Australia for the purpose of claiming

128 See for example, David Marr and Marion Wilkinson, Dark Victory (Allen and Unwin, Sydney, 2003).
129 Border Protection (Validation and Enforcement Powers) Act 2001 (Cth); Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth); Migration Legislation Amendment Act (No 1) 2001 (Cth); Migration Legislation Amendment Act (No 5) 2001 (Cth); Migration Legislation Amendment Act (No 6) 2001 (Cth).
refugee protection and could be removed (if necessary, through use of force) to a country which the Minister had declared for processing pursuant to criteria set out in s 198A of the Migration Act and examined below. Declarations were made with respect to Nauru and Papua New Guinea (PNG) and detention facilities established.

**Operation Relex**

[14.130] The legislation also formed the basis of a naval interdiction program dubbed "Operation Relex" which was designed to deter and deny access to Australia by boat.\(^{131}\) Beyond the interception of boats within Australian waters and removal of their occupants to declared countries for processing, the Australian Navy was engaged in surveillance and response operations on the high seas. Boats were redirected, towed or escorted to Indonesian waters with no attempts made to assess refugee status.\(^{132}\) Boats were not easily diverted. A report by Australia's Border Protection Command which was released under the *Freedom of Information Act 1982* (Cth) in March 2012 revealed that boat diversion under Operation Relex was met with "non-compliant behaviour" including "deliberately lit fires, improvised weapons, potential physical assault and increased risks to the safety of personnel required to rescue [asylum-seekers] who jump overboard" with consequent danger to the lives of IMAs and Australian Defence Force personnel.\(^{133}\) A number of asylum seekers drowned following boat sabotage.\(^{134}\) The dangers inherent in naval operations under Operation Relex were exacerbated by the Howard Government's intensive management of the program. Beyond a cabinet instruction to issue

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\(^{131}\) Operation Relex was approved by Prime Minister John Howard and Defence Minister Peter Reith and took effect in the form of a warning order issued by the Chief of Defence Forces: *Chief of Defence Forces Warning Order 007/01* (28 August 2001) (dedclassified), released to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia (20 September 2002).


\(^{134}\) In answers to questions on notice by Senator Ronaldson, Representative of Customs and Border Protection advised that full and accurate statistics are not kept on the number of asylum seekers who drown at sea while trying to reach Australia: Answers to Question on Notice nos 81, 83 and 84 asked by Senator Ronaldson to Australian Customs and Border Protection Service at Senate Standing Committee on Legal and Constitutional Affairs (26 May 2011), at http://www.sievx.com/testimony/2011/Ronaldson.pdf. Statistical information about deaths at sea following boat sabotage is largely anecdotal. David Marr has detailed the drowning of seven asylum seekers who drown at sea while trying to reach Australia: David Marr, "Turn the Boats Back and People will Die – Abbott Knows This", *Sydney Morning Herald* (24 January 2012), at http://www.smh.com.au; see also Marg Hutton, *Drownings on the Public Record of People Attempting to Enter Australia Irregularly by Boat 1998-2011* (23 April 2012), at http://www.sievx.com/articles/background/DrowningsTable.pdf

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warnings to turn boats around and rely on show of force as a means of deterrence, naval officers were unable to take further action during fraught encounters without governmental instructions. These instructions often emanated from the Prime Minister’s Office or Defence Department. Operation Relex raised serious concerns about Australia’s legal obligations concerning safety of life at sea and compliance with the obligation to respect and ensure the right to life, the prohibition on torture and cruel, inhuman or degrading treatment and non-refoulement in light of the forced return of asylum seekers to Indonesia without assessment of their refugee status.

Under Operation Relex, rescue of passengers was carried out as a last resort. Naval officers were only permitted to rescue the passengers from the stricken SIEV 4 after the boat capsized and passengers entered the water. Photographs of the delayed rescue (omitting images of the sinking vessel) were publicly released to support then Immigration Minister Phillip Ruddock’s assertion that passengers had thrown their children overboard. The incident demonstrates the electoral power of majoritarian policy in circumstances where the public have been misinformed or misled. Prime Minister John Howard’s assertions that he did not want such people in Australia coincided with the 2001 election campaign. His resolve in the face of the perceived threat presented by IMAs generated significant electoral capital.

Processing in declared countries

[14.140] The Howard Government sought to divest itself of the burdens of processing and protection and endeavoured to facilitate the resettlement of refugees processed in Nauru and PNG in countries other than Australia. Resettlement places were not easily secured. Of the 1,637 people processed in Nauru and PNG, 1,153 were resettled, 61 per cent of whom were resettled in Australia. Most asylum seekers spent two years in detention


136 These are contained in instruments which include the UN Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea and the International Convention on Maritime Search and Rescue.


138 For example, the following statement by the Prime Minister was broadcast on ABC Radio’s The World Today on 8 October 2001: “I don’t want, in Australia, people who would throw their own children into the sea. I don’t. And I don’t think any Australian does.” Transcript available at http://www.abc.net.au/worldtoday.


140 Chris Evans, Minister for Immigration and Citizenship, Last Refugees Leave Nauru
in Nauru and PNG while some were detained there for close to six years. Concerns about human rights in the context of immigration detention are equally applicable to processing in declared countries with the impacts of detention exacerbated by isolation and scarce essential services, including legal assistance and general and mental health services. In October 2005, 25 of the 27 detainees then held on Nauru were transferred to Australia on medical advice due to mental health concerns.

