Australian Lawyers for Human Rights Refugee Law Kit 2004

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CHAPTER 1 - WHO IS A REFUGEE?

Australian Lawyers for Human Rights <www.alhr.asn.au>

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ALHR is a member of the Australian Forum of Human Rights Organisations. It is invited to attend the Commonwealth Attorney General's NGO Forum on Human Rights, and the Minister for Foreign Affairs' Human Rights NGO Consultations.

In 1998 ALHR was the only Australian-based NGO to attend the Diplomatic Conference of Plenipotentiaries in Rome as part of the NGO Coalition for an International Criminal Court. In July 2000 ALHR joined with the New York-based Lawyers Committee for Human Rights in a submission to the UN Human Rights Committee's review of Australia's reports under the International Covenant on Civil and Political Rights.

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REFUGEE RIGHTS AND AUSTRALIAN LAW

INTRODUCTION - THE IMPORTANCE OF THE RULE OF LAW AND PROTECTION OF HUMAN RIGHTS

These materials had their genesis in concerns about Australia's performance in protecting the human rights of asylum seekers and refugees and in particular, the extent to which the Rule of Law, as a fundamental pre-requisite for the protection of human rights, is being undermined by lack of accountability on the part of government decision-makers in relation to refugee matters.

The Preamble to the Universal Declaration of Human Rights states that 'human rights should be protected by the Rule of Law if man (sic) is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.'

Implicit in this statement is one of the vital principles of the Rule of Law, namely that the law should apply to, and be observed by, government and its agencies, just as it applies to the ordinary citizen.

Justice Dixon stated in the *Communist Party Case* at 187 that:

> *History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.*

In the area of refugee law and migration in Australia, there is impassioned debate about the extent to which government administrative power should be subject to judicial oversight to ensure that the Australian Government is complying with the law.

While it is probably fair to say that much of this debate is influenced by broader political motives, it is also a symptom of deeper uncertainty about the respective roles of executive government and the judiciary in contemporary Australia, where each arm of government – legislative, executive and judiciary – exercise mixed, rather than clearly separated, functions.

It is not our purpose to tease out these issues here other than to say that while the boundaries between the three arms of government may be porous in practice, the central concept behind the separation of powers doctrine, that 'power should be checked with power,' is fundamental. Of particular importance, given the increasing convergence between the legislative and executive arms of government, are the place of an

independent judiciary to determine that government action has been taken according to law and access to the courts for people affected by government decision making.

We view the growth of administrative law, and in particular the expansion of judicial review across a wide range of government administration, as a positive and necessary counterbalance to the historical expansion of executive government power – and a critical safeguard of the Rule of Law.

In the case of asylum seekers and refugees – where fundamental rights and liberties are at stake – the importance of government operating under the law is starkly emphasised.

It is implicit in the materials that follow that we believe government action to limit judicial oversight of government decision making in relation to asylum seekers and refugees has exposed people to an exercise of executive power which puts important individual rights at risk.

PURPOSE AND SCOPE

These materials are intended to give the general lawyer an overview of some of the historical and current legal and administrative issues relating to asylum seekers and refugees in Australia. The materials explain the meaning of the term 'refugee' and outline the rights of asylum seekers and refugees under international law before examining Australia's implementation of its international obligations.

The materials are comprised of this main document, which covers the general issues in some detail, and a number of fact sheets which provide greater depth on specific issues.

WHAT IS A REFUGEE

The basic definition

The term refugee was originally applied to the French Huguenots who came to England after the revocation of the Edict of Nantes in 1695 and was used to describe a person who, owing to religious persecution or political troubles, seeks refuge in a foreign country.

This sense is retained in the modern definition of a refugee, which emerged from international cooperation to tackle the mass displacement of people in the aftermath of World War Two.

The *United Nations Convention Relating to the Status of Refugees 1951* (Refugee Convention) and the *Protocol on the Status of Refugees 1967 (*Protocol*)* establish the modern legal basis for refugee protection at international law.

The Refugee Convention and the Protocol define a refugee as someone who:

1. is outside the country of their nationality or habitual residence;
2. has a well founded fear of persecution on the grounds of:
   - race,
   - religion,
   - nationality,
   - membership of a particular social group, or
   - political opinion, and
3. is unable to seek or is fearful of seeking protection in that country or is fearful of returning to their country.

This basic definition has been augmented, refined or narrowed to varying degrees across jurisdictions. One important development internationally is the idea of an imputed political opinion. In these cases, when it is obvious that the government is acting on the basis of what it believes to be a person's political opinion, no evidence of the person's actual opinion is required.

It is important to note that people who have committed crimes against peace, a war crime, crimes against humanity or a serious non-political crime outside the country of refuge may be excluded from protection under the Refugee Convention.

Other people not covered by the Refugee Convention include internally displaced persons (people who have fled persecution but remain within their own territory) and serving soldiers.

A note on the history of the Refugee Convention and Protocol and the role of the United National High Commissioner for Refugees

The process of developing a body of international law, conventions and guidelines to protect refugees began in the early part of the 20th century under the League of Nations, the predecessor of the United Nations (UN). It culminated on 28 July 1951, when the UN conference approved the Convention Relating to the Status of Refugees.

Several months before the Refugee Convention's passage the United Nations General Assembly established the United National High Commissioner for Refugees (UNHCR). The Refugee Convention has been the foundation of UNHCR's work in leading and co-ordinating international action to protect refugees and resolve refugee problems worldwide. The Commissioner's primary purpose is to safeguard the rights and well-being of refugees and ensure that everyone can exercise the right to seek asylum and find safe refuge in another State.

