

# RETURNING FAILED ASYLUM SEEKERS FROM AUSTRALIA



A DISCUSSION PAPER BY **DAVID CORLETT**

JANUARY 2007

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## Preface

Australia's response to asylum seekers has, since at least the late 1980s become increasingly exclusionary. This trend has accelerated since the election to power of the Howard government. Throughout the later part of the 1990s, the Coalition government steadily withdrew the entitlements of asylum seekers in the Australian community including access to welfare assistance, publicly funded medical care and work rights. In 1999 it expanded and made harsher Australia's detention regime and introduced temporary protection for asylum seekers recognised as refugees. In late 2001 the government constructed the Pacific Solution and in mid-2006 attempted but failed to extend it to ensure that every asylum seeker arriving in Australian territory by boat would not be able to apply for protection in Australia.

Australia's refugee determination system has become almost completely inaccessible given the success of the Howard government's interception and interdiction regimes. Australia operates the most determined and effective system for preventing the arrival of asylum seekers in the world.

In the long term there is no doubt in our minds that the Australian asylum seeker policy ought to be radically overhauled. As we have argued elsewhere, the Pacific Solution ought to be dismantled. The detention system should be reformed. A complementary protection system should be created. And asylum seekers living in the community ought to have better access to a dignified existence while their claims are being processed. The *Migration Act 1958* should be replaced by new legislation that reflects, and holds the government accountable for, Australia's human rights obligations.

Such propositions are, at present, unrealistic. The Howard government's asylum seeker policy is supported by the majority of the Australian community. The Labor opposition promises reforms to humanise the system, while seeking to ensure that it cannot be seen as 'soft' on 'border protection'. And the minor parties, who argue for more far-reaching changes, have little capacity to influence policy.

It is with this political context firmly in mind that this monograph has been written. It is written on the assumption that it is more realistic – in the short-term, at least – to focus on making the current system more humane than to focus exclusively on replacing the system in its entirety.

To have written such a paper involves what some might see as too great a compromise.

But there can also be a kind of irresponsibility in failing to engage with political realities. The dismantling of the current regime may be admirable and necessary, but it is a longer-term project that does not address the very real and urgent concerns of those caught within it. There is a strong moral case for seeking to improve the system.

The monograph is written for those inside and outside the system who are willing to contemplate how it can become more responsive to the needs of asylum seekers in Australia and those who might seek protection in the future. It is intended to highlight the problems in the system and to offer real suggestions for improvement. The text boxes that are located throughout the text to illustrate alternative practices, including those already in place in other countries, are an attempt to add a further layer of complexity to the discussion of return practice. The inclusion of practices in these text boxes does not indicate our endorsement of such practices. Rather, we hope that the information presented will highlight alternative ways of considering the problem of return and demonstrate that the recommendations for reform offered here, even when they run against the grain of current thinking, are not altogether unrealistic or unattainable.

Just prior to this publication going to press, a group of 83 Sri Lankan asylum seekers was intercepted by the Australian Navy in international waters. The arrival of this group, the largest in years, prompted considerable public discussion about how and where the asylum seekers ought to be processed. While this monograph does not deal with the Sri Lankan boat arrivals, it does provide the sort of framework that would have made the handling of the Sri Lankans less vexing for policy makers and the asylum seekers.

Prof. Robert Manne, Chief Investigator

Dr. David Corlett, Research Associate

## Executive Summary

This monograph is the result of a three-year research project into Australia's return policy and practice conducted at La Trobe University by the Chief Investigator, Professor Robert Manne, and Dr David Corlett. The research included extensive consultations with community-based organisations working with asylum seekers and refugees. In-depth interviews were conducted with temporary refugees and asylum seekers both in detention and in the Australian community. In mid-2004, the project conducted fieldwork in Iran, Pakistan, Afghanistan and Thailand with asylum seekers Australia had rejected. In early 2006, we consulted with non-government and government officials in North America and Western Europe around the question of returning failed asylum seekers.

The research from this project has resulted in two substantial publications: *Sending Them Home: Refugees and the New Politics of Indifference* (Quarterly Essay 13, Black Inc, 2004) and *Following Them Home: The Fate of the Returned Asylum Seekers* (Black Inc, 2005). This discussion paper is the final extended publication resulting from the research project.

The monograph views the question of return very broadly. Australia operates a complex system of entry controls beyond the nation's borders. Although evidently problematic to this publication – not least because people intercepted by Australian officials overseas are beyond Australia's jurisdiction – we have included a discussion of these offshore practices to ensure that return practices that are usually not part of public discussion are firmly put on the agenda.

The problem of return cannot be divorced from questions of protection and reception. For this reason, we discuss Australia's practice of offshore processing, detention and the reception of community-based asylum seekers.

One of the most far-reaching recommendations we make is for the development of a comprehensive practice of managing asylum seeker cases from the beginning of the protection determination process to the end. We include in our discussion of community-based asylum seekers a model case management plan (see Box 5.5). We do not intend this to be a definitive model, but a generator of discussion between practitioners and officials about the most effective and humane ways that asylum seeker cases can be managed. The model we set out would involve close partnerships between government, community-based organisations and asylum seekers themselves.

The final section of the monograph is concerned with the fate of those people who have been returned from Australia. We argue that that such people ought to be monitored – both to ensure that they are safe upon return and so that decision-making within Australia can be informed by returnees' experiences.

A list of recommendations is found at the end of the paper. They clearly relate to discussions that occur within the text, but it is also our intention that they might be read as a self-contained and systematic whole.

# 1. Introduction

The removal of non-citizens to whom Australia has no obligations is a sovereign right of the state. All non-citizens who have no entitlement to remain in Australia are expected to depart. This monograph endeavours to take seriously the state's sovereign right to remove non-citizens who have applied for but been found not to be in need of protection.

While accepting this right of states, the discussion of return cannot be had without reference to the protection of those who might need it. Indeed, the question of protection infuses the whole discussion of returning failed asylum seekers. Because of the great risks involved in wrongly returning non-citizens seeking protection, the need for protection ought to be considered of higher importance than the desire of the state to return non-citizens. The right of individuals to protection should be prior to the state's right to immigration control.

So while taking seriously the right of Australia to remove failed asylum seekers, this monograph rests on the presumption that those in need of protection must be protected. There is evidence that this presumption is not well founded in Australian practice.<sup>1</sup> To have a claim for protection rejected in Australia's refugee determination process does not necessarily mean that an asylum seeker does not have protection needs. Australia has returned to situations of persecution people who ought to have been granted refugee status. It has also returned people who, while not refugees in the strict legal sense, have fears for their lives and liberties. There have been repeated calls for a number of years for Australia to implement a complementary protection regime in order to protect such people. A complementary protection regime should be based on Australia's non-refoulement and other human rights obligations as articulated in the various international conventions and covenants to which Australia is party, including:

- The Convention relating to the Status of Stateless Persons
- The Convention on the Reduction of Statelessness
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- The International Covenant on Civil and Political Rights
- The International Convention on Economic, Social and Cultural Rights
- 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 on the Rights of the Child

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<sup>1</sup> See for example, Edmund Rice Centre for Justice and Community Education, 2004, *Deported to Danger: A Study of Australia's Treatment of 40 Rejected Asylum Seekers*; Corlett, D. 2005, *Following Them Home: The Fate of the Returned Asylum Seekers*, BlackInc; Edmund Rice Centre for Justice and Community Education, *Deported to Danger II: The Continuing Study of Australia's Treatment of Rejected Asylum Seekers*, online, available [http://www.erc.org.au/index.php?module=documents&JAS\\_DocumentManager\\_op=downloadFile&JAS\\_File\\_id=118](http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=118); Weisser, R. 2006, 'Shia refugee sent home killed as Aussie spy', *The Australian*, 27 November, p.2.

## BOX 1.1 COMPLEMENTARY PROTECTION

A form of complementary protection was once written into Australia's *Migration Act 1958*. Under former section 6A(l)e of the *Act*, non-citizens with 'strong compassionate and humanitarian grounds' to remain in Australia could be granted residence. But throughout the 1980s and 1990s, the courts broadened their interpretation of the term 'strong compassionate and humanitarian' to such a degree that the Australian parliament and immigration bureaucracy felt that their ability to control immigration was being compromised.<sup>2</sup> For this reason, the government deleted 6A(l)e from the law, instead granting the immigration minister the power to allow a humanitarian stay. Since that time, only people who fit the strict legal definition of a refugee are granted protection in Australia, unless, at the end of the refugee determination process, rejected asylum seekers successfully appeal to the minister to use his or her humanitarian power. The power residing in the minister is completely discretionary. The minister cannot be compelled to use the power and decisions made with this power are not reviewable by any court. Between 1996 and 2003, the minister chose to intervene on humanitarian grounds on about five per cent of cases that came to him.<sup>3</sup>

The Refugee Council of Australia, Amnesty International Australia and the National Council of Churches in Australia have published a paper recommending that complementary protection – based on Australia's human rights obligations – be incorporated into Australia's protection system, including at the primary and review stages of the determination process.<sup>4</sup>

Australia is alone among comparable countries for not having a complementary protection regime. Canada, for example, includes in its definition of those in need of protection refugees according to the 1951 Convention, as well as those at risk of torture or cruel, inhuman or degrading treatment or punishment.<sup>5</sup>

Sweden has recently changed the way it assesses the claims of asylum seekers, including consolidating the basis for granting protection. Under the new Swedish law, refugee status can be granted to those who fit the UN refugee definition, as well as those fearing gender or sexual persecution and those fleeing 'serious conflict' in their home country. The new law replaces 'humanitarian' grounds to remain in Sweden with 'particularly distressing circumstances' which are linked to the individual's health, adaptation to Swedish life and the situation in their home country.<sup>6</sup>

### RECOMMENDATION 1.1

*That the issue of 'return' be understood as part of Australia's broader protection obligations. A successful return should be understood as one in which returnees' human rights are protected. This understanding should be clearly articulated in government policy and should frame Australia's approach to return. To this end, Australia must ensure that people who need protection are indeed granted protection.*

### RECOMMENDATION 1.2

*That Australia implement a complementary protection regime in order to ensure that non-citizens who are not Convention refugees, but who nonetheless cannot be removed from Australia because of risks to their fundamental human rights, are protected in Australia.*

<sup>2</sup> Bittel, D. 1992, 'Whither compassion? Australia's response to the refugee dilemma', *Public Accountability and the Law: Public Interest Law Conference Proceedings*, eds. S. Simmington & C. McElwain, The University of New South Wales, 8-10 October 1992, p.63; Crock, M. 1996, 'Judicial review and part 8 of the Migration Act: Necessary reform or overkill?' *Sydney Law Review*, vol.18, no.265, pp.278-9.

<sup>3</sup> The Senate, Senate Select Committee on Ministerial Discretion in Migration Matters, Report, March 2004, p.29, online, available [http://www.aph.gov.au/senate/committee/minmig\\_ctte/report/report.pdf](http://www.aph.gov.au/senate/committee/minmig_ctte/report/report.pdf), accessed 23 May 2006.

<sup>4</sup> Refugee Council of Australia, 2004, National Council of Churches in Australia, Amnesty International Australia, 'Complementary Protection: The Way Ahead', April, available online at <http://www.refugeecouncil.org.au/docs/current/comp-protection-model.pdf>.

<sup>5</sup> Citizenship and Immigration Canada, 'Refugee Protection in Canada', nd, online, available at <http://www.cic.gc.ca/english/refugees/asylum-1.html>, accessed 22 May 2006.

This monograph is not concerned with the vast majority of non-citizens in Australia who should be returned – i.e. those who stay longer than they are entitled to – but with people who have temporary protection or who may have sought protection in Australia. There are five general categories of such people:

1. Those who are interdicted prior to arrival in Australia and those who arrive in Australia without a valid visa, do not pass through Australia's migration zone and are deemed not to engage Australia's protection obligations (turnarounds and interceptions);
2. Those who are interdicted and sent to an offshore processing centre (asylum seekers in 'offshore overseas places');
3. People who arrive in Australian territory, either by plane or boat, and who are detained during the processing of their protection claims (asylum seekers in onshore immigration detention);
4. Non-citizens who arrive with a valid visa and who later apply for protection and people who arrive without a valid visa but who pass Australia's immigration zone and later apply for protection (Community-based asylum seekers);
5. Non-citizens who are granted temporary protection (such as a Temporary Safe Haven, Temporary Protection and Temporary Humanitarian Visa holders)

This categorisation no doubt reflects a comprehensive understanding of the issue of return. It does not, however, situate Australia's return policy and practice in the broader discourse of international protection. There has, in recent decades and particularly in recent years, been an increasing interest in the exclusion of asylum seekers from the developed world.<sup>7</sup> The heightened interest in return, including to situations of dubious safety, is part of this discourse and a cause of great concern.<sup>8</sup> It is beyond the scope of this paper, however, to do more than mention such a trend.

It is also important to note – although entirely inadequate just to note – that return from the developed to the developing world is and ought to be considered a deeply fraught discussion in which to engage. In a world of soul-destroying poverty and desperate need, it seems morally wrong to be thinking about returning from Australia non-citizens whose chief misfortune is to have been born beyond the boundaries of a prosperous and peaceful state. This dilemma was highlighted recently when, during the Commonwealth Games, members of the Sierra Leone team defected into the Australian community.<sup>9</sup> It was right that they had their protection claims assessed. But if they had been found not to be in need of protection, it is the logic of this paper that they ought to have been returned to Sierra Leone. That is, they ought to be returned from one of the wealthiest countries in the world to the poorest country in the world.<sup>10</sup> To suggest such a thing is not just an attempt to protect the wealth and privilege associated with life in the developed world against the desperation of the developing world. It is recognition that the institution of asylum is not a cure-all for the world's ills. Australia ought to be

<sup>6</sup> Migrationsverket, Important changes in the Aliens Act with effect from March 31, 2006, online, available [http://www.migrationsverket.se/infomaterial/om\\_verket/viktiga\\_andringar\\_en.pdf](http://www.migrationsverket.se/infomaterial/om_verket/viktiga_andringar_en.pdf), accessed 22 May 2006.

<sup>7</sup> For an older discussion see for example Richmond, A. 1994, *Global Apartheid: Refugees, Racism and the New World Order*, Oxford University Press, Toronto. A far from exhaustive list of more recent articles dealing with this includes Noll, G. 2003, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones,' in *European Journal of Migration and Law* 5(3), pp.303-341; Crisp, J. 2003, 'Assault on asylum: globalisation, migration and the future of the international refugee regime,' London; Crisp, J. 2003, 'A new asylum paradigm? Globalization, migration and the uncertain future of international refugee protection,' *New Issues in Refugee Research* (Working Paper No.100); Bloch, A. and Schuster, L. 2005, 'At the extremes of exclusion: Deportation, detention and dispersal,' in *Ethics and Racial Studies* 28(3): 491-512.

<sup>8</sup> The UK government, for example, has promoted refugee processing centres beyond European borders (see Noll, G., 2003, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones,' in *European Journal of Migration and Law* 5(3), pp.303-341) and has embarked on a public campaign to boost the numbers of failed asylum seekers it removes (Home Office, 'Controlling our borders: Making migration work for Britain. Charles Clarke sets out five year Strategy for Immigration and Asylum,' 7 February 2005, available online at [http://www.ind.homeoffice.gov.uk/ind/en/home/news/press\\_releases/controlling\\_our\\_borders.html](http://www.ind.homeoffice.gov.uk/ind/en/home/news/press_releases/controlling_our_borders.html) accessed 23 May 2006; Home Office, 'Removal Figures Continue to Rise for Failed Asylum Seekers,' 22 November 2005 available online [http://www.ind.homeoffice.gov.uk/ind/en/home/news/press\\_releases/removal\\_figures\\_continue.html](http://www.ind.homeoffice.gov.uk/ind/en/home/news/press_releases/removal_figures_continue.html) accessed 23 May 2006). For a critique of the increased push to return, including to less than ideal situations see Chimni, B. S. 1999, 'From resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems,' *New Issues in Refugee Research*, Working Paper No. 2, available <http://www.unhcr.ch/refworld/pubs/pubon.htm>.

