

Senate Legal and Constitutional Committee

Inquiry into the Administration and Operation of the Migration Act 1958

Submission by

Social Justice Committee
Conference of Leaders of Religious Institutes (NSW)

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Introduction

The Conference of Leaders of Religious Institutes in New South Wales¹ represents 3,500 women and men religious, and promotes the life, mission and concerns of religious congregations in the Church and in our society. CLRI(NSW) does this by:

- § articulating our spirituality and commitment as members of religious congregations;
- § actively promoting Reconciliation between indigenous and non-indigenous Australians;
- § working for justice for all through our advocacy, especially for Aborigines and Torres Strait Islanders, Australians who live in poverty, refugees and asylum seekers, those harshly treated before the law, and victims of racism;
- § raising our corporate voice to challenge the structures of injustice in our state, our country and our world; and
- § establishing committees, working groups and task forces which maximise the potential of the Conference to bring about change, especially structural change, in the area of social justice.

As one of these established committees, the Social Justice Committee is a means through which CLRI(NSW) can act effectively with respect to issues of social justice. The functions of the Committee are to investigate, to initiate action concerning, and to prepare papers on, social justice issues. Many of those who sit on the Social Justice Committee, as well as members of the congregations it represents work closely with refugees and asylum seekers, both in the community and in detention. The Social Justice Committee has a longstanding interest in and commitment to a humane refugee program.

CLRI(NSW) welcomes the recent changes to the *Migration Act* made by the *Migration Amendment (Detention Arrangements) Act*, but argues that the changes do not go far enough to address the deep-seated problems within the Department of Immigration, the detention system and the *Migration Act* itself. In this submission, we hope to raise a number of practical and ethical issues at the heart of the Act for further consideration by the Senate Committee. These issues need to be addressed to ensure a well functioning, humane refugee program. Attached to this submission is an alternative refugee program, launched by CLRI(NSW) in 2001. The program offers a humane, economical and secure means to process and accommodate asylum seekers in Australia.

¹ Hereafter referred to as CLRI(NSW)

The problem of temporary protection

CLRI(NSW) is concerned as to the continued existence of Temporary Protection Visas (TPVs) as part of Australia's humanitarian visa program. Criticism of the scheme has been widespread both within Australia² and internationally.³ The scheme can be criticised on two grounds– in terms of Australia's obligations under the 1951 Refugees Convention and with regard to the psychological effects and material disadvantages of the temporary status these visas confer.

The Convention Relating to the Status of Refugees

The punitive nature of the TPV was described by the then immigration minister, Phillip Ruddock, in 2003:

“what we are saying is that there was a right way to come and a wrong way to come and the TPV is about saying yes, we honour our obligations but if things change at home, and you can go back, then you'll be going back.”⁴

The different “class” of refugee created by the grant of a TPV is not based on the Refugee Convention, but on the means of arrival in Australia, and is as such discriminatory. This directly contravenes Article 31(1) of the Refugees Convention, which specifies that signatories are “not [to] impose penalties on account of their illegal entry or presence”⁵ in the country of asylum.

Ruddock's statement reveals the punitive and deterrent intent of the introduction of the TPV. CLRI(NSW) condemns punitive actions taken on some to deter others from similar behaviour. The dire consequences for those punished can never be justified by resulting deterrence.

Psychological Effects

The Refugee Convention's definition of a refugee is a person who,

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

² See for example Petro Georgiou's arguments in Parliament (including Hansard comments 9th Feb 2005) and in “We Have Abandoned our Dearest Values on Asylum” SMH, 18/2/05, and the Amnesty International Campaign for Permanent Protection (details at http://www.amnesty.org.au/whats_happening/refugees/issues_and_campaigns)

³ Human Rights Watch Commentary on Australia's Temporary Protection Visas for Refugees May 2003, available at <http://www.hrw.org/backgrounder/refugees/australia051303.htm>

⁴ quoted in Greg Marston, ‘A Punitive Policy: Labour Force Participation of Refugees on Temporary Protection Visas’, *Labour and Industry* (Vol.15, No.1, August 2004) 66

⁵ 1951 UN Convention Relating to the Status of Refugees, at <http://www.unhcr.ch>

The Australian Government uses this definition as the basis for its findings of refugee status⁶. As outlined above, depending on the circumstances of their arrival in Australia, a refugee according to the UN definition can be granted a Temporary Protection Visa. Generally, those who have fled their country fearing persecution will have faced significant trauma in their home country. Further trauma can come from the journey to seek asylum, and mandatory detention as part of Australia's refugee processing system. The finding of refugee status and the conferral of a visa should offer these people a chance to settle and address the trauma associated with their flight from their home country. The grant of a TPV can hinder this recovery process, and in fact re-traumatise refugees.

“The research findings illustrate a clear and unequivocal connection between the visa status of refugees on TPVs and their self-reported feelings of distress, despair and depression. The deep uncertainty associated with the TPV severely restricts the capacity of refugees to recover from a traumatic past, as well as to dream, hope and plan for a better future”⁷

Hoffman notes that

“[i]n many ways the TPV has continued detention centre conditions, wreaking psychological damage because the future remains so uncertain, placing significant limits on individuals' freedom, and denying family reunion.”⁸

The inability to send for remaining family members or to even leave Australia temporarily has a predictable effect on the psychology of TPV holders. Habib Wahedi, an Afghani TPV holder who committed suicide in 2003 just before his visa was due to expire, described the pain of being separated from his family with no certainty of ever seeing them again, saying:

“I lived in this land for three and a half years, I was so thirsting to see my children...but I realise I can no longer tolerate these pains.”⁹

Additionally, it can be argued that it works directly against the Government's stated deterrence aims, as it drives asylum seekers to bring their whole families when making a bid for asylum, to ensure that their family stays together.

Material Disadvantage

As well as denying refugees certainty about their future, Australia's temporary protection regime denies them concrete privileges and benefits extended by the government to those with Permanent Protection

⁶ s36(2) *Migration Act*

⁷ Marston, G *Temporary Protection Permanent Uncertainty: the experience of refugees living on temporary protection visas*, Centre for Applied Social Research, RMIT University, July 2003, p 4

⁸ Nigel Hoffman, 'Temporary Protection, Anxiety and Refugee Deterrence', *Arena Journal* (No.21, 2003)

⁹ 7.30 Report, 'Asylum Seeker Suicides While on Temporary Visa', (Mike Sexton) 27th May, 2003, available at www.abc.net.au/7.30/content/2003/s865888.htm, accessed 25/7/05

TPV holders do not have the same rights or access to government services and assistance as refugees who applied from outside Australia, despite having been found to be equally in need of protection. They are not eligible for mainstream welfare payments or most settlement services, which means they are forced to rely on assistance from church groups, charities or any contacts they have in Australia. Furthermore, permanent residence is not automatically assured by the grant of a TPV. If TPV holders are unable to gain permanent resident status, they are also denied the right to bring their families to Australia, and cannot re enter Australia if they leave.

This denial of benefits makes it harder for TPV holders to integrate meaningfully into life in Australia. For example, while a TPV holder has the right to work under the visa, there are often practical difficulties associated with finding work which are insurmountable without the support networks provided with the grant of permanent protection. These practical difficulties have led to an unemployment rate of 64% amongst TPV holding refugees.¹⁰

¹⁰ Michelle Wiese Bockman, 'Refugees at Risk of Homeless Future' (*The Australian*, 11th April, 2005) 4.

Contract with Global Solutions Limited [GSL]

The running of immigration detention centres under the Migration Act is contracted out to GSL, with distressing results. The recently released Palmer Report characterises the contract as “flawed”, going on to note that “the contract places little emphasis on service quality or the establishment of an equitable detention environment...”¹¹. The Palmer Report is instructive in its criticism of the content and implementation of the current contract between the Commonwealth and GSL, but CLRI(NSW) argues against the principle of outsourcing detention services. The outsourcing of detention can serve to compromise the fundamental human rights of detainees. Privatisation and outsourcing are often justified on the grounds that they facilitate higher efficiency and less expense in the provision of services. However, outsourcing to GSL also serves to lower standards, and to limit the accountability of detention centre operators. The Government and private detention centres can avoid giving out information about their operations, because of commercial confidentiality.¹² CLRI(NSW) held similar concerns about the previous contract holder, ACM. These criticisms are not levelled at GSL, but rather at the intention behind contracting out of services which are legitimately those of governments. CLRI asserts that as deprivation of liberty constitutes a serious restriction of a fundamental human right in itself, the conditions under which detention centres operate must be open to public scrutiny. We are concerned that a private company, with an obligation to its shareholders to make a profit, may place more emphasis on financial efficiency and profitability than on optimum conditions for detainees.

Conclusion

CLRI(NSW) believes reforms to the *Migration Act* and to the policies and processes surrounding the administration of the Act and of immigration detention generally are in urgent need of reform. We urge the committee to make a thorough investigation into the issues described above.

¹¹ Palmer Report p176

¹² See for example the discussion in Peter Mares’ book, *Borderline: Australia's Treatment of Refugees and Asylum Seekers* (UNSW Press, 2001) , p77

Working Paper on

The Humanitarian Program for People Seeking Protection in Australia

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How can the baptized claim to welcome Christ if they close the door to the foreigner who comes knocking? “If anyone has the world’s goods and sees his brothers or sisters in need, yet closes his heart against them, how does God’s love abide in him?” (1 Jn 3:17)

Pope John Paul II, Message for World Migration Day 2000, no. 5

“All people have the right to seek and enjoy in other countries asylum from persecution”
Universal Declaration of Human Rights, Article 14 (1)

“In every situation affecting the interests of a child or a family, the interests of the child must come before all others”
Convention on the Rights of the Child, Article 3

“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society”
International Covenant on Economic, Social and Cultural Rights, Article 10 (1)

“No one shall be subject to arbitrary arrest or detention”
International Covenant on Civil and Political Rights, Article 9

“No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment”
International Covenant on Civil and Political Rights, Article 7

“Contracting states shall not impose penalties, on account of their illegal entry or presence on refugees who, coming from a place where their life or freedom was threatened...are in their territory without authorisation...”
Geneva Convention Relating to the Status of Refugees, 1951, Article 31(1)

Recognizing Australia's commitment to these conventions and to the foundations of the Common Law, the following principles are a necessary beginning to any debate on Australia's humanitarian and refugee program.