The original Refugee Convention was limited to protecting mainly Europeans involved in events occurring before January 1951, but as the problem of displacement spread around the world the need to expand the scope of the Refugee Convention was recognised. The 1967 Protocol removed the geographical and time limitations written into the original Convention.

A total of 140 states have acceded to one or both of the UN instruments, including Australia, which ratified the Refugee Convention in 1954 and the Protocol in 1973.

What a refugee is not

Asylum seeker

This is the correct term for a person seeking official recognition of their status as a refugee under the Refugee Convention.

Economic migrant

Millions of 'economic' and other migrants have taken advantage of improved communications in the last few decades to seek new lives in other, mainly western, countries. However, they should not be confused, as they sometimes are, with *bona fide* refugees who are fleeing life threatening persecution and not economic hardship. An economic migrant normally leaves a country voluntarily to seek a better life. Should he or she elect to return home they would continue to receive the protection of their

government. Refugees flee because of the threat of persecution and cannot return safely to their homes in the circumstances then prevailing.[1]

Illegal immigrant

An asylum seeker is not an 'illegal' immigrant. The description of a person who arrives in Australia without a visa or travel documents and claims asylum as 'illegal' is incorrect. It implies that an asylum seeker is not complying with Australian law whereas every person who seeks asylum has a right to do so in Convention countries, including Australia.

A person seeking asylum is not 'illegal' in Australia until the authorities decide that they do not have a right to stay in Australia. This can take some time and an asylum seeker is permitted to stay in Australia until a decision is made about whether they are allowed to stay for a longer period of time.

Queue-jumper

Asylum seekers who arrive in Australia without a visa or travel documents (whether by boat or plane) are often called 'queue jumpers'. The term 'queue jumpers' implies that people who arrive by boat are not complying with our procedures and taking away 'places' that have been set aside for refugees waiting in UNHCR camps until they are accepted for resettlement in Australia.

The idea of the 'queue' comes from the way in which Australia manages its intake of migrants every year. Australia sets a yearly limit on the number of people it will allow to move here. That number is divided into a *migration* component for people who want to move to Australia to live and a *humanitarian* component which is for refugees and others who, even though they may not fit the Convention definition of a refugee, have other humanitarian needs.

The total number of people who are allowed to come to Australia through the humanitarian program for 2004-2005 is 13,000. This number is further broken down into an *offshore* component and an *onshore* component.

The *offshore* component is made up of people who have been given permission and assistance to come to Australia by the Australian government, prior to their arrival. These people are usually waiting for resettlement in UNHCR camps or have been given permission to come to Australia through other officially sanctioned channels.

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[1] UNHCR, The 1951 Refugee Convention: Questions and Answers, June 2001

The *onshore* component is made up of people who apply for refugee protection after they arrive in Australia. The Australian Government has set the number of offshore arrivals at 6400 and the number of onshore arrivals at 6600.

The concept of the 'queue' comes from the fact that the Government has said that for every person who arrives in Australia over the total number of people allowed through the onshore program, one will be subtracted from the offshore program. Thus people claiming protection once they arrive in Australia are seen to be jumping the 'queue' of people in the offshore program.

Calling people who apply for protection whilst in Australia 'queue jumpers' creates the impression that there are rules for seeking asylum which the people in UNHCR camps are following and those arriving onshore are not. There are no such rules and asylum seekers may not always come from countries where there are UNHCR camps set up to process and find countries to resettle them.

Refugees are often forced to leave their countries in such a hurry that they do not have time to organise the appropriate travel documents. Often, refugees are too scared to ask for these documents because it is the government or its agents that are persecuting them and they need to leave secretly. In other cases, where there has been a breakdown of the State, the relevant office or agency may have ceased to exist or be impossible to access.

Indeed, the UNHCR has stated that States should expect that refugees will not have valid travel documentation and must not punish them simply for that fact.

Nor does it matter how refugees arrive in the country in which they seek asylum. A person may still be a genuine refugee whether they arrive by plane, car, train, boat or on foot and there is no requirement to have come through customs or immigration. The Refugee Convention provides that a person claiming refugee status should not be discriminated against on the basis that they are a refugee, their mode of arrival or a lack of genuine documentation.

The next chapter sets out the international legal standards that apply to refugees and asylum seekers and explains the relevance of international law to Australian law.

CHAPTER 2 - INTERNATIONAL REFUGEE LAW

Rights of Refugees and asylum seekers

A person who is a refugee has a number of important rights under the Refugee Convention, including:

- the right to seek asylum in a country outside their country of origin which has agreed to be bound by the Refugee Convention;
- the right not to be returned to the country where they have a well-founded fear of persecution;
- the right not to be discriminated against or penalised because they are a refugee;
- the right to equal access to the courts;
- freedom of religion and movement;
- the right to education and employment; and
- access to travel documents.

Article 31 of the Refugee Convention prohibits penalising asylum seekers based on the manner of their arrival into the country from which they are seeking protection.

However, asylum seekers and refugees also have rights under other international agreements which are shared by the general population in countries party to these agreements. Simply complying with the rights outlined in the Refugee Convention does not satisfy a country's duty to protect the general rights of asylum seekers and refugees under these other agreements.

These agreements, all of which Australia is a party to, include the International Covenant on Civil and Political Rights (1966), the Convention on the Rights of the Child (1989), and the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (1984).