<sup>9</sup> Ker, P. and Johnston, C., 2006, 'Half of Sierra Leone team missing,' *The Age* (Melbourne), March 24, online, available <http://www.theage.com.au/news/commonwealth-games/half-of-sierra-leone-team-missing/2006/03/24/1143083994239.html>; 'Six Sierra Leonean runaways win visas,' *The Age* (Melbourne), March 28, 2006, online, available <http://www.theage.com.au/news/national/six-sierra-leonean-runaways-win-visas/2006/03/27/1143441087283.html>.

<sup>10</sup> Ker and Johnston, *ibid*.

assisting in the development of countries like Sierra Leone, but it will not do this by granting asylum – a mechanism whose purpose is to address a particular sort of need<sup>11</sup> – to people who do not need it.

While failing to take up the broader issues associated with return, the purpose of this paper is to engage in the world as it is. It is a step towards seeking better policy and practice in Australia for the return of people who do not have protection needs. Australia has not done return well. There is a need therefore, and notwithstanding the broader philosophical questions associated with return, to engage in a pragmatic appraisal of Australia's return policy and practice in the hope that the lessons learnt might translate into the development of better outcomes for those seeking protection, those denied protection, and for the state.

'Return' is used throughout this paper to refer to the sending back of non-citizens from Australia or from a point of transit *en route* to Australia. It is not an ideal term, because it implies a degree of choice not always available in practice. It also suggests that failed asylum seekers are 'returning' to a place from which they came, which has not always been the practice either.<sup>12</sup> Similarly, 'repatriation' means return to the native country. Repatriation also has a quasi-technical connotation not suited to this monograph. 'Return' is preferable to 'removal' because the latter invokes a sort of force that is not always present in the practice of ensuring that failed asylum seekers leave Australia. 'Deportation' might also have been used, but it is a term that has come to be associated, in Australia at least, with the deportation of criminal non-citizens.

Discussion of return is inevitably characterised by blurred notions of duress and voluntariness. This lack of clarity has allowed questionable return practices to be disguised as 'voluntary' returns, when in fact they were the result of a range of coercive measures. This paper takes the European Council for Refugees and Exiles understanding of voluntariness in return as its basis. According to ECRE, a voluntary return is one that is made freely by a person who has a legal basis to remain in the country of exile. A forced return is one in which 'sanctions or force' is used to ensure that the non-citizen is removed from the country. In between these two extremes, is mandatory return. This is when a non-citizen is compelled to return, but who complies with the removal directive (See Box 1.2)

The purpose of this monograph is to contribute to the development of better return policy and

## BOX 1.2 EUROPEAN COUNCIL FOR REFUGEES AND EXILES RETURN DEFINITIONS

'Voluntary repatriation' occurs when:

- 'an individual with a legal basis for remaining in a third country has made an informed choice and has freely consented to repatriate to their country of origin or habitual residence; and
- has given their genuine, individual consent, without pressure of any kind; when such consent is elicited as a result of lack of effective protection in the host country or because of an imposition of sanctions, this cannot be classified as voluntary repatriation' and when certain legal and procedural safeguards have been respected.

'Mandatory return' refers to the return of people 'who no longer have a legal basis for remaining in the territory of a country for protection-related reasons and are therefore required by law to leave.' The returnee 'consents to return to his/her country of origin instead of staying illegally or being forcibly removed.' Mandatory return 'also applies to individuals who although not having freely consented to leave, they have been induced to do so by means of incentives or threats of sanctions.'

'Forced return' describes the return of persons who are required by law to leave but have not consented to do so and therefore might be subject to sanctions or force in the form of restraints in order to effect their removal from a country.<sup>13</sup>

<sup>11</sup> Martin, D.A.1990, 'The refugee concept: On definitions, politics, and the careful use of a scarce resource,' in *Refugee Policy: Canada and the United States*, ed. Adelman, H., York Lanes Press, Toronto, pp.30-51.

<sup>12</sup> See Corlett, D. *op.cit.*, chapter 6.

<sup>13</sup> ECRE, 2003, 'Position on Return', October, p.4, available online <http://www.ecre.org/positions/returns.shtml>

practice. The need to develop more efficient and humane policies and practices of return cannot be divorced from the need for more effective mechanisms of protection. This paper is based, therefore, on the assumption that protecting those in need of protection is the primary purpose of asylum policy. The return of refused asylum seekers is only ever legitimate if they have no well founded protection concerns. In sum, the principles that underpin this monograph are the following:

1. That the state has the sovereign right to control its borders in the national interest. This includes removing non-citizens who have no claim to remain in Australia.
2. That all non-citizens have a basic human right to be protected from persecution and from other threats of similar seriousness. Because of the grave consequences involved in protection cases, the human rights of the individuals concerned, as articulated in the various international covenants and conventions of which Australia is a signatory, take precedence over the rights of states to control migration flows.
3. That the return of failed protection claimants from Australia may be improved by ensuring that during their stay in Australia they are treated with dignity, that their claims are processed in a fair and transparent way, and that, to the greatest degree possible (and consistent with UNHCR Guidelines and Executive Committee conclusions),<sup>14</sup> they are able to be active participants in the process by which their future is being determined.
4. That 'border control' and the 'management' of migration more generally should not be seen in absolutist terms, but rather should be based on the recognition that the world is uncertain and unpredictable. Policy should be carefully designed and well targeted, but also flexible and responsive.

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<sup>14</sup> For EXCOM conclusions see Office of the United Nations High Commissioner for Refugees, Department of International Protection, *A Thematic Compilation of Executive Committee Conclusions*, 2nd edition, June 2005, available online at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d4ab3ff2>.

## 2. Offshore interception and turnarounds

THE first general group of people Australia ‘returns’ includes those who have not, or who are legally deemed to have not, entered Australia’s ‘migration zone’. There are two broad subgroups in this category: those who are intercepted overseas while trying to get to Australia and those who have made it to Australian territory but who are turned around. The first subgroup includes those intercepted at international airports and those who are interdicted on the high seas.

Interception, interdiction and airport turnarounds are all border control mechanisms designed to exclude inadequately documented non-citizens from entering Australia. They are, in effect, return mechanisms from beyond the border.

While Australia does not have legal obligations to such people – given that they are not in Australia’s sovereign jurisdiction – they are included in this paper for two reasons. The first is that if Australia, by preventing the arrival of people who have protection needs, contributes to them being returned to situations where their lives and liberties are threatened, Australia should be considered morally responsible for their refoulement. Second, if, as Gibney and Hansen have argued, policies such as overseas interdiction are the ‘perverse fruit’ of the inability of liberal democratic states to remove failed asylum seekers who are within their territories,<sup>15</sup> then any discussion of return ought to include the underside of the issue – mechanisms of exclusion that are designed to circumvent the need to engage in return from within state’s territorial borders.

Australia has in place what the government refers to as a layered ‘border management system’.<sup>16</sup> The layers include a universal visa system,<sup>17</sup> a process by which airlines can check the bona fides of passengers travelling to Australia, the stationing of Australian immigration officials overseas to both ‘prevent and deter immigration malpractice’ and to inform airlines when passengers may be travelling to Australia without valid documentation, and processing on arrival in Australia.<sup>18</sup>

The justification for such a border management system is sound: The state is protecting the national community by ensuring that people who may be a security, criminal or health risk to it are screened and prevented from coming here. There are, however, concerns that the border management system may be preventing people who are seeking protection in Australia from gaining a refuge.

Interception, interdiction and airport turnarounds have been enormously successful from an immigration control perspective. From a protection perspective, however, they are mechanisms that are deeply troubling. This is so for two important reasons. First, they are mechanisms that can have a profound impact on individuals seeking asylum. The return of people who effectively are denied access, not only to Australian territory but importantly, to protection determination processes, greatly increases the risk that people in need of protection will be returned to danger. The second concern relates to the impact of such mechanisms on international protection. If every country in the world implemented a non-entrée regime like Australia’s, international protection would be all but over. In fact, many of the wealthiest countries in the world have implemented non-entrée regimes, although none is as radical or as successful as Australia’s.

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<sup>15</sup> Gibney, M.J. and Hansen, R. 2003, ‘Deportation and the liberal state: the forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom’, *New Issues in Refugee Research*, Working Paper no. 77, p.2.

<sup>16</sup> DIMIA, 2005, *Managing the Border: Immigration Compliance 2003-04 edition*, Commonwealth of Australia, p.2.

<sup>17</sup> *ibid.*, p.3.

<sup>18</sup> *ibid.*, p.2.

In an ideal world, Australia would not have constructed the non-entrée mechanisms it has in place. It would be ideal, then, to advocate that Australia dismantle its non-entrée regime. This monograph, however, is an attempt at engaging in real policy reform and such a recommendation is politically unrealistic. The most that can be expected is that Australia place a higher priority on protection. There are several practical measures, including those already implemented by comparable countries, that would better balance the government's desire for immigration control with its obligation to protect those fleeing persecution and other human rights violations.

## Interception

While there is some discussion in the literature about the use of mechanisms such as visa regimes and carrier sanctions as means of preventing asylum seekers from accessing states' territories and protection determination processes,<sup>19</sup> this paper is concerned with Australian policies and practices of 'return'. It may seem like an arbitrary distinction, but the process by which offshore visas are granted – including a particularly rigid visa process for people from countries deemed as high-risk for overstaying<sup>20</sup> – is not discussed. The focus is on the process by which people who might be seeking to come to Australia in search of protection are prevented from boarding planes *en route* to this country.

In fact the visa system is crucial to the overseas airport interception of potential asylum seekers. Australia has in place a system which allows international airlines and cruise ship companies – carriers – to check that their passengers have permission to come to Australia. This process, Advance Passenger Processing (APP), the government boasts, 'effectively creates an "offshore" border for Australia at the embarkation point overseas.'<sup>21</sup> As a result of APP, carriers are able to refuse unauthorised passengers permission to board their vehicles or vessels. Carriers that bring unauthorised arrivals to Australia are fined and can be required to remove them or pay for the costs of detaining and removing them.<sup>22</sup> The introduction of the APP has led to a marked drop in the number of unauthorised air arrivals. In 1999-2000, the government imposed more than five thousand infringement notices on carriers for bringing into Australia improperly documented people. In 2004-5, this figure had dropped by 80 per cent to 993.<sup>23</sup>

It is impossible to know whether, and if so how many, potential protection claimants are being returned to the countries from which they fled or to third countries as a result of this process. The relationship the APP establishes between carriers and the state also has the effect of blurring responsibility for such returns.

The APP is enhanced by the work of Australian immigration officials overseas. Overseas Compliance Officers work in 'high risk' regions to 'identify and respond to immigration malpractice' by sharing information with local officials and working with other agencies such as the Australian Federal Police.<sup>24</sup>

Australia's Airport Liaison Officers (ALOs) have a much more hands-on role in returning unauthorised non-citizens than Overseas Compliance Officers. According to the Immigration Department, 'ALOs work with airlines at major overseas airports and colleagues from other countries to prevent the travel of improperly documented passengers and to facilitate genuine travellers.'<sup>25</sup> They

<sup>19</sup> See for example, Gibney, M.J. and Hansen, R. *op.cit.*; See also Noll, G. 2005, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', *Journal of International Refugee Law*, 17(3):542-573.

<sup>20</sup> Taylor, S. 2005, 'Offshore Barriers to Asylum Seeker Movement: The exercise of power without responsibility?' unpublished paper delivered at the Moving On: Forced Migration and Human Rights Conference, 22 November 2005, organised by the Sydney Centre for International and Global Law, p.3. Taylor argues that 'as a result of DIMIA's ever improving "risk management" techniques, potential asylum seekers are less and less likely to be granted visas for travel to Australia as evidenced by the downward trend in the proportion of visitor visa entrants making protection visa applications over the past few years. Likewise, the proportion of student visa holders making protection visa applications is trending downward.'

<sup>21</sup> DIMIA, *op.cit.*, p.4.

<sup>22</sup> *Migration Act 1958*, ss 213,217; DIMIA, *op.cit.*, p.26.

<sup>23</sup> DIMIA, 2005, *Managing the Border: Immigration Compliance 2004-05 edition*, Commonwealth of Australia., p.26.

<sup>24</sup> DIMIA, 2005, (2003-04 edition), *op.cit.*, p.6

<sup>25</sup> *ibid.*, p.7.

also train local staff and check passenger documents. When they discover spurious documents, the ALOs notify the airlines which decide whether to allow the passenger to travel.<sup>26</sup> The government credits the ALO network with interdicting between two hundred and four hundred people annually in the five years from 1999-2000.<sup>27</sup> In 2004-05, the number dropped to 179.<sup>28</sup>

ALOs have no role in determining whether 'potentially inadmissible passengers' may have protection-related needs.<sup>29</sup> Although Australia has agreed to a set of non-binding guidelines for immigration liaison officers which specify that requests for asylum should be directed to the UNHCR, the appropriate diplomatic mission or an appropriate non-governmental organisation,<sup>30</sup> the Immigration Department has not established specific processes for dealing with asylum claims with their ALOs' host governments.<sup>31</sup> There is a need for Australia to clarify the roles and responsibilities of its officials and to formalise the processes for protecting non-citizens intercepted at overseas airports. While states are keen to extend their national borders overseas for the purposes of immigration control, they are less willing to accept the implications of pushing their protection obligations so far. The implications of doing so would be radical.<sup>32</sup> The recommendations in this section attempt to infuse protection obligations into Australia's offshore immigration control processes without being so radical as to undermine those very control processes. In short, under the model proposed here, 'potentially inadmissible passengers' intercepted by Australian ALOs *en route* to Australia and deemed to have a *prima facie* protection claim would be referred to the UNHCR for a refugee status determination. As a practical matter and in order to avoid 'warehousing' refugees for extended periods with little prospect of return or resettlement, those found to be refugees ought to be resettled in Australia.

### RECOMMENDATION 2.1

*That Australia develop a protocol for overseas airline liaison officers (ALOs) to respond to 'potentially inadmissible passengers' in need of protection. This should include a clear process by which protection concerns are identified. It should require that the ALO outline to passengers that they are suspected as being inadmissible to Australia and that unless they can show protection concerns, they may be prevented from boarding the vessel. (Box 2.1 provides an example of such a process as it occurs not at overseas airports but at US ports of entry.)*

### RECOMMENDATION 2.2

*That Australia train ALOs about Australia's international obligations, detecting protection concerns and the protocols for protecting 'potentially inadmissible passengers' with protection concerns.*

In practice, ALOs do not have the power to prevent 'potentially inadmissible passengers' from boarding airplanes to Australia. That is the responsibility of the carrier. The carrier ought not to have responsibility for determining protection concerns. This is a task of government.

<sup>26</sup> *Ibid.*, p.7; Senate Legal and Constitutional Committee, 2003, Estimates, Hansard, 28 May 2003, p.529; Questions taken on Notice, Budget Estimates Hearing, 28 May 2003 Immigration and Multicultural and Indigenous Affairs Portfolio, question 15, Output 1.3: Enforcement of Immigration Law.

<sup>27</sup> DIMIA, 2005, (2003-04 edition), *op.cit.*, p.7.

<sup>28</sup> DIMIA, 2005 (2004-05 edition) *op.cit.*, p.7.

<sup>29</sup> Questions taken on Notice, Budget Estimates Hearing, 28 May 2003 Immigration and Multicultural and Indigenous Affairs Portfolio, question 15, Output 1.3: Enforcement of Immigration Law.

<sup>30</sup> International Air Transport Association/Control Authorities Working Group, A Code of Conduct for Immigration Liaison Officers, revised October 2002, item 2.3, cited in Taylor, S. 2005, *op.cit.*, p.10.