The right to seek asylum was obstructed by these arrangements which removed asylum seekers from the protections afforded by Australia’s legal system, including the right of free access to courts (Refugee Convention, Art 16(1)). Status determination was purely administrative and without legal standing. Systemic problems were identified in the processing of claims on Nauru. The status determination process operated independently of Australian law and relied predominantly on oral communication. Migration Agent Marion Le, who acted as agent/advocate for IMAs held at Nauru, identified significant processing flaws. These included decisions which merged the names of more than one applicant and the failure of decision-makers to consider documentation held by the applicants which raised serious concerns for their safety. Lack of independent merits and judicial review heightened the risk of...

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142 People processed in declared countries had no access to government-funded legal advice and faced significant barriers in obtaining pro bono legal advice. Between August 2001 and March 2003, a number of lawyers sought to travel to Nauru in order to provide legal assistance to detained IMAs. Their visa applications were refused twice with no reasons given: Australian Lawyers for Human Rights, Submission for the Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (22 May 2006), at http://www.aph.gov.au.


147 Marian Le, Remaining People on Nauru, letter to Immigration Minister Amanda Vanstone.
refugees being denied protection. The effective removal of IMAs from the rule of law raised concerns about errors in status determination. It furthermore amounted to discrimination under Art 3 for the reasons outlined above and constituted a penalty under Art 31 of the Refugee Convention premised upon unauthorised presence. It if flawed status determination or boat diversion resulted in return to persecution, Australia would have engaged in indirect or “chain refoulement”. Goodwin-Gill has observed that Art 33 enshrines "precisely the sort of obligation which is engaged by extra-territorial action, for it prohibits a particular result – return to persecution or risk of torture – by whatever means, direct or indirect, and wherever the relevant action takes place”.

The Pacific Strategy sought to erase Australia’s onshore protection program and convert it to a discretionary resettlement scheme much like the offshore resettlement program. Its apogee was the introduction of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 which sought to authorise the removal of all IMAs to Nauru and PNG. The controversial Bill was ultimately withdrawn. Nauru and PNG’s assumption of Australia’s refugee processing burden was facilitated by substantial financial support from the Australian Government. Such arrangements may commodify asylum seekers by treating them as inherently unworthy and a harm that may be traded.

Gibney has observed that the commodification of asylum seekers demonises refugees, reinforcing the view that they are of no value.

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148 The Pacific Strategy relied heavily on the “safe third country” notion reflected in s 36(3) of the Migration Act 1958 (Cth) which denies protection to those who have failed to avail themselves of the right to enter and reside in countries which include those through which they have transited en route to Australia. Accordingly, the failure to come directly within the wording of Art 31(1) has resulted in the removal of asylum seekers to other countries, and under the Pacific Strategy this practice was extended to the non-transit countries, namely PNG and Nauru. For an examination of the “safe third country” notion, see Michelle Foster, “Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State” (2007) 28 Michigan Journal of International Law 223; Susan Kneebone, “The Legal and Ethical Implications of Extra-territorial Processing of Asylum Seekers: the Safe Third Country Concept”, in Jane McAdam (ed), Moving On: Forced Migration and Human Rights (Hart Publishing, Oxford, 2008); Susan Kneebone, “The Pacific Plan: The Provision of “Effective Protection”” (2006) 18 Int’l J Refugee L 696; Jane McAdam and Kate Purcell, “Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum” (2008) 27 Aust YBIL 87.


in host countries, and may in turn erode the value of asylum. The implementation of the Pacific Strategy saw the Australian Government treat its human rights obligations as discretionary and amenable to outsourcing. The measures adopted undermined the rule of law and subverted the proper understanding of good faith performance of human rights obligations within Australia and beyond. The broader implications of this approach transcend refugee policy and may undermine protections accorded to members of other unpopular or marginalised groups.

**Offshore processing under Labor**

[14.150] The Rudd Government dismissed the Pacific Strategy for "punishing refugees for domestic political purposes" and burdening developing countries with Australia's processing obligations, and announced the policy's dismantlement. Processing would no longer occur in declared countries. Like the Rudd Government's detention values, this further change promised to promote the human rights of IMAs. But neither of these potentially significant policies was embedded in Australian law. The legislative framework of the Pacific Strategy remained in place and became the foundation for processing IMAs in the excised offshore Territory of Christmas Island. Unlawful non-citizens who arrived there were barred from making a valid visa application unless the Minister exercised a non-reviewable, non-compellable discretion to "lift the bar" on public interest grounds.

Beyond the human rights implications of detention at Christmas Island considered above, the status determination process had the effect of denying legal safeguards available to asylum seekers processed in mainland Australia, including access to migration advice and assistance, merits review before the Refugee Review Tribunal (RRT) and judicial review of tribunal decisions. The status determination and review processes administered at Christmas Island were characterised in guidance manuals as non-statutory and not subject to the Migration Act and Australian case law. If an assessor or reviewer determined that a person

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153 *Migration Act* 1958 (Cth), ss 46A and 195A.

154 Because all IMAs were first taken to Christmas Island, they were processed as offshore applicants under the status determination regime applied at Christmas Island, even if they were subsequently transferred to mainland detention facilities. The "onshore" status determination regime was thus applied almost exclusively to asylum seekers who arrived by air with valid visas.

was a refugee, the Minister would consider whether to lift the bar and grant a visa. Unlike RRT review which may result in a reversal of a protection visa refusal, the review process at Christmas Island could at best result in a favourable exercise of non-compellable Ministerial discretion. The absence of transparency and safeguards raised serious concerns about the rectitude of decision-making and with it Australia’s good faith performance of its international obligations. The inferior status determination process applied to IMAs constituted a penalty in contravention of Art 31 of the Refugee Convention, discrimination as proscribed by Art 3 for the reasons considered above, and raised concerns about a heightened risk of refoulement contrary to Art 33.