Some of the key rights contained in these instruments include:

- the right to liberty and security of person;
- freedom from arbitrary arrest or detention;
- freedom from torture, cruel, inhumane or degrading treatment;
- the right to the equal protection of the law

- the right not to be expelled, returned or extradited to a State where there are substantial grounds for believing that a person would be in danger of being subjected to torture;

- the right of children to have their best interests taken as a primary consideration in all actions concerning them, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies

- the right of a child or his or her parents to have applications to enter or leave a country for the purpose of family reunification dealt with by the state in a positive, humane and expeditious manner; and

- the right of a child to express his or her own views freely in all matters affecting the child, including the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

AUSTRALIA'S INTERNATIONAL OBLIGATIONS

The place of International Law

International law is the law which governs the relationship between countries. International law is made up of international conventions to which countries have agreed to be bound, customary principles which have been accepted by the international community as being 'law' and general principles of law that are recognised by nations.

Conventions and protocols (along with covenants, treaties, agreements and exchange of letters) are forms of agreement between countries which are binding in international law.

Unlike domestic law, there is no police force or system of punishment for countries who breach international law. Where a country breaches international law, the international community may agree to act either through sanctions or by military force against it but this happens very rarely in practice.

The relationship between international law and Australian domestic law

Australia ratified the Refugee Convention on 22 January 1954 and the Protocol on 13 December 1973. This means that Australia has agreed to be bound by certain obligations under international law towards people who meet the Convention definition of a refugee. The most important of these obligations is the requirement under Article 33 that persons

who are recognised as 'refugees' must not be returned or "refouled" to a country where they face persecution for one of the Convention grounds.

In some states, such as the Netherlands, France, and Switzerland, ratification of international conventions results in their automatic incorporation into domestic law. However, in other states, including Australia, such incorporation does not happen automatically. Instead, Australia must pass legislation specifically implementing its international obligations. In the case of the Refugee Convention, the primary piece of domestic legislation that sets out Australia's obligations is the *Migration Act 1958 (Cth)* (**Migration Act**).

States are required both to carry out their treaty obligations in good faith and to interpret a treaty "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." These requirements are set out in Articles 26 and 31 of the Vienna Convention, to which Australia is a party.

When countries ratify international conventions, they become bound by the articles of those conventions, but in some cases it is possible for countries to make 'reservations' to particular provisions in conventions. This effectively means that a country agrees to be bound by all the provisions except those in relation to which they have made a reservation.

However, conventions can prohibit countries from making reservations to particular articles of that convention. In the case of the Refugee Convention, countries are prohibited from making reservations about Article 1 (the definition of the term 'refugee') and Article 33 (non-refoulement).

Putting Australia's international obligations in context

Australia is a sovereign nation and is entitled to *offer* protection to whomever it chooses, regardless of whether a person is a 'refugee' at international law. This means that, to a large extent, a decision by the Australian Government not to *select* a particular offshore asylum-seeker for protection as part of Australia's refugee and special humanitarian program does not contravene its duties under the Refugee Convention.

However, the situation is different for people who claim asylum once they arrive in Australia (onshore asylum seekers). The Refugee Convention makes it clear that when asylum seekers enter Australia seeking asylum, the Australian Government must determine whether they are 'refugees' within the Convention definition and if they are, it must offer them protection.

Neither the Refugee Convention or Protocol prescribe the *process* for determining refugee status – the Australian executive, legislature and judiciary have a discretion in framing and interpreting Australian laws to meet our international obligations.

The way in which Australia has interpreted its international obligations in the area of refugees and asylum seekers is set out in the next chapter.

CHAPTER 3 - AUSTRALIA'S REFUGEE LAW

Australia's response to its international obligations

When it signed the Refugee Convention and Protocol, Australia agreed to be bound by all of its provisions. Australia agreed to protect asylum seekers who can show that they have a well founded fear of persecution on the basis of their race, religion, nationality, membership of a particular social group, or their political opinion.

However, over the last decade, Australia has passed legislation to make it more difficult for asylum seekers to qualify for asylum as refugees under the Migration Act. This means that refugees who may qualify for protection under the Refugee Convention may be turned away. Australia also treats some refugees differently from others, depending on factors such as how or where they arrived in Australia.

Australia has also moved to limit access to the courts for review of administrative decisions on refugee status as well as to legal advice for asylum seekers.

Changing the meaning of 'persecution'

In 2001, the Federal Parliament passed legislation which narrowed the definition of 'persecution'.[2] The new provisions of the Migration Act say that the reasons for persecution set out in the Refugee Convention will not apply unless:

- the reason is the essential and significant reason for the persecution, and
- the persecution involves serious harm to the person; and
- the persecution involves systematic and discriminatory conduct.

It is undesirable to prescriptively define a term that must be able to respond and evolve according to changed circumstances of the person or reference country and developments in human rights law.

As the High Court has observed:

> 'Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society.' [3]

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[2] Migration Legislation Amendment Act (No. 6) 2001 (Cth), section 5.

And again:

> 'I am now inclined to see more clearly than before the dangers in the use of dictionary definitions of the word "persecuted" in the Convention definition. At least, I see such dangers unless there is an acceptance of the need for adjustments appropriate to the context. … [T]he word "persecuted" appears here in an international treaty which is not as susceptible to exposition by reference to Australian or even English standard dictionaries as is a word appearing in a local legal instrument. It is by use of dictionaries that concepts such as enmity and malignity have been imported to the notion of persecution which are neither mentioned in the text of the Convention, nor necessary to the context. Such a feature of the definition now seems to have been abandoned in Australia it being recognised that some persecution is performed by people who think that they are doing their victims a favour.'[4]

The Refugee Convention, while prohibiting state parties from altering the definition of 'refugee,' does not define the term 'persecution', thus leaving it sufficiently flexible to accommodate future types of persecution that could not be envisaged when the Refugee Convention was first drafted. However, state parties are still required by the Vienna Convention to interpret this term in good faith. Australia's definition of 'persecution' gives it a restrictive meaning, inconsistent with the intention of the founders of the Refugee Convention. It greatly expands the risk of genuine refugees being returned to the country where they have a well founded fear of persecution.