<sup>31</sup> Taylor, S. *ibid.*

<sup>32</sup> If Australia took its international protection obligations into the same territory as it takes its border control responsibilities, it would potentially undermine its overseas visa regime because someone arriving at an overseas airport, including the airport in the country in which they are nationals, and who was intercepted by an Australian official might claim the right to come to Australia for protection reasons. In such circumstances, it would be more beneficial to the non-Australian citizen to be intercepted by an ALO than to go to an Australian Embassy and apply for a visa. Such a scenario would be unacceptable to the Australian government. While there is a certain inconsistency and arbitrariness to the model proposed here, it is an attempt to offer real solutions to the particular problem of non-citizens intercepted in a third country *en route* to Australia.

### RECOMMENDATION 2.3

*That Australia clarify the roles and responsibilities of itself and airlines where 'potentially inadmissible passengers' are deemed to have protection concerns. Airlines should not be in a position to determine protection concerns. Nor should they be sanctioned for bringing inappropriately documented persons with protection concerns to Australia.*

### RECOMMENDATION 2.4

*That Australia formalise its relationship with UNHCR at overseas airports in which ALOs are posted. 'Potentially inadmissible passengers' with protection concerns should be referred to the UNHCR for a refugee status determination.*

### RECOMMENDATION 2.5

*That Australia develop a mechanism for non-citizens intercepted by Australian ALOs and subsequently found by the UNHCR to be refugees to be brought to Australia. Such a mechanism should reflect Australia's responsibility in sharing the international protection burden.*

It is impossible to determine the number of people intercepted in overseas airports who may have protection needs. The Immigration Department claims that 'no Australian ALO has in[ter]dicted a passenger where the passenger stated that they wished to seek asylum'. At the same time, it also accepted that 'it is possible... that passengers interdicted by Australian ALOs have later claimed asylum'.<sup>33</sup> What is certain is that the number of unauthorised arrivals at Australian airports who immigration officials assessed as potentially engaging Australia's protection obligations dropped by 94 per cent from 366 in 1999-2000 to 21 in 2002-3. In 2003-04 there were only 23 protection visa applications by unauthorised air arrivals,<sup>34</sup> a figure that jumped to a still meagre 40 in 2004-05.<sup>35</sup> It is probable that while Australia's highly publicised response to unauthorised boat arrivals in this period signalled to potential asylum seekers that Australia was not a hospitable place for people in search of protection, it was Australia's overseas interdiction system that was the key factor. The question that remains unanswered, however, is: What was the fate of those people, possibly numbering in the hundreds if the above figures are extrapolated, who, if they had made it to Australia, would have sought protection here?

There is only one case that has emerged which gives an insight into the answer. On New Year's Day 2005 eleven Afghans *en route* to Brisbane arrived at Kuala Lumpur airport from the Middle East. An Australian ALO inspected their documents and found that the Australian visa labels were counterfeits. According to a Ministerial press statement, all eleven people, aged between 4 and 68 years of age, 'were returned to [the] Middle East later that evening'.<sup>36</sup>

## Airport turnarounds

Australia's layered 'border management system' includes an onshore component. Non-citizens who arrive at Australia's borders without proper documentation and those who have proper documentation but who are assessed as not intending to abide by their visa conditions are liable for immediate removal from Australia.<sup>37</sup>

<sup>33</sup> Letter to Savitri Taylor from John Rees, Acting Assistant Secretary Entry Policy and Procedures Branch, DIMIA, dated 21 October 2005, cited in Taylor, S. 2005, *op.cit.*, p.11.

<sup>34</sup> DIMIA, 2005, (2003-04 ed.), *op.cit.*, p.7.

<sup>35</sup> DIMIA, 2005, (2004-05 ed.), *op.cit.*, p.25. According to the Department, this was a 'significant 74 per cent increase' on the previous year, but in raw figures it is miniscule.

<sup>36</sup> Senator Amanda Vanstone, Minister for Immigration and Multicultural and Indigenous Affairs, 'Australian Border Security Foils Fraudulent Visitors in Kuala Lumpur', VPS 002/2005, online at [www.minister.immi.gov.au/media\\_releases/05/v05002.htm](http://www.minister.immi.gov.au/media_releases/05/v05002.htm), accessed 15 December 2005. This version of events is contradicted by one outlined in a letter to Savitri Taylor from John Rees, Acting Assistant Secretary Entry Policy and Procedures Branch, DIMIA, dated 21 October 2005, cited in Taylor, S. 2005, *op.cit.*, pp.11-12. According to the letter, DIMIA understood that the UNHCR was assisting the eleven Afghans with their applications for a humanitarian visa to Australia.

<sup>37</sup> DIMIA, 2005, (2003-04 ed.), *op.cit.*, p.21.

The vast majority of such people who arrive by air – 98 per cent – are returned within 72 hours of arrival, most on the next available flight.<sup>38</sup> In the case of boat arrivals, a speedy return is more problematic because the boats are destroyed.<sup>39</sup> This fact notwithstanding, in the mid-1990s, the time between the arrival and removal of unauthorised arrivals averaged about 18 days,<sup>40</sup> although it is likely that this figure reflects the legislative exclusion of many of the mid-1990s boat arrivals from Australia's protection determination regime (see below). The lack of travel documentation also influences the time it takes to remove non-citizens deemed to have no claim on Australia.

The only way unauthorised non-citizens can prevent immediate removal is by invoking Australia's protection obligations.<sup>41</sup> The government claims that all non-citizens are free to claim protection in Australia.<sup>42</sup> In fact, the government goes to considerable lengths to ensure that it remains in firm control of who makes protection claims.<sup>43</sup> It has established a 'screening process' whereby immigration officials interview individual unauthorised arrivals to determine their identities and their reasons for leaving their homeland and for coming to Australia. Records of these interviews are relayed (by telephone, in the case of air arrivals) to a senior official in Canberra who determines whether, on the face of it, Australia's protection obligations articulated under the Refugees Convention are invoked. If they are, the unauthorised arrival is allowed to apply for a Protection Visa.<sup>44</sup>

Those who arrive by boat – those who are not interdicted and returned – have been kept separate from asylum seekers who arrived earlier than them in order to prevent the older inmates from 'coaching' the newer ones.<sup>45</sup> Former detainees have spoken of the degree to which detention officials have gone to ensure that asylum seekers 'screened out' do not get access to the outside world.<sup>46</sup>

In 2003–4, only 23 unauthorised airport arrivals were 'screened in' to apply for protection in Australia. Although this number increased to 40 the following year, it is still an extremely low figure.<sup>47</sup>

Australia's turnaround practice has been a concern for human rights activists and others for some years. In 1998, Amnesty International expressed its concern about the practice and quoted an Australian National Audit Office report which warned that the pre-screening process risked being seen as a 'de facto refugee determination system' without the safeguards that a protection determination system should have.<sup>48</sup> According to the Human Rights and Equal Opportunity Commission, 'This process may result in effective denial of access to the formal refugee detention process.'<sup>49</sup> Legal academic, Savitri Taylor, has written:

*There appear to be many cases of unauthorized arrivals with protection needs almost being removed from Australia without being given the opportunity to make an application for a protection visa. What made the difference in these cases was that immediate removal was not feasible and other events intervened to prevent removal thereafter. ... There are also allegations that some individuals who wished to seek Australia's protection have actually been removed without being given the opportunity to apply for protection visas.<sup>50</sup>*

<sup>38</sup> DIMIA, *ibid.*, p.24. See also Senate Legal and Constitutional References Committee (SLCRC), 2000, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, Commonwealth of Australia, [Online], Available: [http://www.aph.gov.au/senate/committee/legcon\\_ctte/refugees/contents.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/refugees/contents.htm), p.302-303.

<sup>39</sup> SLCRC, *ibid.*, fn 6, p.302

<sup>40</sup> DIMIA Annual Report, 1997-98, quoted in Taylor, S. 1999, 'Rethinking Australia's Practice of "Turning Around" Unauthorised Arrivals: The Case for Good Faith Implementation of Australia's Protection Obligations', *Pacifica Review*, vol.11., no.1., February, pp.43-61, p.47.

<sup>41</sup> The only people who were not removed from Australia within 72 hours of arriving with inadequate documentation were Protection Visa applicants. See figures in DIMIA, 2005, (2003-04 ed.), *op.cit.*, p.19.

<sup>42</sup> DIMIA, 2005, *ibid.*, p.25.

<sup>43</sup> Taylor, S. 1999, *op.cit.*, p.47.

<sup>44</sup> *ibid.*, pp.43-61, p.47; Amnesty International, 1998, *Australia A Continuing Shame: The mandatory detention of asylum seekers*, June, p.19; HREOC, 1998, *Those who've come across the sea*, p. 24-29.

<sup>45</sup> Mares, P. 2002, *Borderline*, UNSW Press, 2nd ed., p.45.

<sup>46</sup> One group, for example, while screened out, refused to return to their homelands. Eventually, they learnt from their guards that they needed to speak to a lawyer. The immigration department manager finally capitulated and allowed them access to a telephone and the number of a Sydney lawyer. He did not, however, tell them that they needed to dial '0' to get an external line. They all failed to contact the lawyer. Later, most were screened in and found to be refugees. (Anonymous interview, Melbourne, 2003)

<sup>47</sup> DIMIA, 2005, (2003-04 ed.), *op.cit.*, p.7; DIMIA, 2005 (2004-05 ed.), *op.cit.*, p.25.

<sup>48</sup> Amnesty International, *op.cit.*, p.19.

<sup>49</sup> HREOC, *op.cit.*, p. 24.

<sup>50</sup> Taylor, S. 1999, *op.cit.*, p.51.

### RECOMMENDATION 2.6

*That Australian immigration officials at Australian airports clearly state to non-citizens who are about to be turned around that this is the situation and that unless they have protection concerns, they will be removed from the country. (See Box 2.1)*

### BOX 2.1 US EXPEDITED REMOVAL PROCESS

In 1996, the United States legislated for an 'expedited removal' process which would allow its officials to return quickly inadequately documented non-citizens (aliens). The expedited removal process also included a series of mechanisms designed to ensure that aliens who had protection concerns would be able to have their claims assessed.

Aliens suspected of being improperly documented upon arrival in the US by immigration officials are expected to be removed unless they can demonstrate a 'credible fear' of persecution. Upon arrival, such people are referred to a secondary inspection. At this point, immigration officials are required to inform the alien of their legal standing – i.e. that they are facing immediate removal – as well as their rights, should they need protection. The relevant paragraph that must be read to the alien is:

**U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.**

After this statement has been read, aliens in expedited removal are specifically asked three questions whose purpose is to discover any fears they may have. These questions are:

**Why did you leave your home country or country of last residence?**

**Do you have any fear or concern about being returned to your home country or being removed from the United States?**

**Would you be harmed if you are returned to your home country or country of last residence?<sup>51</sup>**

Those who express a fear are then referred to an asylum officer for a 'credible fear' interview. The 'credible fear' is a lower threshold test than the 'well-founded fear' required to prove eligibility for refugee status. This means that the system is designed to err on the side of caution in protecting people who may be in need of it. The 'credible fear' standard is, however, higher than that preferred by the United Nations High Commissioner for Refugees. According to the UNHCR, only 'manifestly unfounded' claims should be fast-tracked.<sup>52</sup>

The operation of the expedited removal process has been criticised in a number of reports.<sup>53</sup> The clear statement of legal standing and the asking of specific questions designed to elucidate any fears on the part of non-citizens seeking to enter the country without appropriate documentation are, nonetheless, practices that Australia should adopt.

### RECOMMENDATION 2.7

*That Australia develop a transparent process whereby any protection related concerns on the part of a potential unauthorised non-citizen at Australian airports can be articulated. These protection concerns should take account of the Refugees Convention as well as other international human rights instruments to which Australia has acceded. The process for determining whether a non-citizen has protection concerns might be based on the US credible fear test. It might also include UNHCR and legal and welfare organisations (See Box 2.2).*

<sup>51</sup> United States Commission on International Religious Freedom (USCIRF), 2005, *Report on Asylum Seekers in Expedited Removal, Volume II: Expert Reports*, pp.234-235.

<sup>52</sup> Hetfield, M. 2005, 'Report on Credible Fear Determinations', *in ibid.*

<sup>53</sup> The most important of these is the USCIRF cited above.

## BOX 2.2 UNHCR'S ROLE IN AUSTRIA'S MANIFESTLY UNFOUNDED ASSESSMENTS

Austria maintains an accelerated procedure to determine whether border asylum applicants are admissible to have their claims for protection heard. Those deemed to have come from 'safe third countries' or whose claims are deemed 'manifestly unfounded' – that is, clearly lacking substance – are denied permission to enter the country.

According to Austrian law, no application made at an airport can be dismissed as 'manifestly unfounded' without the United Nations High Commissioner for Refugees' consent.<sup>54</sup> When immigration officials at an Austrian airport assess a claim to be manifestly unfounded they forward the case to the UNHCR in Austria. UNHCR also has the right to interview applicants. If the UNHCR disagrees with the Austrian officials, the applicant is permitted to apply for protection within the normal refugee status determination procedures. If UNHCR agrees with the Austrian assessment, the claimant is denied entry, although a 'summary appeal process' is available.

Cases in which UNHCR disagrees with the Austrian assessment are used as precedents, so that immigration officials do not refer similar cases to the UNHCR in future.

According to UNHCR, both it and the Austrian government are satisfied with the process. For Austria, UNHCR acts as a safety net. And for UNHCR, the process ensures reasonable standards of protection.

The process has been criticised by the peak body for non-governmental organisations working with refugees in Europe because UNHCR rarely interviews applicants and instead makes decisions on the basis of a written file, and because the UNHCR safety net does not encompass airport applicants deemed inadmissible on 'safe third country' grounds.<sup>55</sup>

## Interdiction

The interdiction of non-citizens who seek to enter Australia at international airports is virtually unknown outside the small circle of Australians who are interested in the details of migration and refugee matters. A far more public issue is the interdiction on the high seas of people referred to by the horrible acronym 'SUNC' – Suspected Unauthorised Non-Citizens – who travel on SIEVs – Suspected Illegal Entry Vessels.

The interdiction at sea of asylum seekers was one of the planks of the Pacific Solution. In the wake of the *Tampa* crisis, the Australian government announced Operation Relex, a military operation including five Royal Australian Navy (RAN) ships and four surveillance aircraft to shield Australia's northern coastline.<sup>56</sup> The purpose of Operation Relex was to intercept and return asylum seeker boats to Indonesia.

The government also legislated to ensure that Australian law covered any action taken by Australian officials. Amongst the package of post-*Tampa* legislation passed by Parliament was the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cwlth) which ensured the legality of the exclusion of the *Tampa* and other vessels from landing in Australia and of sending Special Air Service troops on board the vessel.<sup>57</sup> In fact, the *Border Protection Act 2001* extended legislation passed in 1999 empowering Australian authorities to interdict on the high seas boats suspected of people smuggling.<sup>58</sup>

It took several attempts before Operation Relex could be said to have been successful. It was not until the fifth interception that the RAN was finally able to escort a SIEV back to Indonesia.<sup>59</sup> Of the twelve boats intercepted under Operation Relex, four were eventually returned to Indonesia.<sup>59</sup>

The returned asylum seekers were covered by a regional cooperation agreement that Australia has entered into with the Indonesian government, the International Organisation for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) for the accommodation and

<sup>54</sup> ECRE, 'Austria', available online at <http://www.ecre.org/conditions/2003/austria.shtml>, accessed 27 April 2006.

<sup>55</sup> *Ibid.*

<sup>56</sup> Saunders, M. 2001, 'Patrols to begin the hunt off Java', *The Australian*, 3 September, p.3; Marr, D. and Wilkinson, M. 2004, *Dark Victory*, Allen & Unwin, 2nd ed, see generally pp.172-188

<sup>57</sup> *Migration Act 1958* (Cwlth), s7A states: 'The existence of statutory powers under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders.'