In Plaintiff M61/2010E v Commonwealth (M61/M69) two Sri Lankan plaintiffs detained at Christmas Island challenged the Government’s characterisation of the offshore status determination and review processes as “non-statutory” and unconstrained by Australian law. In a unanimous judgment, the High Court observed that the Minister had decided to consider exercising his powers to lift the bar or grant a visa with respect to every protection visa claim lodged at Christmas Island. The court accordingly held that the establishment and implementation of the status determination and review processes were steps taken under and for the purposes of the Migration Act and subject to relevant statutory provisions and case law.

The Court held that the plaintiffs’ detention was lawful because the Migration Act was engaged. Without reference to the ICCPR, the judgment upheld the “right ... to liberty from restraint at the behest of the Executive” as a right which cannot be constrained without statutory footing. Furthermore, a statutory power to detain does not permit continued detention “at the unconstrained discretion of the Executive.” The enquiries undertaken for the purposes of status assessment and review had a direct impact on the plaintiffs’ rights and interests because they prolonged their detention. Decision-makers were therefore bound to accord procedural fairness.

The judgment embodies a good faith interpretation of Australia’s obligations under the Refugee Convention. The Ministerial power to lift the

156 Migration Act 1958 (Cth), s 415.
bar was exercised on the footing that Australia owed protection obligations and required the application of the criterion for protection as stated in s 36(2) of the Migration Act with reference to other relevant provisions and judgments concerning those provisions. Read as a whole, the Migration Act embodied “an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken” in the Refugee Convention and Protocol.

The bifurcated processing regime was finally abandoned in 2012, due to the combined effect of the M61/M69 decision, the Court’s invalidation of arrangements with Malaysia considered below and the Gillard Government’s inability to pass legislation to give effect to those arrangements. In conjunction with the staged release of detainees into the community, all asylum seekers would be subject to the “onshore” process, including RRT and judicial review. The new arrangements advanced human rights by removing the penalties, discrimination and risk of refoulement inherent in the “offshore” status determination process. While such advancement is to be welcomed, it rests upon the happenstance of political gridlock. The vulnerability of IMAs to the pursuit of political capital illuminates the need for more concrete guarantees of human rights to be embedded in Australian law. The precariousness of this significant policy advance was demonstrated by the Government’s decision to maintain “the excision architecture” in the Migration Act so as to resume “a parallel, non-statutory review process” for boat arrivals in the event that processing in Malaysia becomes possible. The Gillard Government’s efforts to facilitate processing in Malaysia and other neighbouring countries are examined below.

Looking again to our regional neighbours

[14.160] Because the architecture of the Pacific Strategy remained in place after the Howard Government’s defeat in 2007, the outsourcing of Australia’s refugee processing obligations remained possible under the Migration Act. Shortly after assuming Prime Ministerial office, Julia Gillard looked to Australia’s regional neighbours. After negotiations with East Timor failed, a memorandum of understanding was concluded with PNG as a step towards resumption of processing at Manus Island. A co-operative transfer arrangement was concluded with Malaysia in July

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2011, which would see 800 IMAs transferred to Malaysia. Australia would in turn increase its offshore resettlement program over a four year period to accommodate a further 4,000 refugees currently living in Malaysia.\textsuperscript{169} The arrangement promised a welcome increase in resettlement places but commodified and denied fundamental rights to IMAs. In order to divest itself of the burden of processing 800 spontaneous arrivals, Australia was prepared to fund the exchange program and accept five times that number in resettlement places. The inference was once again that IMAs are undeserving queue-jumpers. Immigration Minister Chris Bowen explained the rationale thus:

This is about the deterrent, dead right. These are people who will go to the back of the queue: not the back of the queue to come back to Australia, but the back of the queue completely in Malaysia because there’s 92,000 asylum seekers in Malaysia. We’re going to take 4,000 who’ve been waiting in Malaysia, biding their time, not hopping on boats...\textsuperscript{170}

The non-binding arrangement provides that transferees will be “treated with dignity and respect and in accordance with human rights standards”\textsuperscript{171} but neither the arrangement nor its operational guidelines make any provision for implementing human rights standards. Malaysia is not a party to key human rights instruments, including the Refugee Convention and Protocol and therefore not bound by international law to protect refugees. Malaysian law makes no provision for recognition of refugee status. Its immigration laws create an offence of entry without a valid permit, punishable by fine and/or imprisonment and caning and refugees have been vulnerable to harassment, extortion and violent attacks.\textsuperscript{172}

In Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (M70/M106),\textsuperscript{173} two Afghan IMAs who arrived at Christmas Island and were to be transferred to Malaysia, challenged a Ministerial declaration made under s 198A of the Migration Act. It fell to the High Court to determine the declaration’s


\textsuperscript{170} Malaysian transfer agreement, Papua New Guinea, Interview with David Speers, SKY News (7 May 2011), at http://www.minister.immi.gov.au

\textsuperscript{171} Clause 8(1).


\textsuperscript{173} Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (M70/M106) (2011) 244 CLR 144.
validity. An affidavit sworn by the Minister deposed to a "clear belief" that the Malaysian Government "was keen to improve its treatment of refugees and asylum seekers" having "made a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers and had begun the process of improving the protections offered to such persons". 174 This emerged as a tenuous basis for a declaration.

