AUSTRALIAN LAWYERS FOR HUMAN RIGHTS REFUGEE LAW KIT 2003

FACT SHEETS 1- 3

FACT SHEET NUMBER 1

AUSTRALIA'S VISA SYSTEM

In September 2001, the Australian government introduced a new visa regime for asylum seekers.[1] There are 9 different visas which apply specifically to asylum seekers and they are divided into two major categories: onshore and offshore.

Onshore asylum seekers

There are 2 types of 'Protection Visa' available to onshore asylum seekers:

Protection (subclass 866)

Criteria: Applicant is a refugee, arrived in Australia with valid travel documents and within Australia's migration zone, and did not spend more than 7 days in a country where could have sought protection on the way to Australia.

Rights: Permanent visa, access to government settlement services and welfare system, family reunion, right to return if leave Australia.

Temporary Protection (subclass 785).

Criteria: Applicant is a refugee, arrived in Australia without valid travel documents, or spent more than 7 days in a country where could have sought protection on the way to Australia.

Rights: Temporary visa for 3 years, limited access to welfare system.

Offshore asylum seekers

There are two types of visas available to asylum seekers who make a claim for refugee status offshore, namely:

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[1] *Migration Amendment Legislation (Excision from Migration Zone) (Consequential Provisions) Act 2001*, Schedule 2; *Migration Regulations*, Part 4.

Refugee; and

Humanitarian Visas.

For all of these except the Secondary Movement Offshore Entry (Temporary) Visa the applicant must be outside Australia.

Refugee (subclass 200)

Criteria: Applicant suffers persecution in home country and is not living there, or is sponsored by a family member who is an Australian citizen or permanent resident and has been given a Refugee Visa. Applicant has not spent more than 7 days in a country where could have sought protection.

Rights: Permanent visa, access to government settlement services and welfare system, family reunion, right to return if leave Australia.

In-country Special Humanitarian (subclass 201)

Criteria: Applicant suffers persecution in home country and is still living there, or is sponsored by a family member who is an Australian citizen or permanent resident and has been given an In-Country Special Humanitarian Visa.

Rights: Permanent visa, access to government settlement services and welfare system, family reunion, right to return if leave Australia.

Global Special Humanitarian (subclass 202)

Criteria: Applicant is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and is not living there, or is sponsored by a family member who is an Australian citizen or permanent resident and has been given a Global Special Humanitarian Visa, a Protection Visa, or a Special Assistance Visa. Since leaving home country, the applicant has not resided in another country where could have sought protection for more than 7 days.

Rights: Permanent visa, access to government settlement services and welfare system, family reunion, right to return if leave Australia.

Emergency Rescue (subclass 203)

Criteria: Applicant suffers persecution in home country, and is living there or in another country, or is sponsored by a family member who is an Australian citizen or permanent resident and has been given an Emergency Rescue Visa.

Rights: Permanent visa, access to government settlement services and welfare system, family reunion, right to return if leave Australia.

Woman at Risk (subclass 204)

Criteria: Applicant is a woman living in country other than home country, and is subject to persecution or registered by UNHCR as being of concern, or is sponsored by a family member who is an Australian citizen or permanent resident and has been given a Woman at Risk Visa. Since leaving home country, the applicant has not resided for more than 7 days in another country where could have sought protection.

Rights: Permanent visa, access to government settlement services and welfare system, family reunion, right to return if leave Australia.

Secondary Movement Offshore Entry (Temporary) (subclass 447)

Criteria: This is available to asylum seekers whose first place of landing in Australia is "an excised offshore place" (Christmas Island, Ashmore or Cartier Islands, Cocos Islands, sea installation or resource installation). They must be subject to persecution in their home country, or substantial discrimination amounting to gross violation of human rights in their home country, or a woman subject to persecution or registered by UNHCR as being of concern. There must be no alternative country available for protection. The Applicant must be outside Australia at the time the Visa is granted.

Rights: Temporary visa for 3 years, and can apply for successive TPVs every three years after this. Not entitled to government settlement assistance or family reunification, only single entry, cannot return if leave Australia.

Secondary Movement Relocation (Temporary) (subclass 451)

Criteria: Applicants must be outside their home country and outside Australia. They must be subject to persecution in their home country, or substantial discrimination amounting to gross violation of human rights in their home country, or a woman subject to persecution or registered by UNHCR as being of concern. There must be no alternative country available for their protection.

Rights: Temporary visa for 5 years, and can apply for permanent protection visa after four and a half years. Not entitled to government settlement assistance or family reunification, only single entry, cannot return if leave Australia.