<sup>58</sup> *Migration Act 1958* (Cwlth), Division 12A ss245A-245H

<sup>59</sup> The Senate Select Committee on A Certain Maritime Incident Report (CMI), 2002, Commonwealth of Australia, p.27.

processing of asylum seekers in Indonesia.<sup>60</sup> The Australian government pays the IOM to house, accommodate and provide assistance to 'third country nationals' in Indonesia who are still having their refugee claims assessed by the UNHCR and those who, after having their cases rejected, remain in Indonesia. It also pays the IOM's costs for 'voluntary' removals and UNHCR's costs associated with refugee status determination. Australia has offered to pay UNHCR to return refugees to 'countries of prior protection' such as Pakistan, but UNHCR declined to pursue such a process. Under the regional cooperation agreement, Australia also trains and provides equipment to Indonesian police and immigration officials in order to deal with 'irregular migrants and people smugglers'.<sup>61</sup>

In the immediate period following the beginning of Operation Relex, about 620 people were intercepted and returned to Indonesia.<sup>62</sup> These people make up a small part of the 3961 who were subject to the regional cooperation agreement in Indonesia.<sup>63</sup> 857 were found to be refugees and resettled in third countries by the end of May 2005. At the same date, 127 people remained under IOM supervision.<sup>64</sup> As of the end of April the previous year, 802 had 'voluntarily returned home'.<sup>65</sup> Those not returned or remaining in Indonesia are, presumably, those who eventually made it to Australia or were caught in the Pacific Solution.

Since early 2002, only a handful of asylum seeker boats have sought to enter Australia without prior authorisation. The most prominent and controversial was a small boat with forty-three West Papuans fleeing Indonesian Irian Jaya in early 2006. Indonesia put extraordinary pressure on Australia to reject their asylum claims and to have access to the asylum seekers.<sup>66</sup> In March the Indonesian government was outraged when, in a strong indication that the Australia's refugee determination system had been able to assert its independence in the face of powerful other interests, forty-two of the group were granted protection.<sup>67</sup> Indonesia withdrew its ambassador to Australia and suggested that Australia would encourage more West Papuans to make their way to Australia.<sup>68</sup> Indonesia was concerned that Australia – or some within Australia<sup>69</sup> – was promoting the West Papuan independence movement, a suspicion that was reinforced by Australia's role in the establishment of East Timorese independence.<sup>70</sup> The Howard government responded to Indonesian displeasure by announcing a review of the way in which it conducted asylum seeker procedures, with the Prime Minister suggesting a radical measure whereby consideration of the national interest could become part of the protection determination process.<sup>71</sup> In mid-April, the government announced its intention that any future unauthorised boat arrivals, including West Papuans, who made it to the Australian mainland would be processed under the Pacific Solution arrangements (i.e. extraterritorially and outside Australian domestic law). It also announced co-ordinated surveillance activities with Indonesia around the Torres Straits.<sup>72</sup>

<sup>60</sup> US Committee for Refugees, 2002, *Sea Change: Australia's new approach to asylum seekers*, February, pp.11-13.

<sup>61</sup> *ibid.*, pp.14-15.

<sup>62</sup> SIEV 5 had on it about 240 people (CMI, 2002, p.541), SIEV 7, about 200 (Marr and Wilkinson, 2004, p.320), SEIV 11 only 18 people (CMI, 2002, p.546) and SEIV 12, 162 (Marr and Wilkinson, 2004, p.383).

<sup>63</sup> Senate Legal and Constitutional Committee, Question taken on Notice, Budget Estimates Hearing 25-27 May 2005, Immigration and Multicultural and Indigenous Affairs Portfolio, question 53, Output 1.2: Refugee and Humanitarian Entry and Stay.

<sup>64</sup> *ibid.*

<sup>65</sup> Senate Legal and Constitutional Legislation Committee, 2004, Estimates, Hansard 26 May 2004, p.83.

<sup>66</sup> Allard, T. 2006, 'Indonesia ups ante on Papuans', *The Age* (Melbourne), February 4, online, available <http://www.theage.com.au/news/national/indonesia-ups-ante-on-papuans/2006/02/03/1138958910122.html>; *The Age* (Melbourne), 2006, 'Indonesia pressures govt on boat people', February 6, online, available <http://theage.com.au/news/WORLD/Indonesia-presses-govt-on-boat-people/2006/02/06/1139074165485.html>.

<sup>67</sup> *The Age* (Melbourne), 2006, 'Papuans win temporary visas', March 23, online, available <http://www.theage.com.au/news/national/papuans-win-temporary-visas/2006/03/23/1143083883087.html>

<sup>68</sup> Forbes, M. 2006, 'Jakarta retaliates, and more to flee', *The Age* (Melbourne), March 25, online, available <http://www.theage.com.au/news/national/jakarta-retaliates-and-more-to-flee/2006/03/24/1143083990267.html>.

<sup>69</sup> The Australian Government later reinforced its support for Indonesian sovereignty by signing the 'Agreement between the Republic of Indonesia and Australia on the Framework for Security Cooperation' which affirms the territorial integrity and sovereignty of both parties and states at 2.3 that 'The Parties... shall not in any manner support or participate in activities by any person or entity which constitutes a threat to the stability, sovereignty or territorial integrity of the other Party, including by those who seek to use its territory for encouraging or committing such activities, including separatism, in the territory of the other Party'. (Available online at <http://www.dfat.gov.au/geo/indonesia/ind-aus-sec06.html>)

<sup>70</sup> Banham, C. 2006, 'Papua row means strain, but no crisis: PM', *The Age* (Melbourne), March 31, <http://www.smh.com.au/news/national/papua-row-means-strain-but-no-crisis-pm/2006/03/30/1143441281214.html>

<sup>71</sup> Nicholson, B. 2006, 'Asylum review to apply beyond West Papuans', *The Age* (Melbourne), April 11, online, available <http://www.theage.com.au/news/national/asylum-review-to-apply-beyond-west-papuans/2006/04/10/1144521269174.html>; *The Sunday Times* (Australia), 2006, 'Cabinet to review asylum process', April 11, online available [http://www.sundaytimes.news.com.au/common/story\\_page/0,7034,18792163%255E1702,00.html](http://www.sundaytimes.news.com.au/common/story_page/0,7034,18792163%255E1702,00.html)

<sup>72</sup> Skehan, C. and Allard, T. 2006, 'Papuans may go to Nauru', *The Sydney Morning Herald*, April 13, available online <http://www.smh.com.au/news/national/papuans-may-go-to-nauru/2006/04/13/1144521407343.htm>

The government's intention of extending the Pacific Solution to all unauthorised boat arrivals caused significant divisions within the government. Government backbenchers who had earlier negotiated amendments to Australia's detention and temporary protection regimes expressed the concern that the proposals undermined the Prime Minister's commitment to ensure that children would be kept out of detention. The bill to enact the changes was sent to a Senate committee which, as well as roundly criticising the bill, recommended that a time limit be put on visa determinations, that people found to be refugees be resettled in Australia if no other country would take them, and that children should only be detained as a last resort. It also recommended that asylum seekers held in the Pacific should have access to independent legal advice and that the Commonwealth Ombudsman should have a role in overseeing their circumstances.<sup>73</sup> In August 2006 the government withdrew its bill because it became clear that government senators would cross the floor and defeat it in the Senate.

Australia's practice of sea interception and return to Indonesia raises a number of important concerns regarding the protection of refugees. Broadly, and as with airport interception, it places border control above refugees' need for protection. With its combination of military force and legislative excision of Australian territory from the migration zone very few asylum seeker boats have been able to land in Australian territory for the purpose of claiming asylum.

The touting of joint naval patrols with Indonesia in the event of further West Papuan asylum seekers raised the prospect of *refoulement* in a form not before realised. Had this occurred, Australia would have been collaborating with the persecutory state to prevent potential refugees from escaping that very state. This was not the case when Australia was returning mainly Iraqi, Afghan and Iranian asylum seekers to Indonesia.

#### **RECOMMENDATION 2.8**

*That in situations of offshore interceptions Australian officials be required to provide a statement, in a language that asylum seekers understand, that they are about to be returned to Indonesia and give any individuals who have a reason to fear returning the opportunity to state their concerns to Australian officials. Australia should set in place a mechanism by which such people can have their claims for protection assessed in a fair, credible and accurate process.*

#### **RECOMMENDATION 2.9**

*That Australia negotiate an agreement with Indonesia that ensures that people Australia returns are not endangered in Indonesia and that an independent monitoring body is able to monitor the fate of such people (see section 7).*

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<sup>73</sup> The Senate, Legal and Constitutional Legislation Committee, 'Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, online, available [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/migration\\_unauthorised\\_arrivals/report/report.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_unauthorised_arrivals/report/report.pdf), accessed 17 July 2006.

**BOX 2.3 US INTERDICTION OF CUBANS, HAITAINS AND CHINESE**

The only historical precedent to the Pacific Solution's interdiction and offshore processing of asylum seekers is the U.S.'s interdiction of Cuban, Chinese, Haitian and other boat arrivals. U.S. policy and practice differs between each of these groups, reflecting different standards of protection.

Cubans interdicted at sea are subject to a process similar to, although not as rigorous as, the 'expedited removal process' operating at US ports of entry (see Box 2.1).<sup>74</sup> They are read the following statement in Spanish:

**You are being taken back to Cuba. You will not be taken to the United States. U.S. Government officials in Havana will meet the ship and will provide information to you if you wish to apply to go to the United States through established migration programs. The government of Cuba has provided a commitment to the United States that you will suffer no adverse consequences or reprisals of any sort for illegal departure or for making application for legal migration to the United States at the U.S. Interests Section. Only those people approved by the U.S. Interests Section in Havana can be assured of entry to the United States. I or a U.S. Government official will be available to speak with you if you have any concerns about returning to Cuba. This will be done in a completely confidential setting and no information regarding your concerns will be given to the Cuban authorities. If you would like to speak with me or this officer please let me or this officer know.**<sup>75</sup>

Any Cubans found to have a 'credible fear' are taken to the US naval base in Guantanamo Bay where their claims are assessed against the 'well founded fear' measure. Those deemed not to pass the 'credible fear' test are returned to Cuba under a return agreement between the Cuban and US governments. Under this agreement, Cuba agrees not to punish returnees and the US has the ability to monitor the safety of returnees. The US grants interdicted Cubans speedy processing in its offshore resettlement program for Cubans.

Chinese nationals interdicted by the US are subject to a lesser level of procedural protection. They are given a questionnaire to complete but no translator. The questionnaire includes biographical information and reasons for leaving their home country. If, in the questionnaire, they indicate a fear, they are interviewed in a 'credible fear' process. Those deemed to have a credible fear are brought to the US so they can have their protection claims assessed.

Interdicted Haitians (and all other nationalities) have the fewest procedural rights. They are placed on a coastguard cutter which proceeds towards Haiti. They are not read out a statement indicating their status or their rights. Only those who 'manifest a fear' for their safety – verbally or non-verbally – are placed in the credible fear process. The remainder are summarily returned to Haiti.

To be sure, the risk of *refoulement* is smaller in Australia's sea interdiction than in its overseas airport interception because of the regional cooperation agreement. At least those intercepted at sea are returned to Indonesia where they can access UNHCR's refugee status determination process. There is no such agreement concerning airport interception.

Yet for those asylum seekers who were returned to Indonesia after the establishment of the Pacific Solution, conditions are far from ideal. In 2002, Human Rights Watch (HRW) raised a number of concerns about the situation of asylum seekers in Indonesia, including those who had been intercepted and returned by Australia. It highlighted the lack of a legal right of return to Indonesia for such people and various incidents in which their safety was jeopardised.<sup>76</sup> HRW also noted significant failures in IOM's assistance to asylum seekers in Indonesia, including medical care and conditions in certain camps,<sup>77</sup> and in the quality of UNHCR refugee status determination.<sup>78</sup> The evidence from elsewhere is that people who were rejected as refugees and returned to places like Afghanistan continued to face

<sup>74</sup> There is a degree of absurdity in US policy towards Cubans where those intercepted at sea are generally returned to Cuba while those who make landfall in the US are allowed to remain permanently. The farce of this 'wet-foot, dry-foot' policy was demonstrated in early 2006 when US officials discovered a group of Cubans clinging to an old, dilapidated bridge. Because the bridge was not connected to US soil, the group was returned to Cuba, only later, following a court order, being returned to the US.

<sup>75</sup> Untitled documents from USCRI on file with the author. This section was also informed by consultations with various NGOs and government officials in Washington and New York February/March 2006.

<sup>76</sup> Human Rights Watch, 2002, *By Invitation Only*, December, Vol. 14, No. 10 (C), pp.49-51.

<sup>77</sup> *ibid.*, pp.52-54.

<sup>78</sup> *ibid.*, pp.57-58.

considerable risks, including of persecution.<sup>79</sup> It seems likely that some of the more than eight hundred ‘voluntary’ returnees from Indonesia faced a similar plight, suggesting that, the regional cooperation agreement notwithstanding, Australia was involved in the *refoulement* of those it interdicted and returned. HRW concluded that:

*by returning refugees who have entered its territorial waters to Indonesia, Australia has treated Indonesia as if it were a “safe third country,” without establishing that is so. The only basis for doing so is that the Indonesian police, at present, agree not to arrest and deport asylum seekers so long as UNHCR and IOM process and assist them. This is not an adequate standard of effective protection. Prior to any transfer or return to a third country, all unauthorized arrivals should be given an opportunity to rebut the presumption of effective protection or “safety” in their own case, as well as a chance to appeal on the basis of family ties or other humanitarian circumstances. Safe third country returns should not be imposed on individual asylum seekers by naval officers during the interception of vessels at sea, where individual interviews were not conducted.*<sup>80</sup>

### RECOMMENDATION 2.10

*That Australia clarify its relationship with Indonesia to ensure that those it is returning have a legal basis to be in Indonesia.*

A further concern regarding sea interception is that the government’s determination that unauthorised asylum seekers should not land in Australian territory and should remain on their boats, even while those were only ‘marginally seaworthy’,<sup>81</sup> also placed people at risk – not of persecution, but of drowning. As the Senate committee inquiry into the ‘children overboard’ claims wrote:

*It is clear that the policy ‘to deter and deny’ makes the requirement to ensure the safety of life at sea paramount. At the same time, however, it requires that naval commanders do all in their power to avoid having to embark unauthorised boat arrivals on RAN vessels. In practice, there is significant tension between these two requirements just because, in practice, the line between a ‘marginally seaworthy’ vessel and a sinking fishing boat can be swiftly and unexpectedly crossed. When it is, the lives of both asylum seekers and naval personnel are placed suddenly in peril.*<sup>82</sup>

### RECOMMENDATION 2.11

*That Australia clarify the Royal Australian Navy’s responsibilities to ensure that the safety of asylum seekers remains paramount. The threshold for embarking asylum seekers onto RAN vessels for their own safety should be low, acknowledging that the line between a ‘barely seaworthy’ and an unseaworthy vessel is thin and might be rapidly crossed.*

Further, allegations about mistreatment by naval officers in order to ensure the return of asylum seekers have also been made.<sup>83</sup> The government has denied the allegations.<sup>84</sup> Yet one of the concerns about the offshore interception of potential asylum seekers is that it occurs without any real transparency and accountability. This is evident in the discrepancies in accounts concerning the Afghans intercepted at Kuala Lumpur airport. It is also evident in the case of the *Minasa Bone* whose passengers the government originally said did not claim asylum.<sup>85</sup> The government later altered this

<sup>79</sup> Corlett, D. *op.cit.*

<sup>80</sup> Human Rights Watch, *op.cit.*, p.61.

<sup>81</sup> CMI, *op.cit.*, p.27.

<sup>82</sup> *ibid.*, p.38. Emphasis in original.

<sup>83</sup> Human Rights Watch, *op.cit.*, p.41-45; Four Corners, 2002, *To Deter and Deny*, ABC TV, 15 April, transcript online <http://www.abc.net.au/4corners/stories/s531993.htm>, accessed 19 December 2005. Also Angela Leslie and Julian Burnside, *Soldiers, Sailors and Asylum Seekers, A report prepared for Spare Rooms for Refugees*, nd., on file with author.