A majority of five (Heydon J dissenting) held that a Ministerial declaration can only be made in circumstances where the relevant country has obligations under international or domestic law to meet the criteria set out in s 198A(3). 175 Section 198A(3) requires that the specified country provides access to effective procedures for assessing protection needs, provides protection for asylum seekers and refugees pending their status determination, repatriation or resettlement and meets relevant human rights standards in providing that protection. These criteria were jurisdictional facts which the Minister misconstrued on the basis of a belief as to Malaysia's evolving approach. The declaration was affected by jurisdictional error and therefore invalid. 176

The plurality built on the Court's recognition in M61/M69 that the Migration Act incorporated the Refugee Convention and considered the legislative intention behind s 198A as being to facilitate Australia's compliance with the Convention. 177 The protection contemplated by the section extended beyond the protections in Arts 31 and 33 to other rights including Art 3's prohibition on discrimination, free access to courts in accordance with Art 16(1), the right to equal treatment in elementary education (Art 22(1)) and employment (Art 17(1)), freedom of movement (Art 26) and religious freedom (Art 4). 178

Because s 198A(3) was the only source of power for removal to another country, the arrangement with Malaysia could not be effected. After two

174 Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (M70/M106) (2011) 244 CLR 144, see judgment of French CJ [29].

175 Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (M70/M106) (2011) 244 CLR 144 per French CJ [57]-[67], Gummow, Hayne, Crennan and Bell JJ [134]-[135], Kiefel [248]-[256].

176 Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (M70/M106) (2011) 244 CLR 144 per French CJ [68], Gummow, Hayne, Crennan and Bell JJ [135]-[136], Kiefel [255]-[256].

177 Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (M70/M106) (2011) 244 CLR 144 per Gummow, Hayne, Crennan and Bell JJ [98], French CJ [66].

178 Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (M70/M106) (2011) 244 CLR 144 per Gummow, Hayne, Crennan and Bell JJ [117].
Bills\textsuperscript{179} which sought to defeat the judgment’s effect did not pass, Prime Minister Gillard announced that an expert panel would be convened\textsuperscript{180} to advise the Government on policy options available to prevent asylum seekers from undertaking dangerous boat journeys to Australia. The panel’s report\textsuperscript{181} was delivered on 13 August 2012. It recognised that the creation of greater opportunities for fair and effective processing of asylum claims and resettlement would prevent asylum seekers from endangering their lives at sea. To this end, it recommended greater engagement with source countries, the expansion of capacity building initiatives in the Asia-Pacific region as part of a regional co-operation framework and an immediate increase in the humanitarian program to 20,000 places with a further increase to 27,000 within five years. The report considered that conditions necessary for the safe turning back of boats are not currently met and, recognising the lack of safeguards available in Malaysia, recommended that Australia’s 2011 arrangement with Malaysia be “built on further” rather than immediately implemented.

The panel observed that the motivations for seeking asylum in Australia by boat are “more a matter of judgment than science”\textsuperscript{182}. Nevertheless, in order to discourage irregular maritime travel, it recommended that capacity be established and new legislation enacted to facilitate the processing of IMAs transferred from Australia in Nauru and PNG. Transferees would be provided with “protection and welfare arrangements” which include treatment in accordance with human rights standards, assistance in the preparation of asylum claims, merits review by senior officials and NGO representatives and independent monitoring of care and protection arrangements. The experience of the Pacific Strategy amply demonstrates that the implementation of safeguards in these remote facilities is not straightforward. Fears about a revisiting of the Pacific Strategy have been heightened by the report’s recommendation that “no advantage” should be gained by IMAs “through circumventing regular migration arrangements”. Accordingly, IMAs would remain in Nauru or PNG for as long as they would have waited for resettlement from overseas under the ‘offshore’ component of Australia’s humanitarian program\textsuperscript{183}. The “no advantage” principle reinforces the view that IMAs are queue-jumpers who have eschewed regular migration pathways. Quite apart from the confusion and uncertainty around the application of the principle, it is

\textsuperscript{179} Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 (Cth), Migration Legislation Amendment (The Bali Process) Bill 2012.


\textsuperscript{182} Australian Government, Report of the Expert Panel on Asylum Seekers (August 2012) [2.3].

likely to lead to prolonged and indeterminate offshore detention, revisiting the human suffering and preventable mental harm experienced under the Pacific Strategy.

**A new phase in offshore processing**

[14.170] The Gillard Government accepted the panel’s recommendations in principle and within three days of the report’s release had enacted legislation to empower the Immigration Minister to designate a country as a “regional processing country” by legislative instrument. A Ministerial designation is not subject to the rules of natural justice and the criteria in s 198A have been replaced with the sole condition that the Minister considers the designation to be in the national interest. In considering the national interest, the Minister must have regard to whether assurances have been made by the country in question to the effect that it will respect the principle of non-refoulement and make refugee status assessments (in accordance with Art 1A(2) of the Refugee Convention) or permit such assessments to be made. Such assurances are not legally binding and a designation may be made in their absence. Amendments proposed by Greens Senator Sarah Hanson-Young which would have introduced protections which accord with Australia’s human rights obligations were rejected by the Government and Coalition.

Having stripped the Migration Act of the protections enshrined in s 198A(3), the Gillard Government is working towards the recommencement of processing in Nauru and PNG. Under the Howard Government’s Pacific Strategy, IMAs processed at the same offshore facilities were arbitrarily detained for often prolonged periods, removed from the protections of Australian law and placed in danger of refoulement due to a lack of

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184 There is further uncertainty about whether IMAs will be detained in Nauru and PNG. The expert panel’s report calls for “appropriate accommodation” and “no arbitrary detention”. In an interview on ABC Lateline, panel member Paris Aristotle stressed that IMAs will not be held in detention: ABC Lateline, A Safe Way to Seek Protection: Aristotle (13 August 2012), at http://www.abc.net.au/lateline. The reality is that IMAs will almost certainly be detained. UNHCR guidelines define detention as encompassing “confinement within a restricted location, where freedom of movement is substantially curtailed, and where the only opportunity to leave the limited area is to leave the territory” and determine whether a person is detained with reference to the “cumulative impact of the restrictions as well as the degree and intensity of each of them.” UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (February 1999) Guideline 1.