- Australia is part of the international community and has undertaken its responsibilities towards refugees voluntarily and in the spirit of humanitarianism;
- As a wealthy and stable nation, we share a responsibility for the weakest in the world community;
- Australia is entitled to protect its territorial integrity in ways that are consistent with its international obligations and undertakings and its domestic law and legal principles;
- No refugee or asylum seeker may be subject to punishment, mistreatment or other violations of human rights to deter others from seeking asylum in Australia;
- Refugees and asylum seekers who are intercepted on their way to Australia must be treated with respect for their dignity without subjection to physical violence or threats of physical violence;
- Under no circumstances will a refugee or asylum seeker be diverted to a country that is not party to the 1951 convention or to major human rights treaties, or to a country that cannot support their presence with dignity;
- Aid funds will not be diverted from development projects to underpin the detention and processing of asylum seekers in Australia or in other countries
- The number of resettlement places available under the off-shore humanitarian program must not vary according to the number of on-shore asylum seekers, since the two fill different needs and roles.
- Non-citizens in Australia will be detained only after they have been individually assessed as a risk to public safety or security. All detention requirements must be reviewable by a court and must be for the shortest time possible.
- Any asylum seeker in detention is entitled to be treated humanely with respect for his or her human dignity.
- Asylum seekers who are determined to be in need of protection shall be entitled to family reunion.
- Asylum seekers found to be in need of protection will be granted permanent visas.

Forward

After examining Australia's current Humanitarian Program and the many policy proposals put forward by refugee and human rights advocates, Australian Catholic leaders have prepared this working paper as a contribution to public discussion regarding asylum seeking in Australia. The Working Paper takes into account the experience of the many Religious who continue to give their time and skills to assist refugees, in Australia and overseas. Our hope is that these suggestions will work, in concert with other proposals, to provide material for discussing the current system of dealing with asylum seekers and ways of improving it.

Australia has benefited and continues to benefit from the cultures, gifts and diversity brought by refugees. In recognition of this contribution, the working paper aims to unite the community behind a program, clearly articulated and unifying. Recognizing that the vast majority of asylum seekers are genuine and that people rarely leave their countries and embark on such perilous journeys without due cause, this paper emphasizes the importance of integrating people, as quickly as possible, into the community, with all the supports they need. This is, we believe, a compassionate, balanced, workable and affordable policy.

Although we advocate an increase in untied international development aid and a review of the current resettlement program, this policy does not deal with the Humanitarian Program as it interacts with resettlement or other offshore applications, or international development aid. Issues related to immigration, population and migration policies should not be confused with a discussion of Australia's moral and legal obligations to people in need of protection; where the former are primarily concerned with the needs of Australia and Australians, humanitarian programs, on shore and off shore, must focus on the needs of the people who seek our help. It is the responsibility of Australia, as a wealthy and stable country, to contribute to international solutions to the global issue of the movement of peoples. Only through honourably undertaking the responsibilities we have accepted, can Australia say that it is a member, in good standing, of the international community.

People fleeing threat and violence seek sanctuary and protection in Australia and the measure of our humanity as a nation is in the way we respond to the most vulnerable. The first point of reference *should not be the interest of the State or national security but the human person, so that the need to live in community, a basic requirement of the very nature of human beings will be safeguarded.* (Pontifical Council; *Cor Unum and the Pastoral Care of Migrants and Itinerant People*)

This working paper was an initiative of the Conference of Leaders of Religious Institutes (NSW), in collaboration with:

The Australian Catholic Social Justice Council, and the
The Australian Conference of Leaders of Religious Institutes Australia

Sydney, 22nd August 2002

Contents

Executive Summary

Outline

Arrival in Australia and Immigration Clearance

Reception in Australian Territory

Immigration Clearance and Reception Centres

Detention for Those who Pose a Safety or Security Risk

Limits on Detention

Review of Detention

The Families of Detained Asylum Seekers

In the Community

Visas

Settlement Assistance

The Application Process

Defining “Refugee”

Review

Final Decision and Result

Status Determination

Limits on Removal Detention

Oversight and management

Responsible Authorities

Standards in all Residential Facilities

Annexure

Executive Committee Conclusion 15: “Refugees Without an Asylum Country”

Executive Committee Conclusion 44: “Detention of Refugees and Asylum Seekers”

Executive Committee Conclusion 47: “Refugee Children”

Executive Committee Conclusion 88: “Protection of the Refugee’s Family”

Commission on Human Rights: Excerpt from the “Report of the Working Group on Arbitrary Detention” on the “Situation Regarding Immigrants and Asylum Seekers”

Executive Summary

Australia's current system of receiving, maintaining, and processing asylum seekers and refugees is in crisis. It is an inhumane system because it means that we no longer treat those who seek protection in Australia with the dignity and respect owing to them as human persons. The current system fails to treat them with equality or compassion, and causes unnecessary hardship. We believe the current systems are in need of fundamental and radical overhaul.

Open and honest dialogue with all stakeholders is needed if this system is to be overhauled and more humane ways of receiving, maintaining, and processing asylum seekers and refugees established. This dialogue has already commenced. Through our collective experience working with asylum seekers and refugees we believe we can make a positive contribution to the dialogue at this stage.

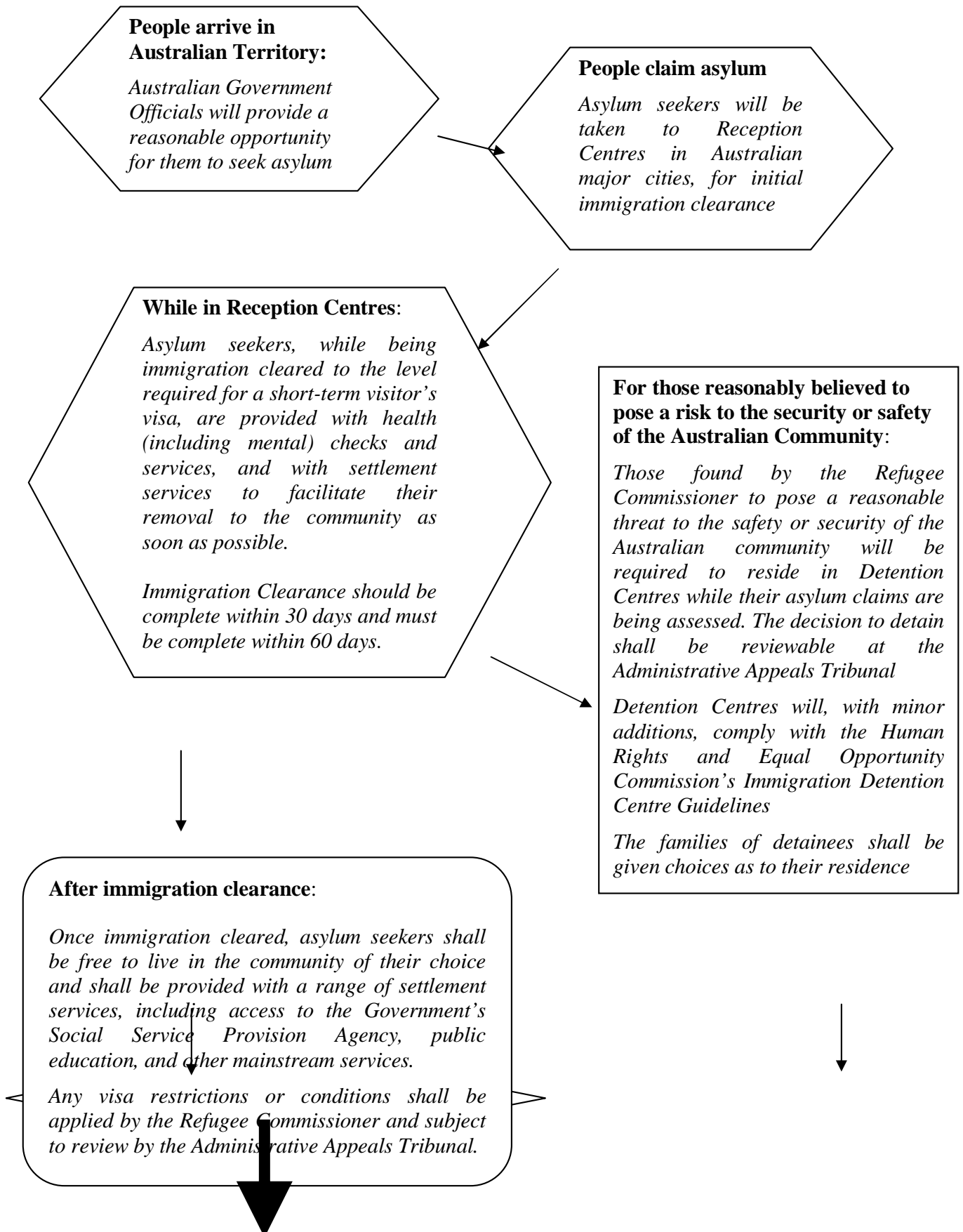
This working paper presents what we believe to be proposals for more humane and equitable systems of receiving, maintaining, and processing of asylum seekers and refugees. The system in its entirety and also in its constituent parts is dealt with in the working paper. We believe this working paper adds new ideas and fresh perspectives to the many valuable suggestions already presented by other groups, and we hope that it will be used, in conjunction with earlier proposals, in the development of an humane and workable on-shore humanitarian program.