FACT SHEET 2

REFUGEE LAW TIMELINE

1976	First Vietnamese refugees arrive by boat.
1977	Australian Ethnic Affairs Council established.
1978	Galbally Report on migrant programs and services. Determination of Refugee Status Committee set up.
1979	Community Refugee Settlement Scheme begins.
1981	Assisted passages to end, except for refugees. Special Humanitarian Program beings.
1983	Remaining distinctions between 'British' and 'aliens' ended, both becoming 'non-citizens'.
1984	The 'Blainey debate' on Asian immigration. National Population Council established. Residence requirement for citizenship reduced to two years.
1987	Office of Multicultural Affairs established within the Department of the Prime Minister and Cabinet.
1988	FitzGerald Report on immigration policy: *Immigration – A Commitment to Australia*.
1989	*Chan Yee Kin v Minister For Immigration And Ethnic Affairs* – High Court articulates the "real chance" test for well-founded fear of persecution. New migration regulations reduce ministerial discretion under the *Migration Legislation Amendment Act*. National Agenda for a Multicultural Australia launched. Immigration Review Tribunal established. Second lot of boats containing Tiananmen Square refugees arrives.

1990	Australian population passes 17 million. Chinese nationals resident at 20 June 1989 to be allowed to remain for four years as temporary residents.
1991	Start of major ministerial consultations with community groups on settlement needs. National Population Council report, *Population Issues and Australia's Future*. Public Accounts Committee report on the business migration program.
1992	Settlement Advisory Council established. Parliamentary Joint Standing Committee report, *Australia's Refugee and Humanitarian System*. *Migration Amendment Act* extends government's powers of detention. *Migration Reform Act* stops review of migration decisions under the *Administrative Decisions (Judicial Review) Act* and excludes grounds of review such as natural justice, unreasonableness, relevant and irrelevant considerations and bad faith. *Chu Kheng Lim* case on legality of detention. *Migration Amendment Act (No. 4)* limits amount of compensation payable for illegal detention of migrants to $1 a day.
1993	Memorandum of Understanding between Australia and China on refugees. Refugee Review Tribunal commences hearings.
1995	*Minister for Immigration, Local Government and Ethnic Affairs v Respondent A* case on Chinese one-child policy - Federal Court rules that refugee status can be based on being a member of a group affected by a government fertility control policy. In response the *Migration Legislation Amendment Bill (No.3)* attempted to remove fertility policies as a basis for refugee claims. It was allowed to lapse, however when the decision was reversed by the Full Federal Court, a result upheld by the High Court in *Minister for Immigration v A&B*. *Minister for Immigration and Ethnic Affairs v Ah Tin Teoh* holds that ratification of a treaty gives rise to a legitimate expectation that government decisions will comply with the terms of that treaty, even where it has not been incorporated into domestic law through legislation. *Administrative Decisions (Effect of International Instruments) Bill 1995* aims to

	counter *Teoh* and remove any legitimate expectation that may have been created by the ratification of a treaty. This bill is not passed.
1996	Federal Coalition government elected.
1997	*Administrative Decisions (Effect of International Instruments) Bill 1997* again aims to counter *Teoh* and remove legitimate expectations based on treaty ratification. It is not passed.
1998	HREOC report, "Those who've come across the seas: detention of unauthorised arrivals."
1999	*Administrative Decisions (Effect of International Instruments) Bill 1999* again attempts to counter *Teoh* and remove legitimate expectations based on treaty ratification, but is not passed. Temporary Protection Visa class is introduced, limiting unauthorised onshore applicants to applying for a three year Temporary Protection Visa rather than a Permanent Protection Visa. Temporary Safe Haven Visa class introduced for people who have been displaced from their place of residence, cannot reasonably return and are in grave danger of their personal safety for related reasons. The Kosovar Safe Haven Visa is also introduced to cater for a group of Kosovar refugees the Australian government had agreed to offer protection to.
2000	Senate Legal And Constitutional Committee Inquiry Report "A Sanctuary Under Review: An Examination of Australia's Refugee Humanitarian Determination Processes".
2001	*Migration Amendment (Excision from Migration Zone) Act* *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* *Border Protection (Validation and Enforcement Powers) Act* These Acts, together with others related to them and passed at the same time (see below), are intended to discourage unauthorised entry into Australia, deter people smugglers and increase the legal response to people arriving in Australia unlawfully. Areas to the north of the mainland that were previously part of Australia's migration zone are excised (**excised territories**). They generally make