186 Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012.

187 These proposed amendments included a 12 month limit on time spent in a regional processing country and an additional condition for Ministerial designation, namely that appropriate protection and welfare arrangements are in place which accord with Australia’s international obligations.
safeguards in status determination notwithstanding the criteria in s 198A. With the criteria now abandoned, it would be unduly optimistic to assume that offshore processing will comply with Australia's human rights obligations.

The expert panel's report and the parliamentary debate which both preceded and followed it marked a shift in discourse around IMAs. While the queue-jumper notion remains, the Government's determination to appear to be in full control of Australia's borders has been augmented and to some degree masked by expressions of compassionate concern about human lives. IMA numbers have risen sharply, with 7,120 arriving in Australia between January and August 2012 and 107 known deaths at sea. In the face of this catastrophic loss of lives, portrayals of IMAs as the sort of people we do not want in Australia have given way to those of IMAs as tragic victims of people smugglers. Offshore processing has re-emerged as the act of "tough love" deemed necessary to prevent deaths at sea; to save IMAs from themselves.

While it is axiomatic that loss of life at sea be prevented, it is misleading to cloak offshore processing in the mantle of humane policy. Offshore processing, as conceived under the Howard Government's Pacific Strategy, was designed to divest Australia of its processing obligations under the Refugee Convention. IMAs processed in Nauru and PNG were denied the protections afforded by international human rights law and the High Court's judgment in M70/M106 recognised that Australia's arrangements with Malaysia would have similar effect. A resumption of processing in Nauru and PNG is likely to be no different. Australia is quite capable of preventing deaths at sea without resorting to a regressive and inhumane policy. An increase in humanitarian pathways would prevent deaths at sea while complying with our international obligations in good faith. The extent to which the Gillard Government implements the expert panel's broader recommendations to this end remains to be seen.

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188 See note 6 above.
193 That is not to say that offshore processing is inherently incompatible with human rights. Offshore processing could operate to provide status determination and humane conditions which comply with applicable international standards and opportunities for expeditious resettlement of recognised refugees. Rather than serving Australia's political objectives, such a regime would require considerable time, effort and commitment to finding durable solutions.
CONCLUSION

[14.180] The policies examined in this chapter demonstrate the vulnerability of IMAs to the pursuit of political capital and highlight the need for human rights protections to be embedded in Australian law. The *Al Kateb* judgement affords a stark illustration of the consequences of an absence of human rights protections within Commonwealth law. The failure to fully implement Labor’s “key immigration detention values” demonstrates the expendability in practice of policy reforms which operate without the force of law.

Where processing is removed offshore pursuant to bilateral arrangements designed to serve Australia’s political interests, IMAs are particularly vulnerable. As this book goes to print, the Gillard Government has begun the process of re-establishing the Howard-era facilities at Nauru and PNG. Following a Ministerial designation under a malleable public interest test, IMAs will be processed at these remote facilities where an application of the “no advantage” principle could see them remain for prolonged periods. The dangers inherent in this regressive policy signal the need for those engaged with the rights of asylum seekers to redouble their efforts to scrutinise and interrogate its operation so that Australia’s human rights obligations are not rendered irrelevant.

Additional resources


*Joint Select Committee on Australia’s Immigration Detention Network, Final Report* (March 2012).


Chapter 8


Chapter 8A

"NO ADVANTAGE" BRINGS NO HOPE

By Tania Penovic. This article is part of our December 2012 and January 2013 Focus on Asylum Seekers.

The emergence of 'no advantage' as a guiding principle in Australian refugee policy is examined below with reference to recent developments in the management of asylum seekers who attempt to reach Australia by boat.

On 28 June 2012, the Gillard government announced the formation of an Expert Panel on Asylum Seekers to "provide advice and recommendations to the Government on policy options available, and in its considered opinion, the efficacy of such options, to prevent asylum seekers risking their lives on dangerous boat journeys to Australia." The announcement followed the drowning of a known 94 asylum seekers attempting to reach Australia by boat and the defeat of two Bills which sought to facilitate the implementation of arrangements for the processing of asylum seekers in Malaysia. A cooperative transfer arrangement was concluded between Australia and Malaysia on 25 July 2011, providing for the exchange of 800 asylum seekers attempting to reach Australia by boat (generally referred to by the government as irregular maritime arrivals (IMAs)) for 4000 refugees living in Malaysia. The arrangement could not be implemented following the High Court's decision in Plaintiff M70/2011 v Minister for Immigration and Citizenship: Plaintiff M106 of 2011 v Minister for Immigration and Citizenship. The Expert Panel's report was intended to facilitate a resolution of the impasse which continued to frustrate the government's efforts to defeat the judgment's effect.

The Expert Panel's report was released on 13 August 2012. Its 27 recommendations aimed to provide a comprehensive and integrated package of short, medium and longer term policy options. Some of the panel's recommendations were aimed at increasing safe pathways towards refugee protection. These included an immediate increase in the humanitarian program to 20,000 places with a further increase to 27,000 within five years. Other recommendations had a clear deterrence aim. Among these was the 'no advantage' principle designed "to ensure that no benefit is gained through circumventing regular migration arrangements". The principle was recommended as one of six guiding principles which should shape Australian policy on asylum seekers. A further guiding principle was adherence to Australia's human rights obligations. These two principles are likely to be mutually exclusive in practice.