The key elements of our proposals are:

- The creation of a Commissioner for Refugees, independent of government but working closely with the relevant government department responsible for asylum seekers and refugees. The Commissioner for Refugees shall have oversight and determinative responsibilities for every element of the on-shore humanitarian program.
- Any person approaching or arriving in Australian territory will be given the chance to enter Australian territory to claim asylum in Australia.
- Australia's refugee definition will remain that of the 1951 *Convention Relating to the Status of Refugees* as amended by its 1967 *Protocol*, and shall be interpreted at least as broadly as the guidelines of the Office of the United Nations High Commissioner for Refugee (UNHCR) guidelines. In addition, the humanitarian program shall be strengthened to include considerations of humanitarian need, statelessness and protection from a return to torture.
- Once a request for asylum has been made, asylum seekers arriving without documentation shall be immigration cleared as soon as possible, and no later than 60 days after arrival in Australia.
- While awaiting immigration clearance, asylum seekers will reside in reception facilities with a priority given to keeping all family units together. These facilities will be within easy access of major Australian cities so as to ensure that relevant services can and shall be provided. Reception facilities must be of the lowest possible security and must be designed with the needs of traumatised people in mind.

- Once provided with a short-term entry, all asylum seekers will be free to reside in the community, with access to full social services, unless they have been found to be a risk to public safety or security. The same social and other services shall be available to all asylum seekers, regardless of mode or place of entry to Australian territory.
- If a person is reasonably believed to be a risk to public safety or security, detention in a separate facility or any visa restrictions shall be individually mandated by a Commissioner for Refugees, on the advice of the relevant Government Department, and reviewed by a competent and independent tribunal.
- The process of refugee status determination shall be transparent and subject to judicial review.
- Procedures will be put in place to assist people found to be ineligible for refugee status in Australia, so that they can make the best decisions for their futures and those of their families. The program will include counselling and, if appropriate, reasonable facilities to obtain admission to a third country.

Working Paper Program Outline



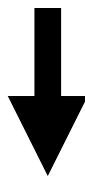


Refugee Status Determination:

Australia's Humanitarian Program shall reflect the needs, not only of Refugee Convention refugees, but also those fleeing war, natural disaster, events seriously disturbing to the public order, torture and human rights abuses.

After an initial decision by the responsible department, asylum seekers found not to be refugees or otherwise not in need of Australia's protection shall have the right to appeal the decision at the Administrative Appeals Tribunal, and subsequently in the Federal Court.

The Refugee Commissioner shall, before the Department's Decision is considered by the AAT, have the power to exchange her decision for that of the Department. This decision shall be appellable at the AAT and subsequently in the Federal Court.



Refugees and others in need of Protection:

Those found to be refugees or otherwise in need of protection shall be granted permanent residency in Australia

They shall be immediately eligible for the full range of rights and services available to permanent residents of Australia

They shall be provided with

People found not to be in need of Protection:

Unless a person has been found by the AAT to pose a risk to the safety or security of the Australian security, or to pose a risk of flight, they shall remain in the community while awaiting their departure from Australia.

Those who have been found ineligible to remain in Australia shall be provided with counseling to assist them in their preparation for

Arrival in Australia and Immigration Clearance

1. Reception in Australian Territory

The Government of Australia has responsibility for the management of people entering and leaving Australian territory. In ratifying the 1951 *Convention Relating to the Status of Refugees* (the Convention), the Government of Australia agreed to an international regime for the protection of refugees.

The 1951 *Convention Relating to the Status of Refugees* requires at Article 33 that States Parties refrain from returning refugees to places where their life or freedom may be threatened.

The Office of the United Nations High Commissioner for Refugees, as a part of its role as supervisor of the application of the Convention¹³, produces a yearly *Note on International Protection*. In 1999, the High Commissioner's *Note* explained that: "refugee protection demands that asylum-seekers be treated on the assumption that they may be refugees until such time as their status has been determined."¹⁴

Since it is impossible to immediately assess the refugee status of people arriving in Australian territory by boat or even plane, it is clearly necessary to allow entry to those who approach Australian territory so as to enable them to claim and be assessed for refugee status. Without that assessment, Australia would be at risk of returning people to places where their lives or freedom may be threatened in the sense of Article 33 of the Convention.

This principle is supported by the United Nations High Commissioner for Refugees Executive Committee's Conclusion number 15 of 1979, "Refugees without an Asylum Country", which states that "It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum."¹⁵

As a result of Australia's ratification of the 1951 Convention, and of the needs of people seeking protection, Australian border management policy must include provision for the entry of people attempting to seek asylum in Australia.

Australian policy complying with these standards could include the following:

- 1.1 People arriving in or approaching Australian territory must be given the opportunity to claim asylum in Australia
- 1.2 The assessment and processing of all asylum applicants must take place on Australian territory, within easy access of a major Australian city.

¹³ Per Article 31(1) of the *Convention Relating to the Status of Refugees*, and 8(a) of the *Statute of the Office of the United Nations High Commissioner for Refugees*.

¹⁴ Executive Committee of the UNHCR's Program. *Note on International Protection* 1999. UN Doc. No. A/AC.96/914, Para 16.

¹⁵ Point (c) of Executive Committee Conclusion 15, 1979. Executive Committee Conclusions are not binding. However, as agreed statements by the States Members of the Executive Committee of the UNHCR, they may have the status of *opinio juris*, and thus act as elements of customary international law. Per Guy Goodwin-Gill, *The Refugee in International Law*. Second Edition. Oxford University Press, 1996, p128.

2. Immigration Clearance and Reception Centres

The Australian immigration program requires a thorough study of the background and attributes of people offered long term and permanent visas. By contrast, it grants short-term visas to tourists and people who wish to travel to Australia on business with much less information. While the Government of Australia must certainly be able to determine the identity and potential threat of people who seek to enter Australia, principles of humanity and recognition of the needs of refugees demand that any restrictions placed on on-shore asylum seekers must be no more lengthy or harsh than is absolutely necessary.

The Executive Committee of the UNHCR, in Conclusion 44 “The Detention of Refugees and Asylum Seekers”, of 1986,

- “(b) Expressed the opinion that 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 determine the elements on which the claim to 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; or to protect national security or public order;
- (c) Recognized the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention...”

Australia’s own High Court, in *Lim v the Minister for Immigration*¹⁶, held that the Commonwealth has the power to detain non-citizens

“...if the detention...is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable the application for an entry permit to be made and considered.”¹⁷

Given these guidelines and the Refugee Convention prohibition on penalising people for their “illegal entry or presence” in the country of asylum if they have come directly from a place where their “life or freedom may be threatened”¹⁸, any mandatory restrictions on the liberty of asylum seekers must not be punitive and must be limited to the administrative requirements of a short term entry permit. Once they have been granted entry permits that allow them to begin the settlement process, asylum seekers’ claims to refugee status can be assessed more completely.

To that end, Australian policy on the initial detention of asylum seekers for the purpose of an entry permit could include the following:

¹⁶ *Chu Kheng Lim and Others v The Minister for immigration, Local Government and Ethnic Affairs and Another*. (1992) 176 CLR 1 F.C 92/051. Accessed on www.austlii.edu.au, 9/05/01.

¹⁷ Per Brennan, Deane, Dawson JJ at their para 32.

¹⁸ 1951 *Convention Relating to the Status of Refugees*, Article 31(1)

- 2.1 Any people seeking asylum who have not been immigration cleared will reside in *Reception Centres*¹⁹ to facilitate initial processing procedures required for “immigration clearance”.
- 2.2 “Immigration Clearance” requires only that the appropriate Government Department determines eligibility for entry as a short-term visitor. The visa security requirements shall be no greater than are demanded for people applying for short-term tourist visas. Place of origin “risk factors” shall not apply and eligibility for permanent residency need not be established until refugee status determination is complete.
- 2.3 Unaccompanied minors must be immediately provided with appropriate foster care and specialized services, including a lawyer and access to Red Cross Tracing Services.
- 2.4 Unless the Refugee Commissioner mandates their continued detention, all asylum seekers will be free to live in the community, at the end of **30 days**. Without exception, at the end of **60 days** in a *Reception Centre*, all asylum seekers shall leave the *Reception Centre*. [See 3.1]
- 2.5 Should it appear that the immigration clearance process would not be completed within 30 days, the appropriate official must lodge with the Refugee Commissioner an application to keep the asylum seeker in the *Reception Centre* for up to 30 further days, before the expiry of the 30 days.
- 2.6 The Refugee Commissioner must make a decision prior to the expiry of the first 30 days, for the asylum seeker to remain in a *Reception Centre*. If there has been no decision within 30 days, the decision of the Commissioner will be deemed to be against detention, and the person must be released.
- 2.7 The asylum seeker shall have the right to appeal the decision of the Commissioner at the Administrative Appeals Tribunal, and subsequently at the Federal Court of Australia.
- 2.8 To ensure access to members of the community and to religious, legal, health, educational and social services, all residential facilities for asylum seekers must be within easy access of a major Australian city.
- 2.9 During the asylum seekers’ 30 days of residence in *Reception Centres*, the responsible authorities, without expanding the current definition of immigration clearance, will complete, or at least commence, the following:
 - a. Provision of complete information regarding the asylum seeking process, including, in the appropriate language, reasons for, limits on and minimum standards of detention, appeal rights and contact information for assistance agencies;
 - b. Provision of independent legal counsel (paid for by the Commonwealth) and private access to them in time to complete the initial application procedures;
 - c. Lodgement of initial application for refugee status with the appropriate Government Department and acknowledgement of a prima facie case
 - d. Identification of the applicant and family members by the appropriate Government Department;

¹⁹ A *Reception Centre* is a residential facility for the short term residence of people not yet immigration cleared. *Reception Centres* shall resemble earlier *Migrant Hostels* or the facilities used to house East Timorese asylum seekers prior to their disbursement to *Safe Haven* facilities. They will be located within or within easy access of major Australian cities. For further details, see “Standards in Residential Facilities”, in section 12 of this document.