	offshore applicants who have spent more than 7 days in a country in which they could have sought and obtained protection ineligible for refugee or special humanitarian visas and only eligible for the new Secondary Movement Declaration (Temporary). They also restrict onshore applicants who have spent 7 days in a country where they could have sought protection to temporary protection visas and prevent them obtaining permanent protection visas. Another new class of visa was introduced - the Secondary Movement Offshore Entry (Temporary) is available for people who have landed in the excised territories and only allows the holder to apply for temporary protection visas. *Migration Legislation Amendment* (*Judicial Review*) introduces privative clause to s.474 of the *Migration Act*, narrowing the basis on which some decisions made under the Act, such as those on refugee status, could be challenged in Courts. A definition of persecution as "serious harm to the person" and "systematic and discriminatory conduct" and "predominant" reason was also added to he *Migration Act*, a higher threshold than the one proposed by the Federal Court in *Ahmadi v Minister for Immigration and Multicultural Affairs* and *Kord v Minister for Immigration and Multicultural and Indigenous Affairs.*
2002	*Minister for Immigration and Multicultural Affairs v Khawar* – the High Court affirmed that, in the definition of 'refugee', the serious harm involved in persecution may be perpetrated by non-State agents, and that the State's only involvement may be the failure to provide protection. This case involved a Pakistani woman who suffered serious and prolonged domestic violence, and who was refused assistance by the police despite appealing for their help.
2003	*S157/2002 v Commonwealth of Australia* – High Court states that the privative clause cannot prevent the Court reviewing in the *Migration Act* decisions affected by jurisdictional error.

Information from Jupp J and Kabala M, *The Politics of Australian Immigration* (1993) AGPS and with thanks to Dr Mary Crock and Louise Pounder for their advice and contribution.

FACT SHEET NUMBER 3

UNHCR GUIDELINES ON DETENTION OF ASYLUM SEEKERS

The use of detention against asylum seekers is, in the view of UNHCR, inherently undesirable. This is even more so in the case of vulnerable groups such as single women children unaccompanied minors and those with special medical or psychological needs.

Of key significance to the issue of detention is **Article 31 of the 1951 Convention**. Article 31 exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Article also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and that any restrictions shall only be applied until their status is regularized or they obtain admission into another country.

It follows from this Article that detention should only be resorted to in cases of necessity. The detention of asylum seekers who come "directly" in an irregular manner should, therefore, not be automatic, nor should it be unduly prolonged. The reason for this is that once their claims have been examined they may prove to be refugees entitled to benefit from Article 3 1. Conclusion No. 44 (XDDCVH) of the Executive Committee on the Detention of Refugees and Asylum Seekers sets the standard in more concrete terms of what is meant by the term **"necessary"**. It also provides guidelines to States on the use of detention, and recommendations as to certain procedural guarantees to which detainees should be entitled.

The term **"coming directly"** covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection could not be assured. It is clear from the travaux préparatoires, however, that the term also covers a person who transits an intermediate country for a short time without having applied for or received asylum there. The drafters of the Convention introduced the term "coming directly" not to exclude those who had transited another country, but rather to exclude those who "had settled temporarily" in one country, from freely entering another (travaux préparatoires A/CONF.2/SR 14 p. 10). No strict time limit can be applied to the concept "coming directly", and each case will have to be judged on its merits. The issue of "coming directly" is also related to the problem of identifying the country responsible for examining an asylum request and granting adequate and effective protection.

Given the special situation of a refugee, in particular the frequent fear of auth other problems, lack of information and general insecurity, and the fact that these and circumstances may vary enormously from one refugee to another, there is no time limit which can be mechanically applied associated with the term **"without delay"** [a condition foreseen in Article 3 1

(I)]. Along with the term **"good cause"** [another condition foreseen in Article 31 (I)], it must take into account all of the circumstances under which the asylum seeker fled (e.g. having no time for immigration formalities].

The term "asylum seeker" throughout the survey and these guidelines also includes individuals who have been rejected from the refugee status determination procedure on purely formal grounds (for example pursuant to the application of the safe third country concept) or on substantive grounds with which UNHCR would not concur (such as in case of persecution by non-State agents). In the absence of an examination of the merits of the case in a fair and efficient asylum procedure or when the rejection after substantive examination of the claim is not in conformity with UNHCR doctrine, such rejected asylum seekers continue to be of concern to UNCHR. These guidelines do not, however, relate to "rejected asylum seekers stricto sensu", that is, persons who, after due consideration of their claims to asylum in fair procedures (satisfactory procedural safeguards as well as an interpretation of the refugee definition in conformity with UNHCR standards), are found not to qualify for refugee status on the basis of the criteria laid down in the 1951 Convention, nor to be in need of international protection on other grounds, and who are not authorized to stay in the country concerned for other compelling humanitarian reasons.