<sup>84</sup> Select Committee on a Certain Maritime Incident, 2002, Official Committee Hansard, Senate, Commonwealth of Australia, 17April, p. 1081-83.

<sup>85</sup> Amanda Vanstone, Joint Media Release with the Minister for Foreign Affairs, Alexander Downer, *Minasa Bone* returns to Indonesia, VPS 006/2003, 9 November 2003, available online [http://www.minister.immi.gov.au/media\\_releases/media03/v03006.htm](http://www.minister.immi.gov.au/media_releases/media03/v03006.htm) accessed 16 December 2005.

claim, suggesting that it did not matter that they had expressed protection concerns because the island they were on had been excised from Australia's Migration Zone and that because of this, they could not claim protection under Australian law.<sup>86</sup>

#### RECOMMENDATION 2.12

*That Australia empower an independent monitoring body to investigate and produce regular reports regarding the efficiency and effectiveness of its non-entrée policies and practices. The measure of the efficiency and effectiveness ought to include both border control factors as well as protection considerations.*

### BOX 2.4 US COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM

In February 2005, the United States Commission on International Religious Freedom published a study on the US expedited removal process. One of the most remarkable aspects of the study was the methodology. The researchers were given access not only to documents and files, but also to staff at ports of entry. Researchers sat in on interviews conducted by immigration officials with non-citizens arriving at ports of entry. They were also given access to non-citizens in immigration detention.

The USCIRF report was frank about the system's failings. The failings, in large part were failings of practice, not of policy. The US government now has at its disposal a thorough and credible assessment of the expedited removal process which presents a clear basis for improving the system.

The Australian government has been reluctant to have its immigration control practices evaluated. Because of this, there is no equivalent report on Australia's immigration system. The USCIRF report is available online at [http://www.uscirf.gov/countries/global/asylum\\_refugees/2005/february/](http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/).

The Australian government maintains that even those it intercepts have access to mechanisms that ensure that they will not be returned to situations of danger. Yet the interdiction and turning around of potential asylum seekers are specifically designed to exclude such people from accessing the process by which they might establish their claim for protection. There is evidence that such practices result in the potential or actual *refoulement* of people who need protection. They are but two of the mechanisms Australia has developed in an effort to ensure that asylum seekers do not access Australia's full refugee determination process. The most public of these mechanisms is the establishment of 'offshore processing centres'.

<sup>86</sup> Senate Hansard, Legal and Constitutional Legislation Committee Estimates, 25 November 2003, p.5.

### 3. Offshore processing

AUSTRALIA developed ‘offshore processing’ in response to the *Tampa* stand-off in late 2001, establishing detention centres on Nauru and Manus Island in Papua New Guinea.<sup>87</sup> Offshore processing involves the interception of asylum seeker boats attempting to land in Australia and the transferral of the asylum seekers from those boats to other countries for processing. While offshore processing does not undermine Australia’s *non-refoulement* obligations as such, its practice in the Pacific Solution has led to the return to dangerous situations – including *refoulement* – of people who ought to have been protected.<sup>88</sup>

Questions regarding return from Australia’s offshore processing centres focus on two main areas: the conditions on Nauru and Manus Island and the refugee status determination process, including access to appropriate legal advice.<sup>89</sup>

The figures suggest that larger numbers of asylum seekers returned from Nauru and Papua New Guinea than returned from the detention camps in Australia (see below). Almost a third of the asylum seekers in the Pacific Solution returned.<sup>90</sup>

But this ‘success’ came at the cost of returning at least some of those who sought asylum in Australia to situations of persecution and violence. The fact that some, possibly significant numbers, of the returnees from the Pacific Solution were sent back to places in which their lives and liberties were

<sup>87</sup> The most important book on this subject remains Marr D. and Wilkinson, M. *op.cit.*. A number of non-governmental reports are also useful including Oxfam/Community Aid Abroad, *Adrift in the Pacific: The Implications of Australia’s Pacific Refugee Solution*, 2002; Human Rights Watch, *op.cit.*; US Committee for Refugees, *op.cit.*

<sup>88</sup> Corlett, D. *op.cit.*

<sup>89</sup> See generally Manne, R. with Corlett, D. 2004, *Sending Them Home: Refugees and the New Politics of Indifference*, *Quarterly Essay* 13, March; Human Rights Watch, *op.cit.*; Gordon, M. 2005, *Freeing Ali*, Scribe.

<sup>90</sup> 482 of the 1547 people detained on Manus Island and Nauru returned. (DIMIA Factsheet 76. Offshore Processing Arrangements, updated 23 August 2005 available <http://www.immi.gov.au/facts/76offshore.htm>, viewed 8 December 2005). Of the 524 Afghans that Australia returned to their homeland to the end of June 2004, nearly eighty per cent (407 individuals) had been detained as part of the Pacific Solution. (DIMIA Annual Report 2003-2004, p.117) Indeed, more than half of the Afghans caught in the Pacific Solution eventually agreed to return. (786 Afghans were detained within the Pacific Solution and 420 of these returned - DIMIA Factsheet 76. Offshore Processing Arrangements, updated 23 August 2005 available <http://www.immi.gov.au/facts/76offshore.htm>, viewed 8 December 2005).

This compares with a single figure return rate of Afghans who made it to Australian territory and sought protection before the introduction of the Pacific Solution in late 2001. In the financial years 1999-2000 and 2000-2001 3532 Afghans arrived in Australia by boat and sought protection. (Senator Amanda Vanstone, Minister for Immigration and Multicultural Affairs, Media Centre, Background Paper on Unauthorised Arrivals Strategy, available online [http://www.minister.immi.gov.au/media\\_releases/ruddock\\_media01/r01131\\_tables.htm](http://www.minister.immi.gov.au/media_releases/ruddock_media01/r01131_tables.htm) accessed 13 April 2006). If we take the voluntary repatriation figures from 2002-2004 as indicative of the number of Afghans returning (ie. 117 people from both in detention and on TPVs: DIMIA Annual Report 2003-2004, p.117) then only 3 in 100 Afghans returned from the Australian mainland.

There may, of course, be a straight-forward explanation for this difference in return rates. By the time the Afghans in the Pacific Solution had their cases processed, the Taliban, the authority that many claimed to be fleeing, was no longer in power in their homeland. In other words, the threat they feared no longer existed and it was therefore safe for them to return. Yet in early 2002, hundreds of Afghans remained in Australia’s detention centres refusing to return. (Madigan, M. 2002, ‘Ray of hope for desperate detainees’, *Courier Mail*, 25 January, p.1) As the figures attest, most were finally allowed to remain in Australia while many on Nauru agreed to return. The timing of the Pacific Solution arrivals with the fall of the Taliban does not therefore adequately explain the different return rates for those in the Pacific Solution and those in Australia.

Nor do the material conditions in the Pacific Solution camps adequately explain the discrepancy. To be sure, conditions were harsh, as they were in Australia. But the complaints about the conditions within the Pacific Solution mirror, in general terms, the complaints – at least during the period on which Curtin and Woomera were operational – about the detention centres on Australian territory. (Mares, P. 2002) Yet unlike those in the Pacific Solution, the detainees in the Australian detention centres refused to return.

This is not simply an example of one group – those in the Pacific Solution – being excluded from the ‘culture of rights’ that the other group was able to access. (Gibney, M. J. 2005, ‘Beyond the bounds of responsibility: western states and measures to prevent the arrival of refugees’, *Global Migration Perspectives*, 22, p.19.) It is arguable that of all the world’s liberal democracies, Australia is the one in which the ‘culture of rights’ is weakest. In many significant instances, Australian courts have struck down attempts by refugee advocates to eke out meaningful rights for asylum seekers. (See for example High Court of Australia, *Al-Kateb v Godwin* [2004] HCA 37 (6 August 2004), available online at <http://www.austlii.edu.au/au/cases/cth/HCA/2004/37.txt> and Minister for Immigration and Multicultural and Indigenous Affairs v *Al Khafaji* [2004] HCA 38 (6 August 2004) available online at <http://www.austlii.edu.au/au/cases/cth/HCA/2004/38.txt>. See also *Re Woolley*; *Ex parte Applicants M276/2003* by their next friend GS [2004] HCA 49 (7 October 2004) available online at <http://www.austlii.edu.au/au/cases/cth/HCA/2004/49.txt>)

A plausible explanation for the larger proportion of returnees from the Pacific Solution compared with mainland Australia – and it is one that cannot properly be tested – is the psychological impact of extra-territorial processing. The very act of detaining asylum seekers on extremely remote Pacific islands, for a third of those caught within the Pacific Solution, conveyed an overwhelming message that they would never gain the protection – or indeed the chance of a better life – that they sought in Australia. Once their application for protection was rejected – and for many it ought not to have been – they became convinced that there was no reason to remain. Even detention in Australia’s archipelago of remote and desert detention centres did not have this same profound psychological impact.

It is this realisation of being impossibly separated from Australia’s sense of moral obligation that possibly led the Pacific Solution detainees, and not those within Australia, to opt to return. This would be viewed as successful policy on the part of governments seeking to prevent asylum seekers from accessing their territories.

threatened, suggests that while the rate of return was impressive, it was done at the cost of undermining the very reason for the existence of the protection determination process – namely, offering protection to those in need of it.

There is a further lesson from the Pacific Solution regarding the return of failed asylum seekers. Although Australia was successful, in the period between early 2002 and late 2003, in encouraging returns from the Pacific Solution, after this time, return almost completely ceased. The most significant factor in this is that the cases of the remaining asylum seekers on Nauru were re-opened and many were found to indeed be in need of protection. But there was also another factor that seems to have become an obstacle to return; the mental deterioration of many asylum seekers on Nauru militated against them returning.<sup>91</sup> Nor was such a lesson new; Australia's onshore immigration detention regime is a case study in the damage that long-term immigration detention does to those caught within its realm.

### **RECOMMENDATION 3.1**

*That asylum seekers transferred to offshore processing centres be provided with high quality legal advice and assistance in order that they can best make their case for protection.*

### **RECOMMENDATION 3.2**

*That the protection determination process in Australia's offshore processing centres be efficient, transparent and accurate. Those rejected at the first instance should have access to a meaningful and independent appeals process.*

### **RECOMMENDATION 3.3**

*That as well as Australia's protection obligations under the 1951 Refugee Convention, other international instruments to which Australia is a party be considered in the granting of protection.*

### **RECOMMENDATION 3.4**

*That conditions of reception in Australia's offshore processing centres be humane and allow for a dignified existence. Opportunities for meaningful activities, including educational and vocational training that equip asylum seekers to continue their lives whether the outcome of their protection claim is positive or not, should be provided. The conditions of offshore processing centres should not be used as a means of pressuring asylum seekers to return to their homelands or to third countries.*

### **RECOMMENDATION 3.5**

*That vulnerable groups, including children, single women, torture survivors and the seriously ill, should not be transferred to offshore processing centres, but be brought to the Australian mainland for care and processing.*

### **RECOMMENDATION 3.6**

*That in view of the deleterious psychological effect of extended stay in an offshore processing centre, a limit be placed on the time an asylum seeker or refugee can remain in such a place before they are resettled in Australia.*

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<sup>91</sup> In late 2005 a group of mental health professionals travelled to Nauru to assess the well-being of the remaining 27 asylum seekers there, apparently precipitating the transfer of all but two to Australia. (Gordon, M. 2005, 'Vanstone vows quick response to Nauru report', *The Age*, 30 September, p.6.)

Australia's offshore processing centres are beyond the reach of Australian courts and any independent scrutiny. Australian citizens must obtain visas in order to travel to the offshore processing centres, adding an extra means of preventing media and others from reporting on them.

### RECOMMENDATION 3.7

*That Australia's offshore processing centres be subject to regular independent monitoring. Australia's agreements with the countries in which the centres are located should include provision for media and others to access the camps.*

The return of people without protection needs would also be enhanced by the provision of pre-return counselling and by a return process that, to the greatest extent possible enhanced the decision-making of returnees. These issues are discussed at length in section 5 below.

### BOX 3.1 PROCESSING THE FIRST WEST PAPUANS

In early 2006 there was a moment in which it seemed that Australia might have been improving the way in which it received and processed asylum seekers arriving without prior authorisation by boat.

After landing in the Torres Straits, a group of 43 West Papuans were transferred to Christmas Island. Single men were detained, but women and children were not.

Immigration lawyers were flown to the island to provide legal advice.<sup>92</sup> Recently employed social workers were also brought to the island to assess the welfare needs of the asylum seekers.

In the end, and notwithstanding significant pressures to compromise, the Immigration Department found 42 of the 43 to be refugees and brought them to the Australian mainland.

Ironically, the success of this process led to efforts to further radicalise the Pacific Solution such that all asylum seekers arriving by boat in Australia – including those who make it to the Australian mainland – would be processed extraterritorially. This attempt failed.

<sup>92</sup> Speech by Manne, D. for Castan Centre for Human Rights Law: *Boatloads of Extinguishment?* Forum on the proposed offshore processing of "Boat People" (5 May 2006)

# 4. Detention

AUSTRALIA'S *Migration Act 1958* (Cwlth) mandates the detention of 'unlawful non-citizens' until they are either granted a visa or are removed from the country.<sup>93</sup> The immigration detention population includes non-citizens who have overstayed or breached their visas, those who have committed crimes and who are awaiting deportation, and asylum seekers. The asylum seeker population in immigration detention includes those 'screened in' at Australian airports (see above), those who were eligible to be in the community but who breached their visa conditions and are subsequently detained (see below), and stowaways and others who arrive without proper documentation but who pass through immigration clearance and apply for asylum within 45 days of being in the country.<sup>94</sup> The majority of asylum seekers in immigration detention over recent years, however, have been unauthorised boat arrivals.

## BOX 4.1 UNHCR VIEWS ON DETENTION

According to UNHCR Executive Committee conclusion No. 44 (XXXVII) 1986, the detention of asylum seekers, because of the hardship involved, '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.'

In its 1999 Guidelines on Detention, the UNHCR was more assertive, positing that the detention of asylum seekers is 'inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.'

The Guidelines continue, arguing that if asylum seekers are detained, they should be entitled to minimum safeguards including:

- (i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand;
- (ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;
- (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend;
- (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain;
- (v) to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.<sup>95</sup>

<sup>93</sup> *Migration Act 1958* (Cwlth) ss 189 and 196.

<sup>94</sup> Those who apply after 45 days are not detained, but can have fewer entitlements attached to their bridging visas (see below).

<sup>95</sup> Office of the United Nations High Commissioner for Refugees, 1999, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February, available online at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bd036a74>, Geneva.

While in the past Australia has been remarkably successful in returning large numbers of detained asylum seekers,<sup>96</sup> it has been less so in recent years. The vast majority of those who arrived in the 'fourth wave' of boat asylum seekers were found to be refugees and were released into the Australian community on temporary protection visas.

Notwithstanding this, hundreds of people remained in detention for considerable periods of time. By 2005, considerable numbers of these people had been detained for four, five, six and, in one case, seven years.<sup>97</sup> The government continued to assert that the detainees needed to leave Australia. It said that they had all had their claims for protection assessed in Australia's refugee determination process and that they had been found not to be refugees. If they did not want to leave Australia, the government insisted that they would remain in detention. The High Court determined that non-citizens, including those who were stateless and had nowhere to return to, could be detained indefinitely.<sup>98</sup> Yet the asylum seekers themselves insisted that they could not return to their countries of origin – including Afghanistan and Iran – and that the process by which their claims had been assessed was flawed. By early 2005, if not before, the situation had reached stalemate; both sides had committed themselves to positions from which they would not move.