Some interpretative guidance may be obtained from the accompanying Explanatory Memorandum. For example, although not included in the s91R list of examples of what will amount to 'serious harm,' the Explanatory Memorandum notes that 'serious mental harm' is not excluded. But fear of 'discrimination or disadvantage' in comparison with opportunities or treatment which could be expected in Australia should not be considered 'serious harm.' The Explanatory Memorandum does recognise that serious harm can arise from "a number of acts which, when taken cumulatively, amount to serious harm of the individual".

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[3] per McHugh J in "Applicant A" & Anor v Minister for Immigration and Ethnic Affairs & Anor [1997] 190 CLR 225

[4] per Kirby J in Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14 [108]

Differential treatment of asylum seekers

One of the legal obligations under the Refugee Convention is the prohibition against discrimination against asylum seekers as a class of people, *and* between different categories of asylum seekers.

This section shows how Australia's laws create, and discriminate between, different categories of asylum seeker depending on their manner of arrival in Australia or their method of application for protection.

As explained above, Australia's refugee program is comprised of an offshore component and an onshore component. Until recently, there was no real distinction between the class of visa, and the conditions attached to the visa, granted to a refugee under either component. Both entitled the visa holder to permanent residence in Australia and access to the same entitlements and services as other Australian permanent residents.

It is still the case that refugees who enter Australia through the traditional offshore program are entitled to a visa which gives them permanent residence. However, a number of recent legislative changes have radically altered the position for onshore asylum seekers and others who, but for recent legislative changes, would have been entitled to apply for a protection visa through the onshore program.

The key changes include what has euphemistically been called the 'Pacific Solution' and the creation of a number of visa sub-classes which entitle particular 'classes' of refugee to temporary residence only and limited access to the entitlements and services available to permanent residents and citizens.

These restrictions apply to these 'classes' of refugee even although the person:

- is a 'genuine refugees' under the Refugee Convention and fits the revised definition of refugee in the Migration Act;
- has an identical claim to protection as other asylum seekers who arrive by other means; and
- had little or no control over the circumstances of their arrival to Australia.

Another significant change introduced in September 2001 prevents individuals from applying for protection where they have previously been included in a family application. As outlined below, this can lead to unfair outcomes and place individuals at risk of persecution on return to their home country.

The 'Pacific Solution'

On 1 September 2001, the Australian Government announced the 'Pacific Solution' in response to the MV Tampa incident.

Tampa

On 26 August 2001, a Norwegian container vessel called the *MV Tampa* was directed by the Australian coastguard to rescue 433 people from a sinking fishing boat in international waters off near Christmas Island. The rescuees were asylum-seekers who had engaged the services of a people smuggling syndicate to transport them to Australia. Although the Australian authorities denied the *MV Tampa* authority to land the rescuees on Christmas Island, its crew was concerned about the medical condition of some of the rescuees and, as a result, the vessel entered Australian territorial waters on 29 August 2002 and anchored 4 nautical miles from Christmas Island.

Before outlining what the 'Pacific Solution' involves, it is important to understand the geographical meaning of 'Australia' and the terms 'territorial sea' and 'migration zone.'

'Australia' means the Commonwealth of Australia - which includes the states and internal territories and the external territories of Christmas Island, Cocos (Keeling) Islands, Ashmore and Coral Sea Islands. It also includes the territorial sea of Australia within 12 nautical miles of the coastline.

The 'migration zone' is made up of the land area of all the states and territories of Australia and the waters of proclaimed ports within those states and territories. The land area starts at the mean low water mark. The migration zone does not include the territorial sea that is off the coast of the Australian states and territories.

The purpose of the migration zone is to define the area of Australia where a non-citizen must hold a visa in order to legally enter and remain in Australia. Anyone who enters the migration zone, including Australian citizens, must present themselves for immigration clearance.

The 'Pacific Solution' involves:

- a series of governmental agreements with Nauru and New Zealand for those countries to accept the asylum-seekers and to determine whether any of them were entitled to protection under the Refugee Convention;

- excision of certain territories (meaning that for the purposes of the *Migration Act*, excised territories are no longer deemed by law to be part of the migration zone where one could seek asylum in Australia – effectively these areas are no longer part of Australia) - Christmas Island, Cocos (Keeling) Islands, Ashmore and Coral Sea Islands, Australian sea installations and Australian resources installations - from the Australia Migration Zone (see map);
- the detention and removal of unauthorised arrivals in the excision zone and powers to remove a person to another country where their claims, if any, for refugee status may be handled;.
- a prohibition on people who arrive in an area excised from the migration zone applying for any class of visa (unless the Minister exercises his discretionary power); and
- where asylum seekers who arrive in the area marked on the map are permitted to apply for a visa following the exercise of the Minister's discretionary powers, they will only ever qualify for a temporary protection visa (3 years). These people must reapply for a temporary visa every 3 years and may be deported on each occasion. If they leave Australia, they have no automatic right of return.[5]

It will be seen that these legislative amendments have the effect, among others, of differentiating between asylum seekers who 'arrive' by boat and land on one of the excised territories and those who arrive by plane.