- e. Security assessment by the appropriate Government Department;
 - f. Health checks and the commencement of appropriate treatment by the appropriate Government Department;
 - g. Mental health evaluation with particular emphasis on histories of torture or trauma, and the commencement, if necessary, of appropriate treatment by the appropriate Government Department;
- 2.10 Immigration clearance and permission to leave the *Reception Centre* must not be slowed by the completion of the procedures outlined in 2.7.
- 2.11 *Reception Centre* Management shall work with those providing settlement services for refugees, so as to facilitate the refugees' independent entry into the community.
- 2.12 See section 12 of this document for further details regarding *Reception Centre* standards.

Detention for those who Pose a Safety or Security Risk

The *International Covenant on Civil and Political Rights* states at Article 9 that:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

No individual can be deprived of the protection of international human rights law, whether or not they are outside the borders of their normal country of residence.²⁰ People protected as refugees under the 1951 Refugee Convention are due additional rights and protections, but they do not lose the rights guaranteed by the *International Covenant on Civil and Political Rights* (ICCPR), or the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)²¹. Australia is party to both *Covenants* and to the Refugee Convention and so is bound to comply with them in good faith.

In 1997, The United Nations Human Rights Committee considered a petition from an asylum seeker detained in Australian detention centres from the point of view of Article 9 of the ICCPR. *A v Australia*²² found that while it was not “per se arbitrary to detain individuals requesting asylum”,²³

“every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors, detention may be considered arbitrary, even if entry was illegal.”²⁴

The Executive Committee of the UNHCR, in the 1986 Conclusion 44 “Recommended that detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review”. This requirement that is also addressed by the United Nations Commission on Human Rights’ Working Group on Arbitrary Detention, which also focused on the requirement that each person is individually assessed to determine whether it is necessary to detain them.²⁵ The Working Group also established that asylum seekers should

²⁰ See Article 2(1) of the *International Covenant on Civil and Political Rights* and Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*: the rights of the Covenants are to be “respected and ensured” without “distinction” (ICCPR) or “guaranteed” without “discrimination” (ICESCR) because of “race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status” [italics added]

²¹ See also Article 5 of the 1951 *Convention Relating to the Status of Refugees*, which states that “Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.”

²² Communication Number 560/1993, UN Doc CCPR/C/59/D/1993 (30 April 1997)

²³ at 9.3

²⁴ At 9.4

²⁵ The Report of the Working Group on Arbitrary Detention to the Commission on Human Rights, 1998. UN Doc no E/CN.4/1999/63. Guarantees 2, 3 & 4. See Annex 6 of this document

not be “held in custody for an excessive or unlimited period, with a maximum period being set, as appropriate, by the regulations”.²⁶

Taking these principles into account, Australian policy on the further detention of asylum seekers for safety and security reasons could include the following:

3 Limits on Detention

- 3.1 No asylum seeker may be detained after immigration clearance unless they have been individually assessed as a risk to public safety or security.
- 3.2 All asylum seekers are presumed not to present a risk to the Australian Community until sufficient evidence is provided to provide for a reasonable belief that the person is a risk to public safety or security.
- 3.3 Lack of identification documents does not provide reasonable grounds for belief that the asylum seeker is a risk to the community unless there is also evidence that the asylum seeker continues to wilfully obstruct the government’s identification procedure.
- 3.4 Health concerns, including communicable diseases, do not provide reasonable grounds for belief that the asylum seeker is a risk to the community. Those diagnosed with health problems shall be referred to the department of health for treatment and public health risk management.
- 3.5 A responsible authority with reasonable grounds for believing that the individual asylum seeker would present a risk to public safety or security if released, must, before the end of the asylum seeker’s residence in a *Reception Centre*, apply to the Refugee Commissioner²⁷ to detain the person.
- 3.6 The Refugee Commissioner shall make a decision about the need for detention, in light of all the circumstances of the case, including whether the Commissioner reasonably believes that the person would, if released, pose a risk to Australian security or safety. The Commissioner shall provide reasons for this decision to the asylum seeker, the asylum seeker’s legal counsel, and to the management of the detention centre, before the end of the 30 (or 60) day reception period.
- 3.7 The Refugee Commissioner shall take into account the needs of any children who would be affected by the decision to detain a family member, as is required by the *Convention on the Rights of the Child*.
- 3.8 Should the Commissioner find that in all the circumstances of the case, the potential risk to the Australian community posed by the asylum seeker does not require detention, she may require the addition of reporting or other conditions to the visa. Conditions shall be for security purposes only and shall not impact on the services available to asylum seekers, or on work or study rights.
- 3.9 Where detention is found to be necessary in the circumstances of the case, the asylum seeker will then be moved from the *Reception Centre* to a *Detention Centre* at the end of the reception period.

²⁶ The Report of the Working Group on Arbitrary Detention to the Commission on Human Rights, 1998. UN Doc no E/CN.4/1999/63. Guarrantee 10. See Annex 6 of this document

²⁷ The Refugee Commissioner is an independent officer of the Commonwealth, with investigative and determinative powers regarding the on-shore humanitarian program. See Section 12

4 Review of Detention

- 4.1 Any asylum seeker notified of continued detention has an immediate right of review at the Administrative Appeals Tribunal (AAT) and a subsequent right of appeal to the Federal Court of Australia.
- 4.2 Where the AAT does not uphold the decision of the Refugee Commissioner to detain the person, the AAT or the Commissioner may require the addition of reporting or other conditions to the visa. Conditions shall be for security purposes only and shall not impact on the services available to asylum seekers, or on work or study rights.
- 4.3 After an asylum seeker has spent 3 months in Detention, the Department must again apply to the Refugee Commissioner to continue detention. The appropriate officer must complete a written report on the progress of their examination of the person's risk to the community and on the continued need for detention. The decision to continue detention shall be made by the Refugee Commissioner.
- 4.4 Should the Commissioner not decide to continue the detention before the end of the first 3 months, the Commissioner shall be deemed to have decided against continued detention and the asylum seeker shall be released immediately into the community.
- 4.5 Any asylum seeker notified of continued detention has an immediate right of review at the Administrative Appeals Tribunal and a subsequent right of appeal to the Federal Court of Australia
- 4.6 The maximum time that any asylum seeker may remain in detention, for purposes of processing, is 6 months. At the end of that time, if there is insufficient evidence to exclude the asylum seeker from Australia on legal grounds, then they must be allowed to enter the community to await a final decision on their refugee status determination.
- 4.7 If the asylum seeker is returned to detention for a breach of visa conditions, their stay shall be no longer than 30 days for each return.
- 4.8 Asylum seekers found not to be refugees shall be treated according to part 10.

5 The Families of Detained Asylum Seekers

The *Convention on the Rights of the Child* (CROC), to which Australia is a party, requires in Article 3(1) that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”

The legitimate expectation that Australian decision makers should give consideration to the imperatives of the *Convention on the Rights of the Child* was confirmed in the High Court case *Teoh v the Minister for Immigration*²⁸.

Article 2(2) requires that

²⁸ Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh. F.C. No. 95/013 (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (extract), (1995) 183 CLR 273. Per Mason CJ and Deane J, at paras 36-39; Per Toohey J at Para 32; Gaudron J at para 3.

“States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

Article 37(b) further requires that

“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment 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;”

As a result, when decisions are being made about the need for detention of individual asylum seekers, the needs of children related to the person must be considered as a priority, and require that any restriction on liberty is as limited as possible.

The preamble to the *Convention on the Rights of the Child* explains that the States Parties to the Convention

“[Were] Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, [and recognised] that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,”

Article 3(2) requires that:

“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

Article 9(3) further explains that:

“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.”

To this end, any system for the care and assessment of asylum seekers must, as a priority, consider the needs of the child as a member of a family unit and the need of the child for his or her parents. When individual members of the child's family are individually determined to require detention or security monitoring, the decision to detain the person, and the conditions of detention must reflect the needs of the children whose lives would be impacted.[\[affected?\]](#)

The Executive Committee of the UNHCR addressed some of these considerations with regard to the particular situation of refugees and in Conclusion 47 of 1987:

- “(c) Reiterated the widely-recognized principle that children must be among the first to receive protection and assistance;
- (d) Stressed that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity;
- (e) Condemned the exposure of refugee children to physical violence and other violations of their basic rights, including...arbitrary detention, and called for national and international action to prevent such violations and assist the victims;”

In light of these principles, the Australian Humanitarian Program must include elements of the following:

- 5.1 Should one member of a family be found to present a risk to the Australian Community and should the Refugee Commissioner decide to detain that person, the remaining family members will be given the opportunity to decide where they will reside for the remainder of the asylum seeking process.
- 5.2 Should a family choose to be separated, facilities will be provided for the released family members by the appropriate Commonwealth Government Department in the neighbourhood of the detention centre and they will be given regular and private access to the detained family member. The Department may provide for housing through contract with State Departments of Housing, or with Non Government Organisations with demonstrated specialised knowledge and experience in the field.
- 5.3 Should a family elect to remain with the detained family member, the family, including the detained member, will be provided with separate housing within the detention facility.
- 5.4 The non-detained members of the family will be free to leave detention at any time. The non-detained parent shall be permitted to take any children from the centre at any time, including visits to family and friends for days and weeks.
- 5.5 Children shall, without exception, attend local schools daily.
- 5.6 At all times, as required by the *Convention on the Rights of the Child*, the best interests of any child must be a priority. Parents must be allowed to determine what is in the best interests of their children. Children able to contribute to any discussion shall have the opportunity to do so, and shall have their opinions weighed according to their age and abilities.
- 5.7 Families living in detention or separated due to detention will be provided with appropriate services, including access to family counselling and social work assistance.
- 5.8 The screening of detained asylum seekers with families must take priority so as to maintain family ties.