While a "comprehensive regional cooperation framework" was envisaged by the panel, it recommended that the Australian government establish processing facilities in Nauru and Papua New Guinea (PNG) for processing IMAs as soon as practicable. Processing in Malaysia was not recommended in the short-term during which Australia's arrangements with Malaysia should be revised and protections afforded to asylum seekers strengthened. Panel member Paris Aristotle indicated that "Nauru and Manus Island would be an initial short-term circuit break while the transitional process is put in place towards other regional arrangements that may include Malaysia or Indonesia as long as those arrangements can be set in place." The establishment of a regional cooperation framework will require ongoing political commitment and high level diplomacy and is unlikely to be achieved expeditiously.

The Gillard Government accepted the panel's recommendations and acted quickly to re-establish offshore processing in Nauru and Manus Island (PNG). Three days after the panel released its report, legislation was enacted to facilitate the processing in other countries. The first group of IMAs was transferred from Christmas Island to Nauru on 26 September 2012 and as at 7 December 2012, there were 400 men living in tents in Nauru. Appropriate accommodation was yet to be built and processing was yet to commence. Transfers to Manus Island commenced on 21 November, 2012. The operation of the 'no advantage' principle in Nauru and Manus Island is examined below.

No advantage in Nauru and PNG
"No advantage" brings no hope | Human Rights in Australia | Right Now

In its various media releases announcing the transfer of asylum seekers to Nauru and PNG, the Department of Immigration and Citizenship iterated its commitment to implementing the "no advantage principle", which it described as the "central principle" of the panel's report. The principle would require that IMAs would not achieve an advantage over those who wait for resettlement as refugees while living in refugee camps and settlements in other countries. Accordingly, those who attempt to reach Australia by boat will have to wait for the same period of time they would have subject to significant variation within and between different refugee camps and settlements. For some, it may be five years, for others considerably longer. Paris Aristotle has indicated that 5 years is too long. Minister Bowen has expressed a different view:

... I've said repeatedly - repeatedly - that the no-advantage test will mean that people will wait for a very substantial period. Could it be five years? Yes it could.

Obtaining accurate information in order to discern how long an IMA would have waited for resettlement from overseas is a costly and complicated exercise. The Federal government has not made known the basis upon which this counterfactual enquiry will be made. It has also failed to acknowledge the preventable human cost which will be exacted from the forced and unnecessary prolongation of what is often a lengthy and difficult process. Keeping IMAs in Nauru and PNG beyond the period necessary to determine their refugee status is likely to amount to arbitrary detention contrary to article 9(1) of the International Covenant on Civil and Political Rights. While the expert panel's report calls for "appropriate accommodation" and "no arbitrary detention", the reality is that the arrangements in place do fall within the ambit of detention as understood by the UNHCR.

The human rights implications of offshore processing under the Howard government's Pacific Strategy are well-documented. Beyond the prohibition on arbitrary detention, the practice of offshore processing raised concerns about Australia's compliance with its human rights obligations, including the prohibition on cruel, inhuman and degrading treatment (in article 7 of the ICCPR as well as article 16 of the Convention against Torture). The degraded status determination process applied to boat arrivals constituted a penalty in contravention of article 31 of the Refugee Convention premised on unauthorised presence and raised the danger of return to persecution due to flaws in status determination in breach of the non-refoulement obligation in Article 33. In light of significant epidemiological data charting the link between remote detention and mental illness, keeping people detained in such facilities was in breach of the right to the highest attainable standard of health in article 12 of the International Covenant on Economic Social and Cultural Rights and article 24 of the Convention on the Rights of the Child.

The application of the "no advantage" policy to detention in Nauru and PNG exacerbates the excesses of the Pacific Strategy. Most asylum seekers detained in Nauru and PNG during the Howard years spent two years in detention while some were detained for close to six years. While isolation, indeterminate duration of detention and the uncertainty as to their future had a devastating effect on IMAs at that time, those detained in Nauru and PNG today are all likely to be subject to prolonged and indeterminate detention. If found to be refugees, their resettlement will be deliberately delayed in order to send a message of deterrence to others. This amounts to cruel and irrational policy.

The no advantage principle is likely to see Nauru and PNG become places of long term accommodation rather than the "short term circuit break" envisaged by the Expert Panel. Reports from the makeshift processing facility at Nauru have detailed hunger strikes, suicide attempts and a pervading sense of despair and hopelessness among detainees.

"No advantage" in Australia

Despite the clear deterrence aim of offshore processing, more than 7,000 IMAs have arrived in Australian territorial waters since 14 August 2012. Because there is insufficient capacity to process all IMAs in Nauru and PNG, the government has sought to extend the "no advantage" principle to IMAs processed at Christmas Island and mainland Australia. A Bill currently before the Parliament seeks to bar all IMAs from making valid visa applications, to render them liable for transfer to Nauru or PNG (irrespective of whether they arrive in mainland Australia) and exclude all IMAs from Australia's refugee processing regime. The Bill revisits the Howard government's controversial attempt to expand its excision regime in 2006 and is currently before the Senate Legal and Constitutional Affairs Committee, which will provide its report by 25 February 2013.

On 21 November 2012, Immigration Minister Chris Bowen issued a media release entitled "No advantage onshore for boat arrivals". The "no advantage principle" would be applied to people attempting to arrive in Australia by boat, "whether that means being transferred to have their claims processed, remaining in detention or being placed in the community". People 'processed in the Australian community' will not be granted a permanent protection visa if found to be a refugee "until such time that they would have been resettled in Australia after being processed in our region." Accordingly, these refugees (along with IMAs whose status remains to be determined) would be granted bridging visas with restricted access to financial support and accommodation assistance and no work rights.