One of the chief justifications for Australia's mandatory, indefinite, non-reviewable detention system is that it allows the government to remove non-citizens it deems it has no obligations towards.<sup>99</sup> Yet while the government was successful in returning hundreds of the 'third wave' of asylum seekers (because it combined detention with exclusion from the refugee determination process), more recently, detention seems to have become counter to the goal of return. Indeed, few long-term detainees ultimately return. Former detainees have spoken of the institutionalising affect of long-term detention.<sup>100</sup> The psychological damage inflicted by long-term detention<sup>101</sup> means that detainees, even if they were unlikely to face danger upon return, are unable to make the profound decision to return.

Detention not only undermines the ability of individuals to choose to return. It also creates a culture of fear. Detention of the sort practiced in Australia breeds and ferments fear. It throws together into a closed, prison-like environment individuals who do have real fears and those who may not, leaving them to brood over their claims. In immigration detention, life becomes focused on the felt injustice of detention and on the state of one's asylum claim. The world shrinks to these concerns. Fear is transferred between detainees. Fear has both an objective and subjective aspect. Detention heightens the subjective aspect of fear, such that even if people do not have objective fears of persecution or other human rights violations, their subjective fears well up and loom increasingly large.

Asylum seekers in detention have also spoken consistently of a lack of faith in the onshore

<sup>96</sup> See HREOC, *op.cit.*; McMaster, D. 2001, *Asylum Seekers: Australia's Response to Refugees*, Melbourne University Press. Also Crock, M. 1995, 'The peril of the boat people: Assessing Australia's responses to the phenomenon of border asylum seekers', in *Tomorrow's Law*, ed. H. Selby, The Federation Press, Sydney, pp.28-51.

<sup>97</sup> Shaw, M. and Gordon, M. 2005, 'Vanstone offers freed detainee hope', *The Age* (Melbourne), July 19, available online <http://www.theage.com.au/news/immigration/vanstone-offers-freed-detainee-hope/2005/07/18/1121538921826.html>.

<sup>98</sup> High Court of Australia, *Al-Kateb v Godwin* [2004] HCA 37 (6 August 2004), available online at <http://www.austlii.edu.au/au/cases/cth/HCA/2004/37.txt> and Minister for Immigration and Multicultural and Indigenous Affairs v *Al Khafaji* [2004] HCA 38 (6 August 2004) available online at <http://www.austlii.edu.au/au/cases/cth/HCA/2004/38.txt>.

<sup>99</sup> Ruddock, P. 2000, 'Firm but fair approach to asylum seekers', *The Australian*, 22 December, p.9.

<sup>100</sup> See for example Corlett, D. *op.cit.*, p.120.

<sup>101</sup> A non-exhaustive list of publications includes Silove, D. & Steel, Z. 1998, *The Mental Health & Well-Being of On-Shore Asylum Seekers in Australia*, Psychiatry Research and Teaching Unit, University of New South Wales, Sydney; Silove, D., Steel, Z. & Watters, C. 2000, 'Policies of deterrence and the mental health of asylum seekers', *Journal of the American Medical Association*, vol.284, no.5, pp.604-611; Silove, D., Steel, Z. & Mollica, R. 2001, 'Detention of asylum seekers: assault on health, human rights and social development', *The Lancet*, vol.357, 5 May, pp.1436-7; Steel, Z. & Silove, D. 2001, 'The mental health implications of detaining asylum seekers', eMJA, [Homepage of the Medical Journal of Australia], Available: [www.mja.com.au/public/issues/175\\_12\\_171201/steel.html](http://www.mja.com.au/public/issues/175_12_171201/steel.html); Sultan, A. & O'Sullivan, K. 2001, 'Psychological disturbances in asylum seekers held in long term detention: a participant-observer account', eMJA, [Homepage of the Medical Journal of Australia], Available: [www.mja.com.au/public/issues/175\\_12\\_171201/sultan/sultan.html](http://www.mja.com.au/public/issues/175_12_171201/sultan/sultan.html); Mares, S and Jureidini, J. 2004, 'Psychiatric assessment of children and families in immigration detention—clinical, administrative and ethical issues', *Aust NZ J Public Health*, December 28(6):520-6; Steel Z., Momartin S., Bateman C., Hafshejani A., Silove D.M., Everson N., Roy K., Dudley M., Newman L., Blick B., Mares S. 2004, 'Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia', *Australian and New Zealand Journal of Public Health*, December 28(6):527-36; Human Rights and Equal Opportunity Commission, 2004, *A Last Resort? National Inquiry into Children in Immigration Detention*; Federal Court of Australia, *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549 (5 May 2005), available online at [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2005/549.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/549.html). Evidence from elsewhere supports the case that detention undermines mental health. See Physicians for Human Rights, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, available [http://www.phrusa.org/campaigns/asylum\\_network/detention\\_execSummary/](http://www.phrusa.org/campaigns/asylum_network/detention_execSummary/) and a chapter by Professor Haney in United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, available [http://www.uscirf.gov/countries/global/asylum\\_refugees/2005/february/conditionConfin.pdf](http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/conditionConfin.pdf)

refugee status determination process. They suggest that the granting of protection is akin to winning a lottery. People with similar cases get different outcomes. Some people who detainees believe to have flimsy protection claims have gained protection while others whose claims are compelling are rejected. The lack of faith in the refugee determination system is compounded by detention. Like fear, distrust is part of the detention culture. Detention confirms that the protection determination process is less about offering protection to those in need of it and more about containing and deterring asylum seekers. Indeed, former detainees have spoken about their first moments of detention – and the humiliation that it entailed – as cementing their lack of trust in Australian authorities and the refugee status determination process in this country. This means that even if it is safe for some asylum seekers to return, they do not believe the Australian system to determine their safety. The return of failed asylum seekers from detention to situations of insecurity, persecution and other human rights violations suggests that there is some basis to detainees' scepticism about the onshore refugee status determination process in Australia.

Furthermore, asylum seekers in detention are often provided with scant information about their cases. Their access to officials and decision-makers is limited, their chief contacts within the system being detention centre guards. The situation of asylum seekers in detention, including the impact of detention itself, points to the need for asylum seekers to be released from detention after identity, health and security screening. The number of asylum seekers in detention is presently very small, allowing for a system to be developed that is both relatively inexpensive and flexible. Asylum seekers ought to be given a caseworker to manage their claims for protection and their reception pending a decision. (See section 5)

#### **BOX 4.2 ALTERNATIVE DETENTION MODEL**

In 2002, the Justice for Asylum Seekers Alliance released a fully costed proposal to replace Australia's mandatory, indefinite detention system for asylum seekers arriving in Australia without prior authorisation. Under the proposal, asylum seekers arriving without a visa would be detained for an initial period during which their identity, health and security risk would be assessed. As a result of this assessment process, asylum seekers would then be assigned one of various reception options including ongoing detention (for security reasons or in preparation for return and subject to a review mechanism), or release either into hostel accommodation, the care of a community organisation, family or on their own undertaking.

According to JAS, such a model would enhance both return and resettlement outcomes. The proposal is available at <http://www.safecom.org.au/RTPScanberra1.pdf>

#### **RECOMMENDATION 4.1**

*That Australia implement a more nuanced detention regime, such as that proposed by the Justice for Asylum Seekers Alliance, to eliminate the negative mental health implications of long-term, indefinite detention and to ensure that the policy goal of return might be realistically achieved.*

#### **RECOMMENDATION 4.2**

*That alternatives to detention be developed as part of a holistic reception paradigm, including the development of a case management approach to community-based asylum seekers. (See discussion in section 5)*

**RECOMMENDATION 4.3**

*That detention for the purposes of removal should be available only when a failed asylum seeker is assessed as a flight risk. In such instances, a time limit on detention should also be in place. Stateless persons should not be detained pending removal because, by definition, they cannot leave Australia and go to another state. Persons who are unable to access necessary travel documentation should be released from detention until arrangements can be put in place for their removal. Children should not be detained.*

In mid-2005, under a deal brokered by a group of dissident Liberal Party backbenchers, all children and their families were released from detention. Many long-term detainees were also released either on bridging visas or on more substantive visas based on ministerial intervention. The Commonwealth Ombudsman was empowered to investigate and make recommendations into cases of people who have been detained for more than two years.<sup>102</sup> Two years' administrative detention, however, should be viewed as unacceptable.

**RECOMMENDATION 4.4**

*That the detention of failed asylum seekers be subject to regular administrative review as a means of guarding against arbitrary and extended detention.*

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<sup>102</sup> See website of the Commonwealth Ombudsman. In a recent report, the Ombudsman called for the Immigration Department to improve its involuntary removal processes ([http://www.comb.gov.au/commonwealth/publish.nsf/Content/bulletin\\_2006\\_02](http://www.comb.gov.au/commonwealth/publish.nsf/Content/bulletin_2006_02)).

## 5. Community-based asylum seekers

IT is not only the detention regime that undermines Australia's efforts at returning failed asylum seekers. The conditions in which asylum seekers in the community are kept also work against their return should their claims be rejected. Community-based asylum seekers include those who arrive in Australia on valid visas, those who arrive without proper documentation but who pass through Australia's 'migration zone' and apply for protection 45 days after entering the country, and those who are released from immigration detention on bridging visas – because they are under the age of 18, over 75 or have health concerns that cannot adequately be addressed in the detention environment. It also includes a small number of people who are placed in community-based detention i.e., people who agree to reside at a place of residence determined by the government and are in the care of a community agency. Further, it includes people who are released from detention pending their removal.

Community-based asylum seekers have greater or lesser entitlements to community resources depending on the bridging visa they are granted. For example, many asylum seekers with a Bridging Visa E (BVE) are not entitled to work or to publicly funded welfare or medical assistance. Those with Removal Pending Bridging Visas (RPBVs), however, a visa category for which immigration detainees are 'invited' to apply by the Minister, have work rights and are eligible for welfare support, Medicare, and a host of other services.<sup>103</sup> As of mid-2005, a total of 58 people had been invited to apply for RPBVs.<sup>104</sup> In contrast, there are significant numbers of asylum seekers living in the community on BVEs.<sup>105</sup>

Community-based asylum seekers, particularly those who arrive with valid visas before applying for protection, make up the majority of asylum seekers in Australia.<sup>106</sup> Exact numbers of community-based asylum seekers are difficult to find,<sup>107</sup> although it is estimated that there are about eight thousand. This includes people who have been in Australia for a short period of time – a matter of months – and others who have been in Australia for up to a decade.<sup>108</sup> The latter have established families, relationships within the Australian community and have begun to build their lives in this country. It is unreasonable to expect such people to uproot again and leave Australia after such an extended time.

### RECOMMENDATION 5.1

*That the refugee determination process be made as efficient as possible, reducing the length of time a person waits for a final decision, without compromising the quality of decision-making. Decision-makers should be encouraged to make quick decisions while erring on the side of caution.*

<sup>103</sup> DIMIA, Factsheet 85. Removal Pending Bridging Visa, available online at [www.immi.gov.au](http://www.immi.gov.au).

<sup>104</sup> Answer to Question Taken on Notice, Budget Estimates Hearing, 25-27 May 2005, Immigration and Multicultural and Indigenous Affairs Portfolio, Output 1.3 Enforcement of Immigration Law, Question 166.

<sup>105</sup> According to Departmental figures, the vast bulk of BVE holders are people making arrangements to leave Australia or people preparing a request for Ministerial intervention (DIMIA, 2005 (2003-04 ed.) op.cit, p.56). This does not provide a clear picture of the number of asylum seekers who might fit within these categories. It has been estimated that 40% of asylum seekers are denied the right to work because of the 45-day rule or for other reasons. (Hotham Mission, 2005, *Submission to the DIMIA Change Management Taskforce*, August 5, p.30) The experience of community-based organisations is that many of their asylum seeking clients are on BVEs (Asylum Seeker Project of the Hotham Mission, 2003, *Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E*, Research and Evaluation, November, p.7)

<sup>106</sup> During the 1999-2001 'fourth wave' boat arrivals made up the bulk of new asylum applications.

<sup>107</sup> In mid-2005, I requested statistical information from the immigration department. A departmental official said that the department did not keep this information.

<sup>108</sup> Corlett, D. 2005, 'The forgotten asylum seekers', *AQ*, vol.77, Issue 5 September-October, pp.27-32

**RECOMMENDATION 5.2**

*That there be a period of time, after which, regardless of the fear of persecution, an asylum seeker should not be compelled to leave Australia. This ought not to be an automatic grant of residence, but in order to prevent spurious cases that are prolonged specifically to delay appropriate removal, should include an administrative process whereby asylum seekers need to prove that they have sought a resolution of their case.*

The very fact that there are asylum seekers who have been in Australia for nearly ten years and who have not been offered a substantive visa or returned, suggests shortcomings in Australia's handling of community-based asylum claims. The government has argued that an important cause of long-term unresolved asylum claims is the various tiers of appeal open to applicants for protection. While there is some truth to this assertion – including that unscrupulous immigration advisors seek to pursue all avenues to ensure their clients remain in Australia's immigration process – it portrays only part of the problem. Flaws within the onshore refugee status determination system ought not to be attributed simply to the supposed bad character of asylum seekers. For example, it is evident that a lack of faith in the refugee status determination system – including due to its politicisation in recent years<sup>109</sup> – is an important factor in asylum seekers' appealing negative determinations. This, and the absence of a clear end to the protection application process,<sup>110</sup> contributes to asylum seekers' continuing to pursue their claims after multiple rejections. The lack of a complementary protection option and the tail-end granting of humanitarian stay also contributes to the extended stay of asylum seekers which in itself works against return should this be appropriate.

**RECOMMENDATION 5.3**

*That the government encourage all asylum seekers to access legal advice. To this end, the government should ensure that adequate funding is available for community-based, not-for-profit immigration law services. In a case management model (see below) it would be the role of Immigration Department case managers to ensure that all asylum seekers are referred to appropriate legal advisors.*

**BOX 5.1 LEGAL ASSISTANCE AND INCREASING EFFICIENCY**

The United States Executive Office of Immigration Review, a part of the Department of Justice, recently expanded rights presentations to groups of immigration detainees because such programs had 'proven effective in improving the efficiency of immigration proceedings by providing early and accurate self-help legal information and materials to detained aliens.'<sup>111</sup> According to one of the expert witness reports for the USCIRF report on expedited removal, such programs mean that, 'detained individuals make better-informed decisions on proceeding with their cases, and are more likely to obtain representation, that non-profit organizations reach a wider audience of people with minimal resources, and that cases are more likely to be completed faster, resulting in fewer court hearings and less time spent in detention (because of case completion or removal).'<sup>112</sup>

From a totally different setting, a recent review of the impact of legal assistance on the UNHCR refugee status determination process in Egypt found that asylum seekers offered legal advice were more likely to be found to be refugees than those without legal advice and called for the expansion of legal assistance to asylum seekers.<sup>113</sup> If protection of those in need of it is the purpose of the refugee status determination process, legal advice should be expanded.

<sup>109</sup> Crock, M. 2001, 'The refugee convention at 50: Mid-life crisis of terminal inadequacy? Some comments on the processing of refugee claims in Australia,' article on file with author.

<sup>110</sup> As well as appeals to the courts, failed Protection Visa applicants can appeal to the Minister to grant a discretionary humanitarian visa (s417) or to have their PV case re-opened on the basis of new material (s48B)

<sup>111</sup> U.S. Department of Justice, Executive Office for Immigration Review, 'Expansion Planned for Legal Orientation Program For Aliens in Removal Proceedings,' News release, April 21, 2006, available online <http://www.usdoj.gov/eoir/press/06/LegalAccessRelease2006.htm>, accessed 27 April 27, 2006.