Guideline 1: Scope of the Guidelines

These Guidelines apply to all asylum seekers who are in detention or in detention-like situations. They apply to all persons who are confines within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where the only opportunity to leave this limited area is to leave the territory.[2[1]]

Persons who are subject to limitations on domicile and residency are not general considered to be in detention.

When considering whether an asylum seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each one should also be assessed.

2[1] This definition is based on the Note of the Sub-Committee of the Whole on International Protection of 1986 (37th. Session EC/SCP/44 Paragraph 25) which defined detention to mean "confinement in prison, closed camp or other restricted area, on the assumption that there is a qualitative difference between detention and other restrictions on freedom of movement".

Although the concept of "detention" is not defined in EXCOM Conclusion No. 44, it is stated in the 1988 Note on International Protection (39th. Session A/AC.96/713) that the Conclusion is of direct relevance to situations other than detention in prisons.

Guideline 2: General Rule

The right to liberty is a fundamental right, recognized in all the major human rights instruments both at global and regional levels. The right to seek asylum is, equally, recognized as a basic human right. The act of seeking asylum can therefore not be considered an offence or a crime. Consideration should be given to the fact that asylum seekers may already have suffered some form of persecution or other hardship in their country of origin and should be protected against any form of harsh treatment.

As a general rule, asylum seekers should not be detained.

The position of asylum seekers differs fundamentally from that of the ordinary alien and this element should be taken into account in determining any measures of punishment or detention based on illegal presence or entry. Reference is made to the provisions of Article 14 of the Universal Declaration of Human Rights, which grants all individuals the right to seek and enjoy asylum and Article 31 of the 1951 Convention which exempts refugees from penalties for illegal presence or entry when "coming directly" from a territory where their life or freedom was threatened. There is consensus that Article 31 should not be applied restrictively.[3]

Guideline 3: Exceptional Grounds of Detention

Detention of asylum seekers may exceptionally be resorted to, if it is clearly prescribes by a national law which is in conformity -with general norms and principles of international human rights law.[4][3]

The permissible exceptions to the general rule that detention should normally be avoided must be prescribes by law. In such cases, detention of asylum seekers may only be resorted to, if necessary, in order:

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[3][2] Article 31 of the 1951 Convention; for further reference and interpretation see above introductory notes to the UNHCR Guidelines.

EXCOM Conclusion NO. 22 (XXXII) Paragraph II B 2(a)
EXCOM Conclusion NO. 44 (XXXVII) Paragraph (d)
Note on International Protection 1987 Paragraph 16
Sub-Committee of the Whole on International Protection EC/SCP 4 and EC/SCP 44 1986 Paragraph 31

[4][3] Article 9(I) International Convenant on Civil and Political Rights ("ICCPR")
Article 37(b) UN Convention on the Rights of the Child ("CRC")
Article 5(1)(f) European Convention for the Protection of Human Rights ("ECHR")
Article 7(3) American Convention on Human Rights 1969 ("American Convention")
Article 6 African Charter on Human and People's Rights ("African Charter")
EXCOM Conclusion No. 44 (XXXVII)

- to verify identity;

- to determine the elements on which the claim for refugee status or asylum is based;

- 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; 5[4] or

- to protect national security or public order.

Where detention of asylum seekers is considered necessary it should only be imposed where it is reasonable to do so and without discrimination. It should be proportional to the ends to be achieved (i.e. to ensure one of the above purposes) and for a minimal period.[6][5]

Where there are monitoring mechanisms which can be employed as viable alternatives to detention (such as reporting obligations or guarantor requirements), these should be applied first unless there is evidence to suggest that such an alternative will not be effective.

Detention of asylum seekers which is applied for any other purpose, for example, as part of a policy to deter future asylum seekers, is contrary to the principles of international protection.[7][6]

Under no circumstances should detention be used as a punitive or disciplinary measure for failure to comply with administrative requirements or breach of reception centre, refugee camp or other institutional restrictions.