Bridging visas granted to recognised refugees bear some similarities to the Howard government's Temporary Protection Visa (TPV) regime under which most refugees would be granted a three year visa then have their protection needs reassessed after 3 years. TPV holders had no right to family reunion and could not re-enter Australia if they departed during the three year visa period. But unlike asylum seekers granted a bridging visa, TPV holders were permitted to work.

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and impedes integration into Australian society. Quite apart from raising concerns about human rights and dignity, this
policy lacks pragmatism and common sense. It also fails to recognise that the interests of society as a whole are served by
enabling refugees to successfully integrate into society and become purposefully employed. Yet In the forlorn hope of
sending a message to asylum seekers who might travel to Australia as IMAs, the Minister has signalled an intention to
deprive IMAs of hope. Such policies mark us as a society and reveal Australia to be a nation which treats its international
obligations as discretionary. Perhaps recognising the cruelty and Irrationality in the new policy, Minister
Bowen indicated recently that some refuaees may be &iven work rii]bts. How the grant of such rights will be determined
remains to be seen
Enabling refugees to begin their lives in Australia with support, work rights and hope for the future confers a benefit on
society as a whole. Until the government recognises that the needs of refugees and the wider community coincide, the
consequences·will be borne by refugees and society as a whole.
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Chapter 8B

PARLIAMENTARY CONTORTIONS FOLLOWING THE HIGH COURT’S MALAYSIAN DECLARATION DECISION

The Gillard Government’s efforts to facilitate the offshore processing of asylum seekers have been the subject of lengthy and heated parliamentary debate in recent months. The parliamentary contortions followed the High Court’s invalidation of the government’s arrangements for offshore processing in Malaysia in *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (the Malaysian Declaration case). While efforts to amend the *Migration Act 1958* (Cth) in order to defeat the judgment’s effect were focused initially on implementing the government’s arrangements with Malaysia, the amendments to the *Migration Act* which were finally passed on 16 August 2012 became the basis for a resumption of offshore processing of irregular maritime arrivals (IMAs) in Nauru and Papua New Guinea. The legislative aftermath of the *Malaysia Declaration case* and the evolution of the current statutory framework for offshore processing (and concomitant changes to processing of IMAs in Australia) are examined below.

The *Malaysia Declaration case* was examined in Volume 19, Part 2 of this journal. The case concerned a challenge to a ministerial declaration made under s 198A(3) of the *Migration Act* on 25 July 2011 pursuant to a cooperative transfer arrangement between Australia and Malaysia which was concluded on the same day. Under the arrangement, 800 asylum seekers who had travelled to Australia by boat without valid visa documentation would be transferred to Malaysia while Australia would increase its offshore resettlement program over a four-year period to accommodate a further 4,000 refugees residing in Malaysia.

Section 198A was introduced by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); one of the six Acts which underpinned the Howard Government’s Pacific Strategy. Section 198A(3) permitted the Minister to declare in writing that a specified country provides access to effective procedures for assessing protection needs, provides protection for asylum seekers and refugees pending their status determination, repatriation or resettlement, and meets relevant human rights standards in providing that protection. Ministerial declarations made in 2001 with respect to Nauru and Papua New Guinea became the basis for the processing of IMAs in those countries under the Pacific Strategy. The declaration made 10 years later with respect to Malaysia was challenged in the *Malaysia Declaration case* by two Afghan asylum seekers who were liable for removal from Australia to Malaysia.

A majority of six found that the criteria set out in s 198A(3) were jurisdictional facts which were not established with respect to Malaysian law and practice. Malaysia is not bound by international law to provide the access and protection or to meet the criteria required under the section. The criteria in s 198A(3) were not established, rendering the ministerial declaration invalid. Because s 198A(3) was the only source of power for removal to another country, the government could not proceed with the arrangement with Malaysia.

In order to defeat the judgment’s effect, the government introduced the *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011* which sought to empower the Minister to designate another country as an “offshore processing country” on the sole condition that the Minister thinks it is in the national interest to do so. The Bill was opposed by the Greens, and Coalition support was contingent on the amendment of the Bill to require that designated countries be parties to the Refugee Convention or its 1967 Protocol. The Coalition did not attach the same importance to the international obligations of declared countries during its administration of the Pacific Strategy. While Papua New Guinea has been a party to Refugee Convention (subject to a series

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of reservations) since 1986, Nauru only became a party to the Refugee Convention and Protocol in June 2011. The Coalition’s proposed amendments would have facilitated processing in Papua New Guinea and Nauru (which it has maintained as its preferred processing venue) but would have precluded processing in Malaysia, which is not a party to the Refugee Convention or Protocol. The Bill was withdrawn on 13 October 2011 in the face of lack of support in the House of Representatives and the prospect of inevitable defeat in the Senate.