<sup>112</sup> Kuck, C.H. 'Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices,' in USCIRF, *op.cit.*

<sup>113</sup> Kagan, M. 2006, 'Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt,' *Journal of Refugee Studies*, 19(1), pp.45-68

**RECOMMENDATION 5.4**

*That the protection determination process be fair, accurate and timely and should include a mechanism for protection of people who are not Convention Refugees but who nevertheless should be protected.*

The return of long-term asylum seekers in Australia is made more problematic because of the conditions of their reception here. As noted, many community-based asylum seekers have no work rights and no entitlement to welfare assistance nor to publicly-funded medical care. Such people are reliant on family or friends, or on community-based organisations to meet their basic needs. There is evidence that Australia’s policy regarding community-based asylum seekers has considerable negative consequences for asylum seekers, including chronic poverty and homelessness and mental and physical health implications.<sup>114</sup>

**RECOMMENDATION 5.5**

*That asylum seekers within the Australian community have access to publicly funded medical care.*

The denial of work rights and welfare entitlements also places community-based asylum seekers in the invidious position where, in order to pay for the basics of life in Australia, some are compelled to work illegally. If they are caught, they can be placed on a bond or in detention. The detention environment and its psychological implications have been discussed above. For community-based asylum seekers, the detention of a breadwinner results not only in family separation, but also in further welfare risks, including homelessness. In 2001, a Federal Court Judge, reflecting on a case concerning a Sri Lankan asylum seeker who had breached his visa conditions by working in order to support his wife and young children, and was then placed in detention, wrote that in the circumstances, the law was being ‘used as an instrument of injustice’. He continued:

*It is a matter of some concern that the current regulatory environment can operate to require that persons employing proper procedures to remain in Australia be required to live off such charity as may be available or to beg to make up the shortfall to enable their sustenance.<sup>115</sup>*

The reduction of people to the point of destitution, with all that this means physically and psychologically, cannot assist in promoting the return of people whose protection claims are rejected.

There is undoubtedly a dilemma for the government in its reception of asylum seekers. The challenge for policy-makers is to design policy that allows asylum seekers to make their case for protection as best they can, while ensuring that the entitlements to which asylum seekers are eligible do not become reason for applying for asylum or indicate to asylum seekers that their stay in Australia is guaranteed. Striking such a balance is a delicate thing. The evidence suggests that the current regime is set too far in the direction of undermining the well being of asylum seekers to get the return outcomes the Australian government desires. Indeed, the detention and Bridging Visa regime are deliberately structured to deter potential asylum seekers from seeking protection in Australia. In order to get better return outcomes, the government should improve its reception of asylum seekers and thus empower them to make decisions within the limitations of the refugee determination process. Asylum seekers should be provided with the material and psychological resources to rebuild their lives whatever the outcome of their protection applications – whether they are granted protection or required to leave the country.

<sup>114</sup> Hotham Mission, 2003, *Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E, Research and evaluation*, November; UQ Boilerhouse Community Engagement Centre, 2005, *Defending human rights: Community-based asylum seekers in Queensland*; Louise Humpage with the Fitzroy Learning Network, 2004, *A Framework for Engaging Victoria’s Newest Residents – Refugees, Temporary Protection Visa Holders and Asylum Seekers*, Centre for Applied Social Research.

<sup>115</sup> De Silva v Minister for Immigration & Multicultural Affairs [2001] FCA 962 (23 July 2001) available online at [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2001/962.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/962.html), accessed 2 July 2005.

**BOX 5.2 THE RECEPTION OF ASYLUM SEEKERS IN SWEDEN<sup>116</sup>**

Upon arrival in Sweden, asylum seekers are assigned a caseworker whose role is to manage their cases and their reception in Sweden. Asylum seekers are eligible for public housing and to financial assistance. They are given access to publicly funded legal assistance and to health care if necessary. Asylum seekers in Sweden are expected to engage in organised activities. These activities are designed to provide information about life in Sweden should asylum seekers be granted residence and to prepare those who are refused to leave the country.<sup>117</sup> The first organised activity is an orientation session during which asylum seekers are informed of, among other things, the determination process, their rights to medical care, accommodation and financial assistance, Swedish laws and the job market.

This relatively generous response to asylum seekers – compared with Australia – and the case-management model have been attributed with a high rate of return of failed asylum seekers. In the late-1990s about 70% of failed asylum seekers left Sweden.

More recently, flaws in the system have emerged. The system was criticised for being open to political manipulation, particularly because the review mechanism was closely linked to the political process. In early 2006, responding to this charge, an independent review body was created.

There is also a lack of resources to properly ensure that all asylum seekers have access to organised activities meaning that preparation for permanent residence or return is compromised.

Further, community organisations in Sweden cite a change in culture within the Swedish Migration Board as a significant obstacle to an effective asylum seeker system, suggesting that a 'rejection mentality' developed in the late 1990s. Since 1999, there has been a marked drop in the number of successful asylum claims in the first instance. In 1999, 47% of asylum seekers were successful at the primary stage. By 2002, the figure was 20% and by 2004, 10%. This drop in successful asylum claims was accompanied by a significant fall in the return of failed asylum seekers, suggesting a link between a transparent, fair determination process and the willingness of failed asylum seekers to return. A considerable number of failed asylum seekers were people from countries such as Iraq, Afghanistan and Somalia where return was problematic, if not impossible. But instead of being granted protection, such people added to the numbers of rejected asylum seekers who refused to leave Sweden.

In 2005, the asylum seeker issue became politically important with the emergence of what became known as *apatiska barn* or the 'catatonic children'.<sup>118</sup> These were children from families whose protection claims had been rejected and who faced return to former Soviet States, the former Yugoslavia, Bangladesh and Africa. Many had been in Sweden for a number of years. These children began to display symptoms of psychosocial regression, including not moving or talking.

In response to the *apatiska barn* and to the more general problem of 'non-returnables', the government created an interim law allowing rejected asylum seekers from Iraq, Afghanistan and Somalia, as well as families to reapply to remain in Sweden.

The interim law expired at the end of March when a new system, including the independent appeals board became effective.

One way of increasing the material and psychological resources of asylum seekers to rebuild their lives whether in Australia or post-return is to ensure that asylum seekers within the community have the right to gainful employment or vocational training during the processing of their claims. Permitting asylum seekers to work would allow them to generate their own funds for life in Australia and to save for their return should this be the final outcome of their application. It would also provide an external focus and contribute to better psychological health. Employment should not be viewed as a means to permanent residence. For this reason, asylum seekers should only be employed in temporary positions. This should be monitored as part of the case management approach (see below).

Vocational training provides an opportunity for asylum seekers to improve their saleable skills in preparation for either residence in Australia or return to their homelands.

<sup>116</sup> This section is informed by consultations with the Swedish Migration Board, various non-governmental organisations and academics in Sweden.

<sup>117</sup> Migrationsvert, 'Facts about...organized activities', October 2004, information provided by the Swedish Migration Board, March 2006.

<sup>118</sup> AFP, 2005, 'Mystery illness of refugee children has Swedes puzzled', 1 May; AFP, 2005, 'Pediatricians slam Sweden's refugee policy, say children's rights violated', 25 May; AFP, 2005, 'Refugees in Sweden may abuse children to avoid expulsion: reports', 23 November; AFP, 2005, 'Scandal in Sweden as refugee agency toasts deportations', 22 December.

### RECOMMENDATION 5.6

*That asylum seekers be encouraged to work or attend vocational training designed with the dual ends of return or settlement in Australia in mind. Training obligations should be developed as part of a case management model within the Immigration Department.*

### RECOMMENDATION 5.7

*That a database of short-term vocational training courses be developed by the Immigration Department in order that case managers can refer asylum seekers to appropriate courses. The attendance of such courses could be part of the case plan and form the basis of providing asylum seekers with the skills to move permanently into the Australian community, or to return to their homelands with increased employment opportunities.*

## BOX 5.3 AGEF'S CASE MANAGEMENT OF EMPLOYMENT ASSISTANCE

Association of Experts in the Fields of Migration and Development (AGEF) is a German non-government organisation that provides employment assistance to returnees – asylum seekers and other migrants – from Europe in their countries of return. It provides counselling and job placement services in countries like Afghanistan and Kosovo, linking individual returnees to employers.

AGEF has proposed the development of a model for providing employment options to returnees through a case management system which begins in the host country and crosses into countries of return. AGEF refers to a 'chain' of linked organisations in both host countries and countries of return. In host countries, for example, several organisations might undertake preparatory activities such as counselling, orientation courses for self-employment, vocational training, and organising the logistics of return. The case management model would ensure that the organisations providing these services are directly linked to organisations in countries of return. In countries of return, organisations participating in the case management model would provide either i) 'measures for job-placement' including orientation to the local labour market, assessment of work competencies, individual work place training, employment promotion packages, or ii) 'measures for business start-up' including orientation courses, business plan seminars, the purchasing of equipment and grants, loans and subsidies.

Nor is it only the psychological implications of the reception of community-based asylum seekers that work against the return of those who are found not to have protection concerns. Many failed community-based asylum seekers, should they decide to return, do not have the means to do so. The Australian government has offered incentives to certain groups to return – Afghans and Iranians in detention and recipients of temporary protection and temporary humanitarian visas (see below) – but its financial assistance to community-based asylum seekers is extremely limited. In order to obtain government assistance, failed community-based asylum seekers must agree to be detained.<sup>119</sup> According to the ASP of the Hotham Mission, an organisation that has worked with more than one hundred asylum seekers as they prepared to leave Australia:

*The welfare reality for many bridging visa E holders that face refusal and removal from Australia, is that without the allowance of the right to work or some form of income support at the final stages, very few will have the capacity to self-fund, without getting further in debt, putting them in vulnerable situations on return....*

*[T]he current option of 'assisted removal' for failed asylum seekers in the community who cannot self-fund, requiring cancellation of the bridging visa, detention pending removal, debt to Commonwealth, no control over their own travel documents, and in some cases informing country of origin of the removal, is an inappropriate, expensive and unnecessary response to people opting to voluntarily repatriate.<sup>120</sup>*

<sup>119</sup> Hotham Mission 2005 *op.cit.*, p.13.

<sup>120</sup> *ibid.*, p.15.

**RECOMMENDATION 5.8**

*That asylum seekers in assisted removal procedures not be detained unless deemed to be at risk of absconding.*

**RECOMMENDATION 5.9**

*That the government provide assistance and incentives for failed asylum seekers to return. These could include both cash and in-kind support and could be delivered by community-based organisations.*

**BOX 5.4 UK'S ENHANCED ASSISTED REMOVAL**

In late 2005, the British Government, through the International Organisation for Migration (IOM), established an enhanced assisted removal program.<sup>121</sup> Under the new program each individual is eligible to £3000 (A\$7,500) of reintegration assistance – an increase of £2000 on an existing program. The reintegration assistance included up to £1000 in cash and the balance of the assistance in the form of training and assistance in countries of return. The new program resulted in a significant jump in applicants for assisted voluntary return.<sup>122</sup>

Concerns persist, however, about the failure to link return under the AVP and protection. The IOM does not take responsibility for the safety of returnees, arguing that it is not within its mandate, that protection determination is a state responsibility and that anyone returning through the IOM is a 'voluntary' returnee who takes responsibility for themselves.<sup>123</sup>

While questions remain about the UK's willingness to return people with protection needs, doubts about the voluntariness of some of IOM's returns persist. In the UK, the £3000 return 'carrot' comes with a hefty stick. Asylum seekers whose claims for protection are ultimately rejected can have their welfare benefits removed from them. There is provision, known as a 'Section 4' or 'hard case' exemption, for some failed asylum seekers to have their benefits restored. One way for failed asylum seekers to have their benefits reinstated is to demonstrate that they have sought to leave the UK. The British government has made it clear that signing up to the IOM's voluntary return program is one way to gain a Section 4 exemption.<sup>124</sup> This, however, places failed asylum seekers who ought not be required to return – those from Iraq, for example – but whose asylum cases have been rejected in an impossible situation. If they sign up with the IOM, they are effectively 'volunteering' to return to a country where, *prima facie*, they will be endangered, but if they do not, they will have the means of material existence in the UK withdrawn from them.

The way in which the Immigration Department manages community-based asylum claims also obstructs the return of claimants found not to be in need of protection. A high staff turnover, lack of communication between different divisions within the department and poor data management have contributed to flaws in the management of asylum cases.<sup>125</sup> A further significant problem is the fact that the Department often does not have contact with community-based asylum seekers for years at a time.<sup>126</sup> This has welfare implications – as the Department is ignorant of the developing circumstances of community-based asylum seekers<sup>127</sup> – but it also sends a confusing message to asylum seekers regarding Australia's commitment to resolve their cases – either by granting protection or facilitating return.

In mid-2005, following the wrongful detention of Cornelia Rau<sup>128</sup> and deportation of Vivian Solon,<sup>129</sup> the Department embarked on a process of internal reform. Among the developments was the initiation of a 'Case Management and Community Care Pilot'.<sup>130</sup> This 12-month pilot appears to take

<sup>121</sup> International Organisation for Migration (UK), '6 Month Enhanced Reintegration Package: IOM Briefing and FAQs', available online at <http://www.iomlondon.org/pilot.php> accessed 11 April 2006.

<sup>122</sup> 'Record number of asylum seekers return home', 24dash.com available online at <http://www.24dash.com/content/news/printNews.php?navID=7&newsID=3578>, accessed 11 April 2006.

<sup>123</sup> Interview with Jan de Wilde, IOM Chief of Mission, London, 17 March 2006.

<sup>124</sup> Refugee Council, 2004, 'Applying for Section 4 NASS (hard case) support', June, available online at [http://www.refugeecouncil.org.uk/downloads/briefings/hard\\_cases\\_jun04.pdf](http://www.refugeecouncil.org.uk/downloads/briefings/hard_cases_jun04.pdf), accessed 23 May 2006.

<sup>125</sup> See Hotham Mission, 2005, *op.cit.*; Palmer, M. 2005, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Report, July.

<sup>126</sup> Hotham Mission, 2005, *op.cit.*, pp.6-7.

<sup>127</sup> See generally *ibid.*

<sup>128</sup> Palmer, M. *op.cit.*; Manne, R. 2005, 'The Unknown Story of Cornelia Rau', *The Monthly*, Issue 5, September.

<sup>129</sup> Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report no. 03/2005.

seriously calls for a more integrated, co-ordinated approach to asylum claims. The model will incorporate a departmental case manager whose role is to assess the welfare and other needs of asylum seekers and to prepare a case plan, including referring asylum seekers to welfare and specialist organisations for support and care. The post-Rau changes, including the development of the case-management model, represent the most important policy reforms in the asylum seeker area in more than a decade.<sup>131</sup>

**RECOMMENDATION 5.10**

*That the Immigration Department further develop its case management approach. The case management approach should require community-based asylum seekers to have regular contact with a case manager within the Department. The case manager should, with the asylum seeker, develop a case plan which sets out the goals and responsibilities of the case manager and the asylum seeker for the duration of the determination process, taking into account the possible outcomes of that process. Part of the case manager's role, consistent with the case plan, would be to ensure that the asylum seeker has access to the legal, medical and welfare resources necessary for a dignified existence. In order to meet these needs, case managers should refer asylum seekers to relevant community-based organisations. The case manager should oversee the case while community-based support workers should undertake the practical tasks of ensuring that the needs of asylum seekers are met.*

*Regular meetings between the case manager and the asylum seeker should focus on meeting the expectations agreed to in the case plan. The regular meetings between the case manager and the asylum seeker would also be opportunities to discuss the option of return and the process by which this might occur. Additionally case conferencing with key stakeholders involved in the case are vital to ensure that intervention plans are understood by all parties and structured best to equip asylum seekers for the potential outcomes of their determination processes.*

Box 5.5 includes a model case management plan. It includes the sorts of issues that might be discussed by Immigration Department caseworkers and asylum seekers and sets up a sort of contract under which both parties are responsible for undertaking various commitments. A plan such as the one below could be utilised at the initial stages of the asylum process or could be adapted should asylum seekers present to a caseworker part-way into the refugee determination process.

In a system focussed on protection and the wellbeing of the asylum seeker, return, given that it is a realistic outcome, should be discussed throughout the period in which protection determination is under consideration.

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<sup>130</sup> 'Case Management and Community Care Pilot', Australian Migration Advice Profession Stakeholders Meeting, Draft for Discussion, 25 November 2005.  
<sup>131</sup> Corlett, D. 2006, 'Redefining the Australian Nation', *Eureka Street*, March/April 2006.