Escape from detention should not lead to automatic discontinuance of the asylum procedure, nor to return to the country of origin, having regard to the principle of non-refoulement.[8][7]

5[4] EXCOM. Conclusion No. 44 (XXXVII)
Detention for the purpose of a preliminary interview to determine the elements of the refugee status or asylum claim is not the same as detention of a person for the entire duration of a prolonged asylum procedure, which the Conclusion does not endorse. As regards asylum seekers using fraudulent documents or traveling with to mislead the authorities. Thus, asylum seekers who arrive without documentation because they were unable to obtain any in their country or origin, should not be detained solely for that reason (see Note on International Protection, A/AC.96/713 para 19, 15 August 1988).

6[5] Article 9(1) ICCPR
Article 37(b) CRC
Article 5(1)(f) ECHR
Article 7(3) American Convention
Article 6 African Charter
EXCOM Conclusion No. 44 (XXXVII)

7[6] Sub-Committee of the Whole on International Protection Note EC/ECP/44 Paragraph 51 (c)

8[7] Sub-Committee of the Whole on International Protection Note EC/SCP/44 Paragraph 41

Guideline 4.- Procedural Safeguards9[8]

Upon detention, asylum seekers should be entitled to the following minimum procedural guarantees:

- the right to be informed of the reasons for detention and of the rights in connection thereto, in a language and in terms which they understand;

- the right to challenge the lawfulness of the deprivation of liberty promptly before a competent, independent and impartial authority, where the individual may present his arguments either personally or through a representative. Such a right should extend to all aspects of the legality of the case and act simply to the lawful exercise by the executive of the discretion to detain. To this end, he should receive legal assistance. Moreover, there should be a possibility of a periodic review.

- the right to contact the local UNHCR Office, available national refugee or other agencies and a lawyer. The means to make such contact should be made available.

Guideline 5: Detention of Persons under the Age of 1810[9]

In accordance with the General Rule stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, minors who are asylum seekers should not be detained.

However if States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child be as a measure of last resort, for the shortest appropriate period of time and in accordance with the exceptions stated at Guideline 3.

Particular reference is made to:

9[8] Article 9(2) and (4) ICCPR
Article 37(d) CRC
Article 5(2) and (4) ECHR
Article 7(1) African Charter
Article 7(4) and (5) American Convention
EXCOM Conclusion No. 44 (XXXVII)
UN Standard Minimum Rules for the Treatment of Prisoners 1955
UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1990
10[9] CRC Articles 3, 9, 20, 22 and 37
UN Rules for Juveniles Deprived of their Liberty
UNHCR Guidelines on Refugee Children 1994

- Article 3 of the Convention on the Rights of the Child, which provides that in any action taken by States Parties concerning minors, the best interests of the child shall be a primary consideration;

- Article 9 which grants children the right not to be separated from their parents against their will; and

- Article 22 according to which States Parties are obliged to provide special measures of protection to refugee children and asylum seekers who are minors, whether accompanied or not.

lf children who are asylum seekers are detained in airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. M efforts must be made to have them released from detention and placed in other accommodation. lf this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families.

During detention, children have the right to education which should optimally take place outside the detention premises in order to facilitate the continuance of their education upon release. Under the UN Rules for Juveniles Deprived of their Liberty, States are required to provide special education programmes to children of foreign origin with particular cultural or ethnic needs.

Children who are detained benefit from the same minimum procedural guarantees (listed at Guideline 4) as adults. In addition, unaccompanied minors should be appointed a legal guardian.

Guideline 6: Conditions of Detention[11][10]

Conditions of detention for asylum seekers should be humane with respect for the inherent dignity of the person. They should be prescribed by law.

Reference is made to the applicable norms and principles of international law and standards on the treatment of such persons. Of particular relevance are the UN Standard Minimum Rules for the Treatment of Prisoners of 1955, the UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment of 1990, the UN Rules for the Protection of Juveniles Deprived of their Liberty and the European Prison Rules.

11[10] Article 10(1) ICCPR
UN Standard Minimum Rules for the Treatment of Prisoners 1955
UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1990
UN Rules for Juveniles Deprived of their Liberty 1990
European Prison Rules 1987

The following points in particular should be emphasized:

- the segregation within facilities of;
- men and women, and
- children from adults (unless these adults are relatives); and
- asylum seekers from convicted criminals;
- the possibility regularly to contact and receive visits from friends, relatives and legal counsel;
- the possibility to receive appropriate medical treatment and to conduct some form of physical exercise; and
- the possibility to continue further education or vocational training.

It is also recommended that certain vulnerable categories such as pregnant women, nursing mothers, children, the aged, the sick and handicapped should benefit from special measures which take into account their particular needs whilst in detention.