The map at the end of this chapter shows the 'excised territories' created by legislation in September 2001.

Temporary Protection

The concept of temporary protection was introduced by regulation changes on 20 October 1999. Prior to then all refugees in Australia had immediate access to a protection visa which provided permanent residence and immediate access to the comprehensive settlement support arrangements provided to refugees resettled from overseas.

Under the 1999 regulations, unauthorised arrivals found to be refugees only have access to a three year temporary visa, in the first instance and have no rights to:

- bring their families into Australia;
- return if they leave Australia;

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[5] Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001

- access settlement services; or

- access the mainstream social welfare system to obtain pensions and *Newstart* allowance.

However, TPV holders are:

- able to work and receive Job Matching from Centrelink;

- eligible for Special Benefit, Rent Assistance, Family Tax Benefit, Child Care Benefit, Double Orphan Pension, Maternity Allowance and Maternity Immunisation Allowance. (Any Special Benefit entitlement is stringently means-tested and is reviewed every 13 weeks);

- able to gain access to Medicare benefits;

- eligible for referral to the early health assessment and intervention program;

- eligible for torture and trauma counselling; and

- able to apply for a permanent Protection visa which may be granted after a period of 30 months, or a shorter period specified by the Minister, if there is a continuing need for protection.

Changes to migration legislation, which came into effect on 27 September 2001, further restricted the conditions attached to temporary protection visas for asylum seekers who were unauthorised arrivals and who, since leaving their home country, have resided for at least seven days in a country where they could have sought and obtained effective protection. This group may apply for further protection visas if they have a need for continuing protection, but will only have access to further three year temporary protection visas and not a permanent protection visa. This stipulation acts as a sort of penalty provision.

Unauthorised arrival who are granted a temporary protection visa and who **did not** reside for at least seven days in a country where they could have sought and obtained effective protection, will continue to have access to the permanent protection visa after 30 months, if they are assessed as still in need of protection. (These changes affect only visa applications lodged **after** commencement of the legislation).

See Fact Sheet No. 1 for details of the differing criteria and conditions relating to the nine classes of refugee visa

People who arrive with family members

Asylum seekers who arrive with family members can either apply for a visa individually, or be included in a family visa application. Following the September 2001 legislative changes however, the outcomes for the individuals involved and the family as a whole can be very different depending on which option is taken.

Many asylum seekers make their visa applications as a family but there are risks with this approach.

A family application often focuses solely on the claims of *one* of the family members. One family member, such as a daughter, may be the subject of persecution in the family's home country. Logically, she should make the claim. That way, she can be protected and enjoy asylum in Australia with the support of her family. Often what happens in practice is that a parent, or uncle, as the head of the family, will make the application, even though another family member may have a stronger claim to protection. Once a family application has been made, the family members cannot make their own individual applications, regardless of whether they have a stronger claim to protection or had no opportunity to make an individual application in the first place.

If a family application is successful, every person included in the application are entitled to protection. So, if a family application that focuses on the claims of a child is successful, the child's parents will be entitled to the same protection if they are included in the application.

If a child's parents are not included in the family application, or the child makes an individual visa application, the child's parents are *not* allowed to come to, or to stay in, Australia unless:

- the child is granted a permanent protection visa which entitles him or her to family reunification; or

- the child's parents make their own visa applications and succeed solely on the basis of their own claims (noting however that the September 2001 provisions of the Migration Act prohibit parents and other family members from claiming protection on the basis that their children or other family members have been granted protection in Australia).

Safe third countries

The Migration Act allows particular countries to be prescribed as being "safe third countries."[6] People who have come from "safe third countries" cannot make an application for a protection visa. For example, the People's Republic of China is a "safe third country" in relation to Vietnamese refugees and their familles.

If a non-citizen has a right to enter and reside in a prescribed "safe third country," and they have previously resided in that country for a continuous period of more than seven days, then that person cannot make an application for a protection visa in Australia, unless the Minister exercises his or her personal and non-compellable discretion to allow the application.

The Migration Act says that Australia has no protection obligations towards a person who has a "right to enter and reside" temporarily or permanently in a third country. The person is required to have taken all possible steps to avail themselves of that third country's protection.[7]

Recent court decisions have differed on the issue of effective protection in a third country. In *NAGV* [8] the Full Federal Court agreed that the leading decision for the principle of effective protection - *Minister for Immigration and Multicultural Affairs v Thiyagarajah* [9] - was wrong. The High Court gave special leave to appeal *NAGV* on the basis that the issue needed to be settled. By the end of November 2004 the appeal had been heard but not decided. [10]

A person may also become a refugee due to his or her actions *after* leaving their country; for example, by expressing political views which the authorities in their home country do not support. In some circumstances, the very act of fleeing one's own country and seeking asylum in another country may give rise to such a claim (a 'sur place' claim).

But the Migration Act now says that if a 'sur place' claim is based on actions or conduct in Australia, the applicant must show that the conduct was not engaged in for the purpose

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[6] In determining if a country should be declared a 'safe third country' consultation may be had with the UNHCR.

[7] See *Minister for Immigration and Multicultural Affairs v Applicant C* [2001] FCA 1332, (18 September 2001)). Sect 36(3)-(5) of the Migration Act - introduced in December 1999 - excludes claimants who have effective protection in a third country: see *WAGH v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 194 (27 August 2003) at [28]).

[8] *NAGV* v *Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 202 ALR 1.

[9] (1997) 80 FCR 543.