In the Community

The *Statute of the Office of the United Nations High Commissioner for Refugees* requires that the High Commissioner provides protection for refugees by, in part, “Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities.”²⁹ The Refugee Convention complements this provision by requiring that “Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees.”³⁰

Since “refugee protection demands that asylum seekers be treated on the assumption that they may be refugees until such time as their status has been determined”³¹, an humanitarian program that manages the care and status determination of asylum seekers must be designed with the needs and rights of refugees in mind.

These needs and rights include the beginning of the process that will lead to the opportunity to naturalise as Australians. This process must include the commencement of settlement services and procedures that will be needed for the people to ultimately settle in Australia as refugees. Such services include assistance with housing, work and education, and other primary settlement needs.

The settlement process must also include access to the types of services that are particularly necessary for those who flee their homes in fear. A significant proportion of those who seek asylum in Australia have experienced trauma, including torture, before their arrival³². The needs of asylum seekers will include provision of health, and in particular, mental health services.

These principles are key to the section of the Australian Humanitarian Program concerned with community residence, which should include elements of the following:

6 Visas

- 6.1 Once cleared by immigration, all asylum seekers, regardless of their mode of entry to Australia, shall be granted bridging visas appropriate to their circumstances
- 6.2 All asylum seekers resident in the community will be given the unqualified right to work and to reside in the states, cities and neighbourhoods of their own choosing.
- 6.3 Should there be reasonable grounds for a belief that the person is at risk of fleeing or posing a threat to the community, provision for monitoring requirements, upon application by the Department, may be attached to the visa by the Commissioner for Refugees. These requirements may take the form of regular reporting or other restrictions. Conditions shall be for security purposes only and shall not impact on the services available to asylum seekers, or on work or study rights.

²⁹ Article 8(c)

³⁰ Article 34

³¹ UNHCR, *Note on International Protection*, 1999, UN Document no A/AC.96/914, Para 16.

³² Pittaway, Eileen. “Refugee Women Still at Risk in Australia: a study of the first two years of resettlement in the Sydney Metropolitan Area.” Canberra, Australian Government Publications Services, 1991. P26-27. Also, Derrick Silove and Zachary Steel. “The Mental Health and Well Being of On-Shore Asylum Seekers in Australia.” Psychiatry Research and Teaching Unit, University of NSW. P 10.

6.4 Should asylum seekers breach their visa conditions in a substantive manner, they shall be detained, and that decision reviewed by the AAT. Late performance of reporting requirements and public order offences shall not constitute substantive breaches.

7 Settlement assistance

7.1 All asylum seekers resident in the community, regardless of their mode of entry to Australia, will be given the same unqualified right to work, to receive social security, job search and training, health and housing assistance, and access to Australian educational institutions as Australian Permanent Residents.

7.2 Social services, including living and rental assistance, and job search and training programs, will be provided through the Government Agency that provides such services to the general community (ie: *Centrelink*). In areas with large numbers of asylum seekers, so as to avoid confusion and misinformation, a designated Government officer will be responsible for asylum seeker needs.

7.3 All Asylum seekers will be eligible for all state education institutions under conditions applied to Australian permanent residents. This includes, but is not limited to universities, TAFEs and institutions catering for the particular needs of people with disabilities.

7.4 The Federal Government will provide for specialized and transitional educational needs. Both child and adult asylum seekers will be eligible for English language and other bridging tuition at the highest level available to immigrants to Australia.

The Application Process

The 1951 Refugee Convention, to which Australia is a Party, provides a definition of the word “refugee” for the purpose of the Convention, which has been adopted by Australia for use in on-shore refugee status determination. The role of the Office of the United Nations High Commissioner for Refugees, as supervisor of the application of the Convention³³, suggests that any Australian interpretation must correspond to the UNHCR’s guidelines. The *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*³⁴ can provide the basis for this interpretation, complemented by the *Notes on International Protection* and other UNHCR publications.

The Preamble to the *Convention Relating to the Status of Stateless Persons* (the Statelessness Convention) of 1954 states that:

“...only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees of 28 July 1951...there are many stateless persons who are not covered by that convention,”

Since the Refugee Convention’s definition offers protection only to those fleeing persecution on five specific grounds, people fleeing human rights abuses and other situations which demand flight, but which do not amount to persecution for a Convention reason, do not come within the protection of the 1951 Refugee Convention.

The Refugee Convention, with its current definition, does not provide protection for every person who does not benefit from the protection of her or his country of origin - but the International Community must. It is the obligation of States Parties to the ICCPR and the ICESCR to protect the rights of individuals within their jurisdictions.³⁵ However, as is recognised by Article 2(1) of the ICESCR and by the Statelessness and Refugee³⁶ Conventions, where States cannot, or will not, provide that protection, and where people flee to find that protection, it becomes the responsibility of the International Community.

Australia’s position as a wealthy and stable country, and its ratification of most international human rights instruments, requires Australia to provide protection to the widest possible class of people. This responsibility does not require that Australia is indiscriminating in its provision of visas, but it does provide that where there is genuine need for protection of an

³³ Per Article 31(1) of the *Convention Relating to the Status of Refugees*, and 8(a) of the *Statute of the Office of the United Nations High Commissioner for Refugees*.

³⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UNHCR, Geneva, January 1992.

³⁵ Per Article 2 of the ICCPR: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...” and Article 2(1) of the ICESCR: “Each State party to the Present Covenant undertakes to take steps, individually and through international assistance and co-operation..to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant...”. Also: Boutros Boutros Gali (Secretary General of the UN – as he then was): Speech opening the World Conference on Human Rights (Vienna 1993). www.unhchr.ch/html/menu5/d/statement/secgen.htm.

³⁶ Per Article 1A(2): “...the term “refugee” shall apply to any person who:...is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...”

individual's human rights, Australia has an obligation, both legal or moral, to contribute what it can.

As a result of our responsibilities, Australia's Humanitarian Program should include the following elements:

8 Defining "Refugee"

8.1 Australia shall maintain, as its refugee definition, Article 1A(2) of the 1951 *Convention Relating to the Status of Refugees*, as amended by the 1967 *Protocol*:

“owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, is outside the country of his nationality, and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country...”

8.2 The Australian interpretation of the Convention definition shall be at least as broad as that used by the UNHCR.

8.3 Admission under Australia's Humanitarian Program shall reflect the needs of those fleeing war, natural disaster and events seriously disturbing to the public order.

8.4 Admission under Australia's Humanitarian Program shall reflect the humanitarian needs of those who have fled human rights abuses.

8.5 Admission under Australia's Humanitarian Program shall reflect Australia's obligation under Article 3 of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* not to “expel, return (“*Refouler*”) or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.”

8.6 Admission under Australia's Humanitarian Program shall reflect Australia's obligation under Article 32 of the *Statelessness Convention*, to “as far as possible facilitate the assimilation and naturalization of stateless persons...”,

8.7 Australian law shall not preclude a grant of refugee status to an asylum seeker whose past actions would not require exclusion under Article 1F or Article 32 of the 1951 *Geneva Convention Relating to the Status of Refugees* as interpreted by the UNHCR, or by the Executive Committee of the UNHCR in the form of a “Conclusion on International Protection.”

9 Review

9.1 The appropriate Government Department shall make the primary decision regarding the asylum seeker's eligibility for protection.

9.2 Legal counsel shall continue to be provided at Commonwealth expense.

9.3 The Refugee Commissioner shall be responsible for overseeing the status determination process and shall have the power to substitute any decision of the responsible Government Department for her or his own.

- 9.4 Every asylum seeker is eligible for a merits review of the outcome of their initial status determination (whether by the Department or by the Commissioner) in the Refugee Review Tribunal (RRT).
- 9.5 The decisions of the RRT shall be reviewable in the Federal and High Courts of Australia. Access to the courts, equal to that of Australian nationals is a right granted to refugees under the 1951 *Geneva Convention Relating to the Status of Refugees*, Article 16.
- 9.6 There shall be no penalties imposed upon people seeking review of their status determination.
- 9.7 All asylum seekers seeking judicial review shall remain in the community for the duration of their appeal process unless they have previously been found to be a risk to the community in the sense of part 3, above.
- 9.8 The asylum seeker, and his or her advocate or agent must, at all times, be able to access information as to the asylum seeker's status and the progress of his or her claim.

Final Decision and Result

The UNHCR seeks to assist refugees in the search for a “durable solution”: either voluntary repatriation to the refugee’s country of origin, local integration in a country of asylum, or resettlement to a third country, as the prerequisite of a “safe and dignified future”³⁷. The Australian Department of Immigration and Multicultural Affairs³⁸ recognises permanent residency as the eventual ‘durable solution’ for certain refugees in Australia³⁹. The current Minister explained that: “[i]n conjunction with the UNHCR, Australia actively promotes repatriation and integration wherever appropriate”⁴⁰.

Given that the UNHCR promotes integration in the country of asylum, and that Australia promotes these efforts overseas, it is appropriate that people found by Australia to be in need of protection should be granted permanent visas and every aid necessary to assist their early settlement in Australia. In accordance with the principle of the unity of the family already explored, these aids must include the right to family reunification.

Temporary protection, while not appropriate for those individually determined to be in need of protection and thus of a durable solution, can be appropriate for those arriving as a part of a “mass influx” situation, where the ability of the asylum country to identify refugees and to provide them with adequate settlement services is compromised⁴¹. Those who are individually determined to be refugees must, in line with the imperatives of the search for a durable solution⁴², be assisted in their settlement. Permission to remain and settle permanently in Australia is clearly a prerequisite for any move towards a durable Australian solution. Where a “mass influx” situation demands a temporary protection regime, the regime must comply with the standards set by the UNHCR and the UNHCR’s Executive Committee, as discussed in Conclusion 15⁴³, and elsewhere.