The Gillard Government’s plans to pursue its arrangements with Malaysia remained impracticable and were disapproved by the Senate Legal and Constitutional References Committee which released a report on 11 October 2011 containing the single recommendation that the government not proceed with the implementation of the arrangement “due to the obvious defects and flaws in that arrangement”.2 In order to resolve the legislative impasse, independent MP Rob Oakeshott introduced the Migration Legislation Amendment (The Bali Process) Bill 2012 (the Oakeshott Bill) in February 2012. The Bill was brought on for debate in June 2012 in the wake of two boat sinkings and the drowning of 94 asylum seekers attempting to reach Australia. Like the government’s Bill, the Oakeshott Bill sought to empower the Minister to designate a country as suitable for offshore processing in the national interest but added the further criterion that the country is a participant in an international forum known as the Bali Process.3 While the Greens maintained their opposition to offshore processing, the Coalition again sought an amendment pursuant to which the sole criterion for Ministerial designation would be a country’s ratification of the Refugee Convention or Protocol. In its determination to implement its arrangements with Malaysia, the Gillard Government accepted that it would process asylum seekers in Nauru as well as Malaysia in order to secure passage of the Bill.4 After hours of emotive debate which saw the outsourcing of refugee processing to other countries reimagined as humane policy, the Bill passed the House of Representatives but was defeated in the Senate.

Following the defeat of the Oakeshott Bill, Prime Minister Julia Gillard announced that an expert panel would be convened5 to advise and make recommendations aimed at providing a comprehensive and integrated package of short, medium and longer-term policy options. Some recommendations were aimed at increasing safe pathways towards refugee protection. These included an immediate increase in the humanitarian program to 20,000 places (from the existing quota of 13,750) with a further increase to 27,000 within five years.6 Other recommendations had a clear deterrence aim. These included a “no advantage” principle which would guide refugee policy and ensure that IMAs do not benefit from “circumventing regular migration arrangements”.7 Irregular maritime arrivals would therefore be granted protection no sooner than if they had waited for resettlement from refugee camps and settlements outside Australia. While a “comprehensive regional cooperation framework” was recommended by the Expert Panel, processing in Nauru as soon as practicable was characterised as “a necessary circuit breaker to the current surge in irregular migration to Australia”.8 Recognising the need to build confidence that protections will be respected and implemented in practice and human rights upheld in Malaysia,9 the panel recommended that Australia’s arrangement with Malaysia be

2 Senate Legal and Constitutional Affairs References Committee, Australia’s Arrangement with Malaysia in Relation to Asylum Seekers (October 2011), Recommendation 1.
3 See generally http://www.baliprocess.net.
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“built on further” rather than immediately implemented. The panel recommended that, as an alternative, the Australian Government establish processing facilities in Nauru and Papua New Guinea as soon as practicable for the processing of protection claims by asylum seekers attempting to reach Australia by boat.

The Gillard Government endorsed the panel’s recommendations, announced its intention to implement its recommendations in full, and within three days of the report’s release had passed the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth) which amended the Migration Act to empower the Immigration Minister to designate a country as a “regional processing country” by legislative instrument. A ministerial designation is not subject to the rules of natural justice and the criteria in s 198A have been replaced with the sole condition that the Minister considers the designation to be in the national interest. In considering the national interest, the Minister must have regard to whether assurances have been made by the country in question to the effect that it will respect the principle of non-refoulement and make refugee status assessments (in accordance with Art 1A(2) of the Refugee Convention) or permit such assessments to be made. A designation may be made in the absence of any assurances.

Work towards the recommencement of offshore processing commenced within days of the release of the Expert Panel’s report and, on 26 September 2012, the first group of IMAs were transferred from Christmas Island to Nauru. The transfer of asylum seekers to Manus Island commenced on 21 November 2012. Appropriate accommodation is yet to be built at the Nauru and Manus Island regional processing centres. People held in these centres will be processed pursuant to the domestic laws of Nauru and Papua New Guinea respectively. Processing of protection claims commenced in Nauru in 18 March 2013 and is yet to commence in Papua New Guinea. The application of the “no advantage” principle is likely to see people held at these regional facilities wait for substantial periods of time before achieving refugee protection.

The “no advantage” principle has been extended to all IMAs irrespective of their place of arrival. On 31 October 2012, the government introduced a further Bill which purported to implement the Expert Panel’s recommendation that “arrival anywhere on Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place”. The Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 built upon the Howard Government’s declaration of some 4,891 Australian territories, including the territory of Christmas Island, as excised offshore places. Persons who arrive in these places would be deemed to be outside Australia for the purpose of claiming refugee protection and would be liable for transfer to another country for offshore processing. The Bill sought to amend the Migration Act to require that all IMAs who arrive in Australia would be subject to the same refugee processing regime as those who arrive in excised offshore places. Accordingly, all IMAs would be barred from making valid visa applications and would be liable for transfer to a regional processing country, irrespective of whether they arrive in mainland Australia or an excised offshore place. In excluding all IMAs from Australia’s refugee processing regime, the Bill revisited aspects of the Howard Government’s controversial attempt to expand its excision regime in 2006. After the Senate Legal and

13 Migration Act 1958 (Cth), s 198AB(2).
16 Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.
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Constitutional Affairs Committee released its report in February 2013 recommending that the Bill be passed, the Bill was passed by the Senate on 16 May 2013 and commenced on 20 May 2013.

Asylum seekers who remain in mainland Australia while their refugee status remains to be determined are also subject to the “no advantage” principle. On 21 November 2012, Immigration Minister Chris Bowen issued a media release further expanding the operation of the principle, announcing that people “processed in the Australian community” will not be granted a permanent protection visa if found to be a refugee “until such time that they would have been resettled in Australia after being processed in our region”. Accordingly, these refugees will be granted bridging visas with restricted access to financial support and accommodation assistance and no work rights. Their resettlement will be delayed in order to send a message of deterrence to others. While there remains uncertainty as to how long IMAs recognised as refugees will have to wait for resettlement, it appears certain that parliamentary contortions will continue in this perennially contentious policy arena.

Tania Penovic
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¹⁷ Chris Bowen MP, Minister for Immigration and Citizenship, No Advantage Onshore for Boat Arrival (21 November 2012).