[10] see www.austlii.edu.au/au/cases/cth/HCA/ for an update

of 'strengthening' a claim for refugee status. Previously, a person's motive for relevant conduct was irrelevant[11].

Access to the courts

The review of governmental administrative decisions by the courts (**judicial review**) is an important subset of administrative law which in turn is an important check on the exercise of government power. Administrative law helps to ensure that government officials, like other members of the society, are subject to the Rule of Law.

Administrative decision-makers can make mistakes. That is why Australia has a scheme for the courts to review administrative decisions, including decisions about visas. The ability of an asylum seeker to access the courts ensures that administrative decisions on refugee status are being conducted fairly and consistently with legislation.

Australian citizens and permanent residents who are subject to the administrative decisions of the Commonwealth (for example, decisions relating to tax assessments and social security entitlements) can expect to have those decisions reviewed by the Courts where they believe a decision is wrong in law, made unfairly or does not take appropriate factors into account. The central piece of legislation governing judicial review at the Commonwealth level is the Administrative Decision (Judicial Review) Act 1979 (Cth) (**ADJR Act**) which was designed to codify the common law grounds of judicial review of the actions of administrators and simplify the procedure for gaining review at the federal level.

Prior to 1994, people who were subject to decisions under the Migration Act could also expect to have those decisions reviewed by the Courts under ADJR Act.

Despite judicial review being particularly crucial in immigration matters, where visa decisions may literally be a question of life or death, and the prohibition in the Refugees Convention on discriminating against refugees as a class of persons, the Commonwealth has progressively amended the Migration Act and other legislation to limit the role of the courts in interpreting the Migration Act and to severely restrict access to the courts by asylum seekers for review of protection visa decisions.

The most recent measure was the insertion of a new section 474 – the so called 'privative clause' – into the Migration Act. The privative clause was intended to give decision makers wider lawful operation for their decisions and thereby narrow the basis on which

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[11] Sect 91R(3) of the Migration Act. See *SAAS v Minister for Immigration & Multicultural Affairs* [2002] FCA 726 (11 June 2002).

those decisions can be challenged in the Federal Magistrates Court, Federal Court and the High Court.

The effect of the privative clause was recently considered by the *High Court in Plaintiff S157/2002 v Commonwealth of Australia.*[12] The Court found that the privative clause does not protect an error which has resulted in a failure to exercise jurisdiction or in the decision- maker exceeding his or her jurisdiction. In coming to this finding the Court reasoned that:

- the terms of s474 do not purport to prevent review of decisions affected by jurisdictional error and which are therefore 'regarded in law as no decision at all;[13]'

- if s474 precluded review of unauthorised conduct by officers of the Commonwealth then it would be 'in direct conflict with s75(v) of the Constitution … and thus invalid'[14]; and

- if s474 precluded review of unauthorised conduct by officers of the Commonwealth then it would allow non-judicial decision-makers 'to determine conclusively the limits of [their] jurisdiction' and thus infringe the separation of powers impliedly required by Chapter III of the Constitution[15].

This then leaves the question as what constitutes jurisdictional error sufficient to found judicial review. The majority judgement said:

> 'Although s 474 does not purport to effect a repeal of statutory limitations or restraints, it should be noted that it may be that, by reference to the words of s 474, some procedural or other requirements laid down in the Act are to be construed as essential to the validity of the decision. However, that is a matter that can only be determined by reference to the requirements in issue in a particular case.'[16]

Gleeson CJ argued that:

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12 Plaintiff S157/2002v Commonwealth of Australia (2003) 195 ALR 24

13 Ibid [76]

14 Ibid [75]

15 Ibid [75]

16 Ibid [69]

> 'People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness. If Parliament intends to provide that decisions of the Tribunal, although reached by an unfair procedure, are valid and binding, and that the law does not require fairness on the part of the Tribunal in order for its decisions to be effective under the Act, then s 474 does not suffice to manifest such an intention'.[17]

What constitutes 'jurisdictional error' is not defined in the Migration Act, but the High Court has indicated that it can include the decision maker identifying a wrong issue, asking itself a wrong question, ignoring relevant material, relying on irrelevant material or, in some circumstances, making an erroneous finding or reaching a mistaken conclusion[18]. An erroneous finding of fact will, however, only give access to judicial review if there was no evidence on which the finding could be based.[19]

See Fact Sheet No. 2 which describes the major legislative and regulatory changes affecting the rights of asylum seekers and refugees

Access to legal advice

From this overview of some of Australia's current laws about the determination of who should be granted protection as a refugee in this country, it is clear that Australia's visa system is complex. A person seeking asylum needs legal advice about their status, how to apply for protection and their prospects of success.

However, legal advice is not routinely provided to asylum seekers who arrive in Australia and make an application for asylum. People who are detained in immigration detention are not provided with legal advice unless they specifically ask for it or raise claims which prima facie may engage Australia's protection obligations. Migration officers are not obliged to advise these asylum seekers of the rights to apply to a visa, or of the consequences of their detention for the visas they may be granted.

Many asylum seekers who arrive in Australia do not understand the Australian visa system well enough to know how to make an application for protection. If they do not make their applications soon after arrival, the Australian government can send them back to where they came from. This means that asylum seekers may not be given an opportunity to apply for a visa, either because they do not understand what they need to

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[17] *Ibid* [37]

[18] See *Craig v The State of SA* [1994-1995] 184 CLR 163.