The most appropriate response to a determination that a person is not in need of Australia’s protection is to assist the person in their return to their country of origin. If an immediate or quick return is not possible, then assistance in the search for another country is a humane alternative to a decision to allow the person to remain in Australia.

³⁷ *The Use of Resettlement to address durable solution needs*. A Background Note for the Annual Tripartite Consultations on resettlement. Geneva, 20-21 June 2001. p1. Available at www.unhcr.ch/resettle.triconsult/asylum.pdf. Accessed July 20, 2001.

³⁸ As it was then. Note that the Department is now the Department of Immigration, Multicultural and Indigenous Affairs.

³⁹ DIMA, “Effective Protection in Australia – The Facts”. November 1999, p 3.

⁴⁰ Ruddock, the Hon Philip. “Refugee Claims and Australian Migration Law: A Ministerial Perspective” *UNSW Law Journal*. Volume 23(3), pp1-12, p3

⁴¹ Executive Committee of the UNHCR Program Conclusion no 15, particularly at (f)

⁴² See Note 24

⁴³ See Annex 1

Australia's criminal justice system uses prison only as a punishment of last resort⁴⁴. In line with this principle, the decision to detain a person who is preparing to depart from Australia must be taken with due concern for the risks posed by the person, and for all the circumstances of the case. What ever the perceived threat, if there is no reason to charge a person with a crime, there must be some limit to the time that a person can remain in detention while awaiting removal or deportation from Australia. The Australian Commonwealth *Migration Act* set a limit for an early group of detainees of 273 days in detention⁴⁵. Other countries have set different limits on detention, which may be of value when deciding upon an Australian standard. It is crucial that in the making of this decision, practicality is properly balanced against the right of people not found to have committed an offence to remain at liberty. Any decisions made by representatives of the Government of Australia must ensure that all people within the jurisdiction of Australia are treated in a way that is compatible with their dignity as human beings.

Those found not to be in need of protection cannot be presumed to be criminals. If the Australian Government suspects that an asylum seeker has committed a crime, the proper crime authorities must pursue the case. Unless evidence of past criminal conduct warrants investigation and prosecution, people found not to be in need of protection must not be treated as though they were criminals. Certainly, they must not be treated with any less consideration than criminals are treated in Australia. Like refugees, people who have unsuccessfully sought protection on shore in Australia retain their right to the protection of their human rights, as established by the ICCPR and the ICESCR and other human rights instruments.

These standards and considerations could inform a policy that includes elements of the following:

10 Status Determination

Positive Status Determination

- 10.1 Regardless of mode or place of entry to Australia, all people recognized as refugees or otherwise found to be eligible for protection must be granted permanent residency.
- 10.2 Regardless of mode or place of entry to Australia, all people recognized as refugees or otherwise found to be eligible for protection must be given access to all social and other benefits provided to resettled humanitarian visa holders.
- 10.3 Regardless of mode or place of entry to Australia, all people recognized as refugees or otherwise found to be eligible for protection must be assisted with family reunion.

Negative Status Determination

⁴⁴ s17A(1) *Crimes Act* 1914, Cth: The court "shall not pass a sentence of imprisonment on any person for a federal offense...unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all circumstances of the case." See also *Chu Kheng Lim & Others v The Minister for Immigration, Local Government and Ethnic Affairs and another* (1992) 176 CLR 1 F.C. 92/051: "the involuntary detention of a citizen in custody by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. Every citizen is "ruled by the law, and by the law alone" and "may with us be punished for a breach of law, but he can be punished for nothing else" Per Brennan, Dean and Dawson JJ at para 23. Their honors quoted Dicey: *Introduction to the Study of the Law of The Constitution*, 10th ed (1959), p202

⁴⁵ Section 54(Q)(1), As discussed by the High Court in *Chu Kheng Lim & Others v The Minister for Immigration, Local Government and Ethnic Affairs and another* (1992) 176 CLR 1 F.C. 92/051.

- 10.4 People determined not to be eligible for protection shall remain in the community (if they were not detained prior to the decision) unless there is reason to believe that they pose a flight risk, or a security or safety risk to the community.
- 10.5 Where a person is found by the Department to pose a flight risk or a risk to public safety or security, they shall be detained in a facility dedicated to those awaiting removal or deportation. This decision shall be appealable at the AAT.
- 10.6 People determined not to be refugees shall be provided with complete information regarding the current situation in their countries of origin and shall be assisted in contacting others who could better inform them.
- 10.7 People determined not to be refugees shall be provided with counseling to assist them in their preparation to depart Australia.
- 10.8 People determined not to be refugees shall be provided with all reasonable facilities to obtain admission to another country.

11. Limits on Removal Detention

- 11.1 People shall not be detained prior to removal or deportation for longer than 9 months.
- 11.2 Before the end of that period, the Commonwealth Government must have returned the person to their country of origin; charged the person with a crime and provided them with a Criminal Justice visa or otherwise appropriately dealt with their criminal history; successfully assisted them in the search for a third country, where appropriate, or released them into the Australian community on a Bridging or other visa.

Oversight and Management

12 Responsible Authorities

The on-shore Humanitarian Program, although related in form to the general immigration system, must be viewed and treated differently from immigration and migration programs. While Australia's commitment to offer protection to those who need it undoubtedly provides benefits to Australia, the focus of the program must remain the needs of those admitted. Separating the management and the public profile of humanitarian entrants from immigrants could help to formalise this difference.

The Humanitarian Program would benefit from an office or officer capable of providing both oversight and review of the program's structure, and decisions on individual cases. Introducing an officer responsible for humanitarian entrants, and clearly separated from the Immigration program could contribute to a de-politicisation of refugees and their needs, while providing greater access to the process for refugees and their advocates before the ultimate involvement of the responsible Commonwealth Minister.

Such needs could be addressed through the development and strengthening, where appropriate, of a structure such as the following:

12.1 A Commissioner for Refugees shall be established and mandated with responsibility for overseeing the management of the Humanitarian Program. The Commissioner shall be appropriately resourced, and shall have the power and responsibility:

- To conduct periodic reviews of residential facilities for asylum seekers
- To conduct periodic reviews of the structure of the Humanitarian Program
- To conduct reviews of Humanitarian Program structures and facilities
- To report to Parliament on elements of the Humanitarian Program.
- To comment on the Humanitarian Program to the media, after consultation with the head of the Department and the appropriate Minister.
- To determine the need for detention of individual asylum seekers as requested by the Department, and to assess and act on the needs of individual asylum seekers in detention. To order the release individual asylum seekers from *Reception Centres* and Detention, as is appropriate in all the circumstances of the case.
- To determine appropriate visa conditions, in light of Departmental recommendations.
- To supervise the Humanitarian Program, including Status Determination, in so far as individual cases require consideration of material that may not have been adequately addressed during Departmental consideration.

12.2 All decisions made by the Commissioner shall be able to be appealed to the AAT.

12.3 The Commissioner's responsibilities shall include responsibility for observance of Australia's obligations under *1951 Geneva Convention Relating to the Status of Refugees* and its *1967 Protocol* and under international Human Rights instruments, particularly the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic Social and Cultural Rights*, the *Convention on the Rights of*

the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and others.

- 13.9 While retaining overall management responsibilities for reception and detention residential facilities, the responsible Government Departments may engage the services of Non Government Organisations with demonstrated specialized knowledge and experience in the field.
- 13.9 Parliament shall ensure regular review of activities and actions regarding refugees and asylum seekers. These reviews shall include consideration of how the Humanitarian Program meets international Human Rights standards.
- 13.9 State Authorities shall have jurisdiction over those areas they are responsible for in the State at large. These responsibilities shall be fulfilled with sufficient Commonwealth Funding.
- 13.9 The Commonwealth and State Ombudsmen, the Human Rights and Equal Opportunity Commission shall retain their current responsibilities for oversight and review. The Human Rights and Equal Opportunity Commission shall, in particular, be provided with sufficient funding to allow for a permanent refugee desk.
- 13.9 The Federal Court shall have responsibility for judicial review of status determination, of detention and visa conditions, and of other elements of the management of the program, where appropriate.
- 13.9 The asylum seeker, and his or her advocate or agent must, at all times, be able to access information as to the asylum seeker's status and the progress of his or her claim.

13 Standards in Residential Facilities

The Executive Committee's Conclusion 44 "The Detention of Refugees and Asylum Seekers"

"(f) Stressed that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered"

The Working Group on Arbitrary Detention, in determining whether the detention of asylum seekers is arbitrary, examines the extent to which:

"Custody effected in public premises intended for this purpose; otherwise, the individual in custody shall be separated from persons imprisoned under criminal law."⁴⁶

The Working Group also examines elements of detention such as the information given to detainees and the existence of procedures for keeping people incommunicado.⁴⁷

⁴⁶ The Report of the Working Group on Arbitrary Detention to the Commission on Human Rights, 1998. UN Doc no E/CN.4/1999/63. Guarrantee 8. See Annex 6 of this document

⁴⁷ Guarrantees 9 and 11. See Annex 6 of this Document.

On-shore Asylum seekers are not criminals, they are exercising their right, under the *Universal Declaration of Human Rights*, to “seek and enjoy in other countries asylum from persecution”⁴⁸ or protection of their human rights, where they are not protected in their countries of origin. Given this, and Australia’s commitment to providing protection to those in need, every element of the Humanitarian Program must reflect the person’s right to the protection of his or her human dignity.

Such principles can be illustrated through a program where the standards of residential facilities are structured in the following, or similar, ways:

- 13.1 Any residence requirement for Asylum Seekers must place them within easy access of major Australian cities, to ensure access to religious, legal, health, educational and social services and to members of the community.
- 13.2 No costs will be charged or billed to people who, for the purpose of immigration clearance, refugee status determination, deportation, or other immigration related purpose, have spent time in any residential facility managed by the Commonwealth of Australia.
- 13.3 People who have been found to be ineligible for a permanent visa under Australia’s Humanitarian Program and who are in a detention facility awaiting deportation shall be kept separate from those awaiting refugee status determination.

Reception Centres for awaiting and facilitating Immigration Clearance

- 13.4 A *Reception Centre* is a facility for the short-term residence of people not yet immigration cleared. *Reception Centres* shall resemble earlier *Migrant Hostels* or the structures used to house East Timorese asylum seekers prior to their disbursement to *Safe Haven* facilities. They shall be within or within easy access of major Australian cities, and shall provide settlement preparation assistance to all residents.
- 13.5 *Reception Centres* shall be separate from all detention centres managed under this or another Commonwealth Government program.
- 13.6 As residential facilities based in the community and focused on settlement services, many of the structures and guidelines of the *Supported Accommodation Assistance Program Standards* published by the NSW Department of Community Services in September 1998 are appropriate. Appropriately adapted, these could form the basis of a best practice model for facilities established to cater for the needs of asylum seekers residing in the community.
- 13.7 In particular, certain sections should inform the management structure of *Reception Centres* as they relate to the care and choices of resident asylum seekers. These include:
 - Section 4: Client Participation and Rights;
 - Section 2: Direct Service Provision, as it relates to individual assessment of needs and regular follow up;
 - Section 2.4: Support and protection of children and accompanying adults.

⁴⁸ as promised by Article 14 of the *Universal Declaration of Human Rights*

13.8 Where housing is provided in hostel form after a person's move from the *Reception Centre* to the community, these or similar standards must also be applied.

Detention Centres for those who pose a risk to safety or security

13.9 All asylum seekers resident in detention facilities will benefit from the minimum standards set by Human Rights and Equal Opportunity Commission *Immigration Detention Guidelines* (March 2000), with the following additions:

- At 4.5: Access to the Internet, for research, entertainment and email communication with family, friends, lawyers and others.
- At 5.1: Access to appropriate, dedicated, facilities for prayer and religious services. Meal and other regularly scheduled facility activities shall not interfere with regular prayer times.
- At 9.4: Sleeping quarters for family groups and individuals shall include the facility for securing personal possessions, and, if possible, for locking the sleeping quarters. This is particularly important for groups with children.
- People resident in reception facilities shall have access to kitchens, for the preparation of family and community meals

Annex 1

Refugees Without an Asylum Country

(Executive Committee of the UNHCR Conclusion No 15 (XXX) - 1979)

The Executive Committee,

Considered that States should be guided by the following considerations:

General principles

- (a) States should use their best endeavours to grant asylum to bona fide asylum-seekers;
- (b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of non-refoulement;
- (c) It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum;
- (d) Decisions by States with regard to the granting of asylum shall be made without discrimination as to race, religion, political opinion, nationality or country of origin;
- (e) In the interest of family reunification and for humanitarian reasons, States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted;

Situations involving a large-scale influx of asylum-seekers

- (f) In cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge. States which because of their geographical situation, or otherwise, are faced with a large-scale influx should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing. Such States should consult with the Office of the United Nations High Commissioner for Refugees as soon as possible to ensure that the persons involved are fully protected, are given emergency assistance, and that durable solutions are sought;
- (g) Other States should take appropriate measures individually, jointly or through the Office of the United Nations High Commissioner for Refugees or other international bodies to ensure that the burden of the first asylum country is equitably shared;

Situations involving individual asylum-seekers

- (h) An effort should be made to resolve the problem of identifying the country responsible for examining an asylum request by the adoption of common criteria. In elaborating such criteria the following principles should be observed:
 - (i) The criteria should make it possible to identify in a positive manner the country which is responsible for examining an asylum request and to whose authorities the asylum-seeker should have the possibility of addressing himself;
 - (ii) The criteria should be of such a character as to avoid possible disagreement between States as to which of them should be responsible for examining an asylum request and should take into account the duration and nature of any sojourn of the asylum-seeker in other countries;
- (iii) The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account;
- (iv) Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State;

- (v) Reestablishment of criteria should be accompanied by arrangements for regular consultation between concerned Governments for dealing with cases for which no solution has been found and for consultation with the Office of the United Nations High Commissioner for Refugees as appropriate;
- (vi) Agreements providing for the return by States of persons who have entered their territory from another contracting State in an unlawful manner should be applied in respect of asylum-seekers with due regard to their special situation.
- (i) While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration;
- (j) In line with the recommendation adopted by the Executive Committee at its twenty-eighth session (document A/AC.96/549, paragraph 53(6), (E) (i)), where an asylum-seeker addresses himself in the first instance to a frontier authority the latter should not reject his application without reference to a central authority;
- (k) Where a refugee who has already been granted asylum in one country requests asylum in another country on the ground that he has compelling reasons for leaving his present asylum country due to fear of persecution or because his physical safety or freedom are endangered, the authorities of the second country should give favourable consideration to his asylum request;
- (l) States should give favourable consideration to accepting, at the request of the Office of the United Nations High Commissioner for Refugees, a limited number of refugees who cannot find asylum in any country;
- (m) States should pay particular attention to the need for avoiding situations in which a refugee loses his right to reside in or to return to his country of asylum without having acquired the possibility of taking up residence in a country other than one where he may have reasons to fear persecution;
- (n) In line with the purpose of paragraphs 6 and 11 of the Schedule to the 1951 Convention, States should continue to extend the validity of or to renew refugee travel documents until the refugee has taken up lawful residence in the territory of another State. A similar practice should as far as possible also be applied in respect of refugees holding a travel document other than that provided for in the 1951 Convention.

Annex 2

Detention of Refugees and Asylum-Seekers

(Executive Committee of the UNHCR Conclusion No. 44 (XXXVII) - 1986)

The Executive Committee,

Recalling Article 31 of the 1951 Convention relating to the Status of Refugees.

Recalling further its Conclusion No. 22 (XXXII) on the treatment of asylum-seekers in situations of large-scale influx, as well as Conclusion No. 7 (XXVIII), paragraph (e), on the question of custody or detention in relation to the expulsion of refugees lawfully in a country, and Conclusion No. 8 (XXVIII), paragraph (e), on the determination of refugee status.

Noting that the term "refugee" in the present Conclusions has the same meaning as that in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, and is without prejudice to wider definitions applicable in different regions.

- (a) Noted with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation;
- (b) Expressed the opinion that 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 determine the elements on which the claim to 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; or to protect national security or public order;
- (c) Recognized the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention;
- (d) Stressed the importance for national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens;
- (e) Recommended that detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review;
- (f) Stressed that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered;
- (g) Recommended that refugees and asylum-seekers who are detained be provided with the opportunity to contact the Office of the United Nations High Commissioner for Refugees or, in the absence of such office, available national refugee assistance agencies;
- (h) Reaffirmed that refugees and asylum-seekers have duties to the country in which they find themselves, which require in particular that they conform to its laws and regulations as well as to measures taken for the maintenance of public order;
- (i) Reaffirmed the fundamental importance of the observance of the principle of non-refoulement and in this context recalled the relevance of Conclusion No. 6 (XXVIII).

Annex 3

Refugee Children

(Executive Committee of the UNHCR Conclusion No. 47 (XXXVIII) - 1987)

The Executive Committee,

- (a) Expressed appreciation to the High Commissioner for his Report on Refugee Children (EC/SCP/46) and noted with serious concern the violations of their human rights in different areas of the world and their special needs and vulnerability within the broader refugee population;
- (b) Recognized that refugee children constitute approximately one half of the world's refugee population and that the situation in which they live often gives rise to special protection and assistance problems as well as to problems in the area of durable solutions;
- (c) Reiterated the widely-recognized principle that children must be among the first to receive protection and assistance;
- (d) Stressed that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity;
- (e) Condemned the exposure of refugee children to physical violence and other violations of their basic rights, including through sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation or arbitrary detention, and called for national and international action to prevent such violations and assist the victims;
- (f) Urged States to take appropriate measures to register the births of refugee children born in countries of asylum;
- (g) Expressed its concern over the increasing number of cases of statelessness among refugee children;
- (h) Recommended that children who are accompanied by their parents should be treated as refugees if either of the parents is determined to be a refugee;
- (i) Underlined the special situation of unaccompanied children and children separated from their parents, who are in the care of other families, including their needs as regards determination of their status, provision for their physical and emotional support and efforts to trace parents or relatives; and in this connection, recalled the relevant paragraphs of Conclusion No. 24 (XXXII) on Family Reunification;
- (j) Called upon the High Commissioner to ensure that individual assessments are conducted and adequate social histories prepared for unaccompanied children and children separated from their parents, who are in the care of other families, to facilitate provision for their immediate needs, the analysis of the long term as well as immediate viability of existing foster arrangements, and the planning and implementation of appropriate durable solutions;
- (k) Noted that while the best durable solution for an unaccompanied refugee child will depend on the particular circumstances of the case, the possibility of voluntary repatriation should at all times be kept under review, keeping in mind the best interests of the child and the possible difficulties of determining the voluntary character of repatriation;
- (l) Stressed the need for internationally and nationally supported programmes geared to preventive action, special assistance and rehabilitation for disabled refugee children and encouraged States to participate in the "Twenty or More" Plan providing for the resettlement of disabled refugee children;
- (m) Noted with serious concern the detrimental effects that extended stays in camps have on the development of refugee children and called for international action to mitigate such effects and provide durable solutions as soon as possible;
- (n) Recognized the importance of meeting the special psychological, religious, cultural and recreational needs of refugee children in order to ensure their emotional stability and development;
- (o) Reaffirmed the fundamental right of refugee children to education and called upon all States, individually and collectively, to intensify their efforts, in co-operation with the High Commissioner, to ensure that all refugee children benefit from primary education of a

satisfactory quality, that respects their cultural identity and is oriented towards an understanding of the country of asylum;