[19] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356 and 359-360; *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231 at [19].

ask for or they do not specifically ask to see a lawyer. This can occur even though the asylum seeker may:

- fit within the definition of 'refugee' at international law *as well as* the new definition under the Migration Act; and

- come within the quota Australia has agreed to accept under the humanitarian program; *and*

- be entitled to apply for either a permanent or temporary protection visa under the Migration Act.

OTHER ISSUES

Detention of asylum seekers

Under Australian law, all people who are not Australian citizens and who do not have a valid visa must be detained. The majority of people in detention centres in Australia are asylum seekers who have arrived by boat. This means that people may be detained *even though* they may be refugees under the Refugee Convention *and* refugees according to the Australian definition *and* fall within Australia's yearly quota. The Refugee Convention and the UNHCR say that asylum seekers should not be detained unless it is absolutely necessary. Even then, asylum seekers should only be detained for as long as is necessary to process their claims. Some people have been detained in Australia's immigration detention centres for as long as three years.

A Working Group on Arbitrary Detention was established by the Human Rights Commission of the United Nations in 1991 with a mandate to:

- Investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards set forth in the Universal Declaration of Human Rights;

- Seek and receive information from Government and intergovernmental and non-governmental organizations, and receive information from the individuals concerned, their families or their representatives;

Present a comprehensive report to the Commission at its annual session.

The Working Group regards deprivation of liberty as arbitrary in the following instances:

- where there is no legal reason for the detention – an example of this would be detaining someone without charging them with any crime, or keeping them in prison after their sentence has been served;

- where a person is detained under a valid law but is kept in detention for an unreasonable and disproportionate time; and

- where the person has not been given a fair trial.

In two cases under the First Optional Protocol to the International Covenant on Civil and Political Rights the UN Human Rights Committee found that Australia's current detention policy amounted to arbitrary detention: *A v Australia* (No. 560/1993) and *Mr C v Australia* (No. 900/1999).

In 1992, the High Court of Australia said that detention of the asylum seekers was not illegal under the Australian Constitution (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[20]). However, in making this decision, the High Court did not consider several important aspects of our detention policy, including:

- whether continued detention of refugees is lawful when the Australian government has suspended processing their visa applications;

- whether it is lawful to detain people on a continual basis for very long periods of time; and

- whether it is lawful to detain unsuccessful protection visa applicants who cannot be returned to their home countries, either because their home countries will not take them back or because they are stateless.

- whether the conditions of detention can be such that the detention was unconstitutional.

In August 2004, the High Court upheld the constitutional validity of mandatory detention pursuant to the Migration Act, even where it results in indefinite incarceration.[21] The Court said that the power of the Federal Parliament to detain can only be incidental to its Constitutional power to make laws with respect to aliens (s51(xix)) and immigration (s51

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[20] (1992) 176 CLR 1

[21] *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] 78 ALJR 1056; *Al-Kateb v Godwin* [2004] 78 ALJR 1096; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] ALJR 1156.

(xxvii)). It considered whether there is a point beyond which detention becomes punitive and thus a matter that is only for the judicial power.

In the cases of *Al-Kateb* and *Al-Khafaji* the claimants - who had made written requests to be removed from Australia - faced indefinite detention. Both were unsuccessful protection visa applicants who had no state to where they could be returned.

In *Al-Kateb* a majority[22] held that ss 189, 196 and 198 of the *Migration Act* authorises the indefinite detention of asylum applicants who are designated 'unlawful non-citizens'. Detention under the *Migration Act* is said to not be punishment for an offence; it is incidental to the 'aliens' and 'immigration' constitutional powers, being for the purpose of exclusion of a non-citizen from the Australian community.[23]

In *Behrooz*, the appellant argued that the conditions at Woomera detention centre were so bad that detention was not constitutionally valid and thus he could not be prosecuted for escaping from 'immigration detention'. The High Court said that the detention was constitutionally valid irrespective of the conditions imposed[24] as Mr Behrouz could still use civil remedies and the criminal law if he was subjected to inhumane conditions or assault.[25]

The Full Federal Court has held that the likelihood of torture or even death is not a consideration in the removal of unlawful non-citizens pursuant to subs 198(6) of the Migration Act.[26] The Court held that the requirement in the subsection that removal be "as soon as reasonably practicable" does not mean that an officer has to take into account what is likely, or even virtually certain, to happen to the unlawful non-citizen after they have been admitted into the receiving country.[27]

The issue of children being held in immigration detention is the subject of much controversy in Australia, and has been damned as a practice by the international community. The final report of the Human Rights and Equal Opportunity Commission into children in immigration detention (tabled in May 2004), recommended the release of all children from detention centres and residential housing projects. The report found Australia's current system of detention was "fundamentally inconsistent" with the UN's

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[22] Hayne, McHugh, Callinan, Heydon JJ.
[23] Hayne J at [256], [261]-[263].
[24] Hayne J at [175]-176].
[25] See Gleeson CJ at [21], and McHugh, Gummow, Heydon JJ at [50]-[53].
[26] *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 292; Wilcox, Lindgren and Bennett JJ; 16 December 2003.
[27] The court followed its decision in *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 290.

Convention on the Rights of the Child (CROC), and that children who were detained for long periods were at "high risk of serious mental harm".

In the case of *B and B; Children in Immigration Detention*[28], the Full Court of the Family Court determined that the Family Court of Australia had jurisdiction to make orders in respect of non-citizen children held in immigration detention as part of a general discretionary welfare over all children. Importantly, it was decided that the Migration Act should not be interpreted as permitting the indefinite detention of children in circumstances where there is no real likelihood or prospect in the reasonably foreseeable future of the children being removed from detention. However, on appeal the High Court overturned the Full Court's decision.