- (p) Recognized the need of refugee children to pursue further levels of education and recommended that the High Commissioner consider the provision of post-primary education within the general programme of assistance;
- (q) Called upon all States, in co-operation with UNHCR and concerned agencies, to develop and/or support programmes to address nutritional and health risks faced by refugee children, including programmes to ensure an adequate, well-balanced and safe diet, general immunization and primary health care;
- (r) Recommended regular and timely assessment and review of the needs of refugee children, either on an individual basis or through sample surveys, prepared in co-operation with the country of asylum, taking into account all relevant factors such as age, sex, personality, family, religion, social and cultural background and the situation of the local population, and benefiting from the active involvement of the refugee community itself;
- (s) Reaffirmed the need to promote continuing and expanded co-operation between UNHCR and other concerned agencies and bodies active in the fields of assistance to refugee children and protection, including through the development of legal and social standards;
- (t) Noted the importance of further study of the needs of refugee children by UNHCR, other intergovernmental and non-governmental agencies and national authorities, with a view to identification of additional support programmes and reorientation as necessary of existing ones;
- (u) Called upon the High Commissioner to develop further, in consultation with concerned organizations, guidelines to promote cooperation between UNHCR and these organizations to improve the international protection, physical security, well-being and normal psychosocial development of refugee children;
- (v) Called upon the High Commissioner to maintain the UNHCR Working Group on Refugee Children at Risk as his focal point on refugee children, to strengthen the Working Group and to inform the members of the Executive Committee, on a regular basis, of its work.

Annex 4

Protection of the Refugee's Family

(Executive Committee of the UNHCR Conclusion No. 88 (L) - 1999)

The Executive Committee,

- (a) *Reaffirms* Conclusion No. 9 (XXVIII), Conclusion No. 24 (XXXII), Conclusion No. 84 (XLVIII), and Conclusion No. 85 (XLIX) paragraphs (u) to (x) on family reunion and family unity and on refugee children and adolescents; and *re-emphasizes* that the family is the natural and fundamental group unit of society and is entitled to protection by the society and the State;
- (b) *Underlines* the need for the unity of the refugee's family to be protected, *inter alia* by:
 - (i) measures which ensure respect for the principle of family unity, including, those to reunify family members separated as a result of refugee flight;
 - (ii) the consideration of liberal criteria in identifying those family members who can be admitted, with a view to promoting a comprehensive reunification of the family;
 - (iii) provisions and/or practice allowing that when the principal applicant is recognized as a refugee, other members of the family unit should normally also be recognized as refugees, and by providing each family member with the possibility of separately submitting any refugee claims that he or she may have;
 - (iv) the prioritisation of family unity issues at an early stage in all refugee operations; and
 - (v) programmes to promote the self-sufficiency of adult family members so as to enhance their capacity to support dependent family members;
- (c) *Calls* upon States, UNHCR and other relevant actors to give particular attention to the needs of unaccompanied refugee children pending their reunification with their families; and *affirms*, in this regard, that adoption of refugee children should only be considered when all feasible steps for family tracing and reunification have been exhausted, and then only in the best interests of the child and in conformity with international standards.

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Item 11 (a) of the provisional agenda

CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF TORTURE AND DETENTION

Report of the Working Group on Arbitrary Detention

[Introduction](#) 1

[I. ACTIVITIES OF THE WORKING GROUP](#) 2 - 61

[A. Handling of communications addressed to the Working Group](#) 2 - 18

[B. Country missions](#) 19 - 36

[C. Cooperation with the Commission on Human Rights](#) 37 - 51

[D. The mandate of the Group](#) 52 - 61

[II. SITUATION REGARDING IMMIGRANTS AND ASYLUM SEEKERS](#) 62 - 70

[A. Scope](#) 64 - 68

[B. Criteria for determining whether or not the custody is arbitrary](#) 69 - 70

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. Commission resolution 1997/50 spells out the revised mandate of the Group, which is to investigate cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by local courts in conformity with domestic law, with the standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned. The Working Group is composed of the following five independent experts: Mr. R. Garretón (Chile); Mr. L. Joinet (France); Mr. L. Kama (Senegal); Mr. K. Sibal (India); Mr. P. Uhl (Czech Republic and Slovakia). At its eighteenth session (in May 1997), the Group, at the proposal of its Chairman, Mr. Joinet, decided to amend its methods of work to the effect that at the end of each mandate the Chairman and the Vice-Chairman of the Group should resign, and an election be held to replace them. In pursuance of this amendment, the Group elected Mr. K. Sibal as Chairman-Rapporteur and Mr. L. Joinet as Vice-Chairman. The Group has so far submitted seven reports to the Commission, covering the period 1991-1998 (E/CN.4/1992/20, E/CN.4/1993/24, E/CN.4/1994/27, E/CN.4/1995/31 and Add.1-4, E/CN.4/1996/40 and Add.1, E/CN.4/1997/4 and Add.1-3, and E/CN.4/1998/44 and Add.1-2). The Working Group's initial three-year mandate was first extended by the Commission in 1994; in 1997 it was extended for another three years.

II. SITUATION REGARDING IMMIGRANTS AND ASYLUM SEEKERS

62. In its resolution 1997/50, the Commission on Human Rights requested the Working Group to devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility

of administrative or judicial remedy, and to include observations on this question in its report.

63. Taking into account the preliminary observations submitted to the Commission regarding the definition of the mandate, the applicable international and regional standards and the places of deprivation of liberty concerned (see E/CN.4/1998/44, paras. 28-42), as well as the experience gained from the first two field missions conducted in this area in September-October 1998 (see E/CN.4/1999/62/Add.3 and 4), the Working Group has set the following guidelines for the accomplishment of its mission.

A. Scope

64. It follows from the above-cited resolution that the Working Group's mandate relates essentially to situations in which aliens, asylum seekers or immigrants, are deprived of liberty for the time necessary to consider their applications for admission into the territory concerned and, in the event of refusal, for the period preceding their expulsion as appropriate.

65. The Working Group, following the terminology used by the Commission, describes this form of deprivation of liberty as "custody" ("rétention") (see E/CN.4/1998/44, para. 38).

66. Measures assimilated with such custody are house arrest under the conditions set forth in deliberation 01 of the Working Group (see the Group's report for 1993, E/CN.4/1993/24, para. 20) and confinement on board a ship, aircraft, road vehicle or train. However, resolution 1997/50 does not cover the situation of aliens deprived of their liberty in connection with extradition proceedings or following prosecution or a criminal conviction, except in those cases where the offence under domestic law is related to illegal entry into the territory.

67. The Working Group also considers that its specific mandate does not include determining the lawfulness and conformity with international standards of procedures for granting asylum or conferring refugee status, or for permitting temporary residence where immigrants are concerned, unless they have a direct bearing on the juridical aspects of the custody and its possible arbitrary character.

68. The places of deprivation of liberty concerned may be places of custody situated in border areas, police premises, premises under the authority of a prison administration, ad hoc centres, so-called "international" or "transit" areas (ports or international airports), gathering centres or certain hospital premises (see E/CN.4/1998/44, paras. 28-41).

B. Criteria for determining whether or not the custody is arbitrary

69. In order to determine the arbitrary character or otherwise of the custody, the Working Group considers whether or not the alien is able to enjoy all or some of the following guarantees:

Guarantee 1: To be informed, at least orally, when held for questioning at the border, or in the territory concerned if he has entered illegally, in a language which he understands, of the nature of and grounds for the measure refusing admission at the border, or permission for temporary residence in the territory, that is being contemplated with respect to him.

Guarantee 2: Decision involving administrative custody taken by a duly authorized official with

a sufficient level of responsibility in accordance with the criteria laid down by law and subject to guarantees 3 and 4.

Guarantee 3: Determination of the lawfulness of the administrative custody pursuant to legislation providing to this end for:

- (a) The person concerned to be brought automatically and promptly before a judge or a body affording equivalent guarantees of competence, independence and impartiality;
- (b) Alternatively, the possibility of appealing to a judge or to such a body.

Guarantee 4: To be entitled to have the decision reviewed by a higher court or an equivalent competent, independent and impartial body.

Guarantee 5: Written and reasoned notification of the measure of custody in a language understood by the applicant.

Guarantee 6: Possibility of communicating by an effective medium such as the telephone, fax or electronic mail, from the place of custody, in particular with a lawyer, a consular representative and relatives.

Guarantee 7: To be assisted by counsel of his own choosing (or, alternatively, by officially appointed counsel) both through visits in the place of custody and at any hearing.

Guarantee 8: Custody effected in public premises intended for this purpose; otherwise, the individual in custody shall be separated from persons imprisoned under criminal law.

Guarantee 9: Keeping up to date a register of persons entering and leaving custody, and specifying the reasons for the measure.

Guarantee 10: Not to be held in custody for an excessive or unlimited period, with a maximum period being set, as appropriate, by the regulations.

Guarantee 11: To be informed of the guarantees provided for in the disciplinary rules, if any.

Guarantee 12: Existence of a procedure for holding a person incommunicado and the nature of such a procedure, where applicable.

Guarantee 13: Possibility for the alien to benefit from alternatives to administrative custody.

Guarantee 14: Possibility for the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and specialized non-governmental organizations to have access to places of custody.

70. Where the absence of such guarantees or their violation, circumvention or non-implementation constitutes a matter of a high degree of gravity, the Working Group may conclude that the custody is arbitrary.

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