This case highlights the extent to which Australia is in breach of its human rights obligations under the CROC, which it ratified in 1990. Article 37(b) of the CROC states that the detention of children must only be as a measure of last resort and for the shortest appropriate period of time. Article 3 requires Australia to ensure that in all actions concerning children, the best interests of the child shall be a primary consideration. Further, Australia must "undertake to ensure the child such protection and care as is necessary for his or her well-being." Clearly the nature and effects of the indefinite detention of children in immigration centres cannot be reconciled with Australia's obligations under the CROC.

In November 2003, the UN Human Rights Committee released its findings on a communication taken to it by Mr Bakhtiyari, the father of the children who appeared in *B and B*, under the ICCPR, against Australia.[29] The Committee found that:

> …detention should not continue beyond the period for which a State party can provide appropriate justification…while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period.

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[28] *B & B & Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 (19 June 2003)
[29] Communication No. 1069/2002, Bakhtiyari v Australia

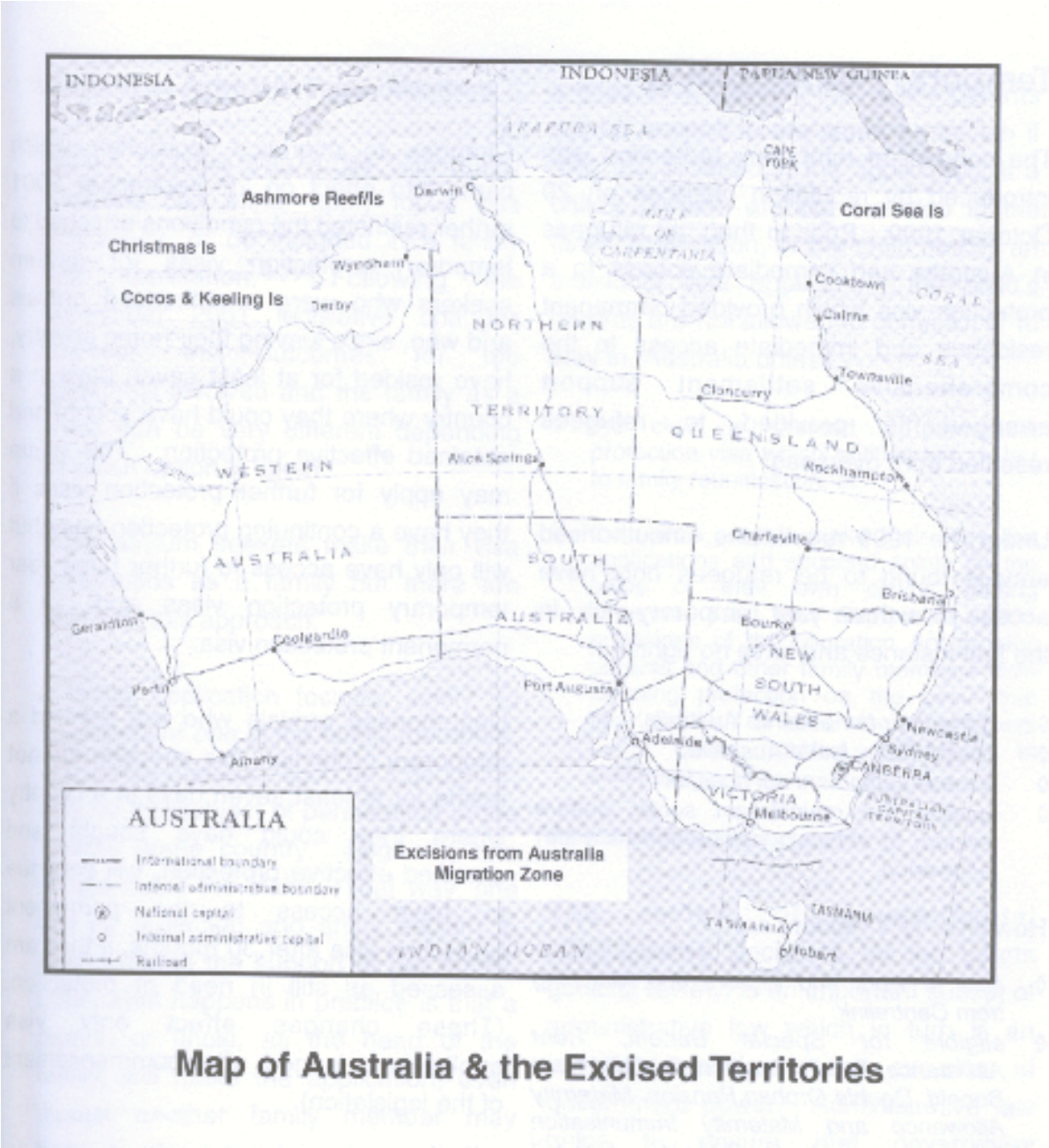
Further, the Committee observed that:

> …in this case [the] children have suffered demonstrable, documented and on-going adverse effects of detention… As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of … the children's right to such measures of protection as required by their status as minors…

See Fact Sheet No. 3 for UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum Seekers.

THE 'EXCISED TERRITORIES' CREATED BY LEGISLATION IN SEPTEMBER 2001, INCLUDING:

- **ASHMORE REEF AND ISLANDS**
- **CHRISTMAS ISLAND**
- **COCOS & KEELING ISLANDS**
- **CORAL SEA ISLANDS**



Map of Australia & the Excised Territories