**BOX 5.5 EXAMPLE CASE MANAGEMENT PLAN**

LIFE AREA	GOAL	ACTIONS	RESPONSIBLE	TIMELINE	REVIEW	COMMENTS
<b>IMMIGRATION STATUS</b> Issues for discussion: - Determination process - Case management - Rights & responsibilities - Return	To have protection claim determined in full, fair, speedy and transparent process	Access legal advice  Disclosure of claim	C/M referral  A/S, legal advisor,  Decision maker	Within 2 weeks of initial meeting  Submission prepared within 2 weeks of legal advisor's meeting  Primary decision within 2 months; review within 4 months	Next case management meeting	Completed DATE
<b>ACCOMMODATION</b> Issues for discussion: - Links with community - Cost of living - Vulnerabilities, ie families, single women, children, victims of torture, trauma, etc - Risk of absconding, reporting requirements (linked to detention release)	To ensure that asylum seekers are appropriately housed during refugee status determination	Referral to accommodation agency, if appropriate  Reporting	C/M  A/S		Each case meeting	
<b>INCOME</b> Issues for discussion: - Cost of living - Income support options	To ensure that asylum seekers have access to a dignified standard of living while in process	Access publicly-funded financial assistance if necessary  Abide by obligations, including employment limitations	C/M  A/S			
<b>EMPLOYMENT/TRAINING</b> Issues for discussion: - Employment/ training options - Country of origin employment needs - Preparation for return	To ensure that asylum seekers remain physically and intellectually active during refugee status determination in order that at the end of the process they are most able to settle in Australia or return.	Educational and vocational assessment  If vocational – identification of gaps in country of origin, matching of skills gap with short courses in an area of mutual agreement  If employment – referral to employment agency for placement  Discussion of entitlements and responsibilities  Employment or training as required  Children to be educated	C/A referral  CM and AS AS to attend  CM  CM  AS: breaching obligations = withdrawal of rights and possible movement to more secure accommodation  CM to facilitate			
<b>HEALTH</b> Issues for discussion: - Broad range of health issues and services in Australia - Not discussion of individual health concerns	To ensure that asylum seekers remain in good health during process	Health assessment  Access to appropriate medical care, including mental health services	CM referral to GP  CM in liaison with GP			
<b>OTHER</b> Issues for discussion: Family back in country of origin, including concerns; Social situation of AS, including what was required to get to Australia (social and economic costs of leaving)	To ensure that DIMA is aware of broad concerns of AS in order that any concerns can be addressed in preparation for settlement or return	Discussion of broad range of issues				
<b>RETURN</b> Issues for discussion: Begin to open up subjective fears of return as well as the social and economic aspects associated with return	To ensure that AS have realistic expectations of success within the refugee status determination process and that AS are clear about the options they have around return	Discussion of return vis a vis the following: Legal status on return Accommodation Financial status Employment Health Family, social life Australia's return assistance packages Use of instrument such as the Return Barometer (Box 5.7) Discussion of post review case consultation (see recommendation 5.16)				

### RECOMMENDATION 5.11

*That front-end discussion with all asylum seekers be initiated, stating clearly that their claims for protection will be treated confidentially and will be processed with diligence, but also outlining the prospect that their applications for protection may be rejected. It should be made clear that in such an event, they will be required to leave Australia and that if they do not do so voluntarily, steps will be taken to ensure their removal. There should be an absolute commitment to protection while also informing the applicant of the right of the government to remove those found not to be in need of protection.*

### RECOMMENDATION 5.12

*That migration agents be required, as a condition of their licence to practice, to inform their clients that their application for protection may result in a rejection and that in such circumstances, they will be required to leave Australia. If they do not do so voluntarily, they will be compelled to do so by the state.*

Community-based organisations with which asylum seekers have contact should be brought into the discussion of return. These organisations have expertise in working with asylum seekers and refugees and often have knowledge of and links to organisations within the countries of origin from which asylum seekers have fled.

### RECOMMENDATION 5.13

*That community-based organisations be funded to discuss the prospect of return with asylum seekers. Such organisations should be charged with discussing the range of factors associated with return. These organisations should not promote return. Nor should they be funded to have any role in organising or facilitating the actual return. Their role should be strictly confined to counselling around the option of return. Government funding should not be tied to return rates. Such organisations should be able to contribute into the Pre-Return Case Consultation (see recommendation 5.16) should they determine that a protection need has been overlooked.*

## BOX 5.6 REFUGEE ACTION

Refugee Action is a UK-wide non-government organisation which runs a program called 'Choices' to 'provide confidential, independent and impartial advice, information and informal counselling to refugees and asylum seekers who are considering return to their country of origin.'<sup>132</sup>

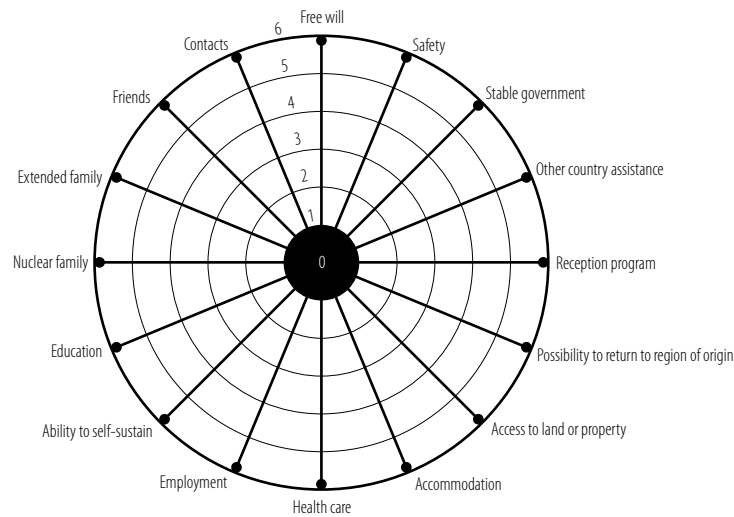
Choices aims to 'help clients make informed choices in a non-pressurised environment' by providing counselling and advice and information about the security situation and political climate in asylum seekers' country of origin. It also helps returnees apply for return assistance and for travel documents.

It further undertakes outreach work 'to promote better understanding of voluntary return' and 'to lobby for the long-term needs for those considering return (resettlement grants, training and employment, 'look and see' provision, needs for elderly, etc).

<sup>132</sup> Refugee Action, Choices, webpage: <http://www.refugee-action.org.uk/ourwork/choices/default.aspx>

### BOX 5.7 RETURN COUNSELLING: ISSUES FOR CONSIDERATION

Below is an instrument developed by Lena Rösell from Sociala Missionen, in Stockholm, Sweden. This instrument can be used in discussions about return and allows returnees and counsellors to broach a broad range of issues and to measure the degree to which they impact on the decision-making of people considering return. It is striking because it can be used to represent visually changes in asylum seekers’ perceptions of their concerns about returning to their homelands. It could be used to plot the changing importance of the different concerns of individuals over a period of time.



There is also a place for national and ethnic communities in the discussion of return. Such discussions might also be an opportunity for the government to engage with local communities around their ability to participate in post-conflict reconstruction and development as well as the Australian government’s immigration control agenda.

#### RECOMMENDATION 5.14

*That the Immigration Department engage with the local communities of significant asylum seeker producing countries to discuss the government’s immigration goals and the issue of return.*

### BOX 5.8 BRITISH REFUGEE COUNCIL AND VOLUNTARY RETURN

The British Refugee Council is funded by the UK Home Office to provide policy input and information on ‘voluntary’ return. It also acts as a link between the Home Office and various non-governmental – including refugee community organisations – and international organisations – including the International Organisation for Migration and the UNHCR. Through the British Refugee Council, the British government now has regular consultations with refugee community organisations where return is discussed.

The Refugee Council does not provide direct counselling and advice around voluntary return, but coordinates the implementation of voluntary return programs run by other non-government organisations.

Locally-based national and ethnic communities of significance and non-governmental organisations should be funded to participate in fact-finding missions to major destinations of return. This could assist in locally based leaders – both those from within ethnic communities and those in the advocacy sector – gaining a solid understanding of the on-the-ground conditions in countries of return. It would also allow the creation of links with services in-country which could provide support for returnees.

**RECOMMENDATION 5.15**

*That the Australian government fund fact-finding missions to countries of major return destination. Local ethnic community leaders and representatives of asylum seeker community organisations could be funded to attend.*

Australia does not have a conclusive end to the protection determination process. Applicants can apply repeatedly to the Minister to use his or her discretionary intervention powers to allow them to remain in the country. While repeat Ministerial applications have allowed failed asylum seekers who nonetheless ought not to be returned to delay leaving Australia, the fact that such people are not protected highlights flaws in the determination process. The repeat application for ministerial intervention also works against a clear end to the determination process after which time failed applicants should be required to return.

Nor does the Australian protection determination system have a pre-departure safety net to ensure that any protection issues arising post-RRT can be assessed. There is a need for a final process in which those in need of protection can be offered it, while facilitating the return of those to whom Australia has no protection obligations.

**BOX 5.9 CANADA'S PRRA<sup>133</sup>**

Asylum seekers whose cases have been rejected and who are expected to depart Canada can apply for protection under the Pre-Removal Risk Assessment process. This process takes into consideration a change in circumstances in asylum seekers' countries of origin, new information demonstrating that asylum seekers will be at risk of persecution, torture or to cruel, inhuman or unusual treatment or punishment, or the possibility that asylum seekers' lives may be otherwise endangered should they be compelled to leave Canada. The PRRA is not an appeal against earlier decisions and consideration is given only to new information or evidence. The PRRA decision is usually made on the papers. Only a very small percentage of applicants are granted the right to remain in Canada under the PRRA.

The creation of such a process might meet the dual objectives of protection and facilitating return.

**RECOMMENDATION 5.16**

*That a final step in the protection/removal process be established called a 'pre-removal case consultation'. The consultation should be facilitated by the Immigration Department case manager, and bring together the asylum seeker, their legal representatives and their welfare support workers. The discussion should focus around two issues: 1. Any protection-related concerns that have arisen in the period between the second tier process and the asylum seekers' pending return. If any are identified, the caseworker should be responsible for triggering the Minister's discretionary power to intervene to overturn a decision in the national interest. 2. The issues that would most effectively facilitate the return of the failed asylum seeker. This would include matters in Australia that need to be finalised and issues in the country of return. A pre-removal case contract would replace the case plan, stipulating the actions required of the asylum seeker to finalise matters in Australia and organise for their return, setting up timeframes of no longer than three months to fulfil these obligations, and outlining the actions of the case manager to ensure that matters of concern in the country of return are dealt with. These might include ensuring that housing, employment, on-arrival support, etc are organised. The case manager would be responsible for organising or outsourcing to non-government organisations the facilitation of such activities.*

<sup>133</sup> Refugee Help in Refugee Hands, A Resource Kit for the Refugee Determination System in Canada After IRPA, FCJ Refugee Centre, Toronto, updated July 2005.

**RECOMMENDATION 5.17**

*That the Immigration Department establish a database and provide training for case managers around accessing organisations, goods and services for the facilitation of return to ensure that the reintegration of the returnee is as smooth as possible.*

A mandatory departure without the use of physical coercion or detention is preferable to forced return. Mandatory return allows failed asylum seekers greater dignity in their return. Mandatory returns are also more cost effective for government.<sup>134</sup> Asylum seekers who are assessed through a vigorous, transparent and fair process not to have protection concerns but who nonetheless refuse to leave the Australia ought to be detained and removed from the country.

**RECOMMENDATION 5.18**

*That detention for the purpose of removal be for the shortest possible length of time. Failed asylum seekers whose removal is not imminent or for whom return will be delayed should be released from detention into a lesser form of monitoring.*

Notwithstanding its right to forcibly remove non-citizens with no right to remain in the country, such removals must be consistent with Australia's international human rights obligations and should, as far as possible seek to maintain the returnees' dignity.

**RECOMMENDATION 5.19**

*That Australia develop guidelines on the use of force in removing failed asylum seekers making specific reference to Australia's international human rights obligations.*

**BOX 5.10 COUNCIL OF EUROPE,  
TWENTY GUIDELINES ON FORCED RETURN<sup>135</sup>****Guideline 15. Cooperation with returnees**

1. In order to limit the use of force, host states should seek the cooperation of returnees at all stages of the removal process to comply with their obligations to leave the country.
2. In particular, where the returnee is detained pending his/her removal, he/she should as far as possible be given information in advance about the removal arrangements and the information given to the authorities of the state of return. He/she should be given an opportunity to prepare that return, in particular by making the necessary contacts both in the host state and in the state of return, and if necessary, to retrieve his/her personal belongings which will facilitate his/her return in dignity.

**Guideline 16. Fitness for travel and medical examination**

1. Persons shall not be removed as long as they are medically unfit to travel.
2. Member states are encouraged to perform a medical examination prior to removal on all returnees either where they have a known medical disposition or where medical treatment is required, or where the use of restraint techniques is foreseen.
3. A medical examination should be offered to persons who have been the subject of a removal operation which has been interrupted due to their resistance in cases where force had to be used by the escorts.
4. Host states are encouraged to have "fit-to-fly" declarations issued in cases of removal by air.

<sup>134</sup> The British National Audit Office found that it costs £11,000 (A\$27,500) for every enforced removal, ten times more than it cost to assist failed asylum seekers to leave voluntarily. National Audit Office, 2005, *Returning Failed Asylum Applicants*, July, p.44.

<sup>135</sup> Available at [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Foreigners\\_and\\_citizens/Asylum\\_refugees\\_and\\_stateless\\_persons/Texts\\_and\\_documents/2005/Twenty%20Guidelines%20on%20forced%20return%202005.pdf](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Foreigners_and_citizens/Asylum_refugees_and_stateless_persons/Texts_and_documents/2005/Twenty%20Guidelines%20on%20forced%20return%202005.pdf), accessed 27 April 2006.

**Guideline 17. Dignity and safety**

While respecting the dignity of the returnee, the safety of the other passengers, of the crew members and of the returnee himself/herself shall be paramount in the removal process. The removal of a returnee may have to be interrupted where its continuation would endanger this.

**Guideline 18. Use of escorts**

1. The authorities of the host state are responsible for the actions of escorts acting on their instruction, whether these people are state employees or employed by a private contractor.

2. Escort staff should be carefully selected and receive adequate training, including in the proper use of restraint techniques. The escort should be given adequate information about the returnee to enable the removal to be conducted safely, and should be able to communicate with the returnee. Member states are encouraged to ensure that at least one escort should be of the same sex as that of the returnee.

3. Contact should be established between the members of the escort and the returnee before the removal.

4. The members of the escort should be identifiable; the wearing of hoods or masks should be prohibited. Upon request, they should identify themselves in one way or another to the returnee.

**Guideline 19. Means of restraint**

1. The only forms of restraint which are acceptable are those constituting responses that are strictly proportionate responses to the actual or reasonably anticipated resistance of the returnee with a view to controlling him/her.

2. Restraint techniques and coercive measures likely to obstruct the airways partially or wholly, or forcing the returnee into positions where he/she risks asphyxia, shall not be used.

3. Members of the escort team should have training which defines the means of restraint which may be used, and in which circumstances; the members of the escort should be informed of the risks linked to the use of each technique, as part of their specialised training. If training is not offered, as a minimum regulations or Guidelines should define the means of restraint, the circumstances under which they may be used, and the risks linked to their use.

4. Medication shall only be administered to persons during their removal on the basis of a medical decision taken in respect of each particular case.

There must be a clear chain of responsibility between the forcible removal of a failed asylum seeker and the Australian government. Australian officials should be entirely responsible for such actions. The use of private removals companies<sup>136</sup> blurs the responsibility of government for removals and raises the prospect of dubious return practices.

**RECOMMENDATION 5.20**

*That Australia not outsource the forcible removal of failed asylum seekers to private companies.*

Some asylum seekers, while not entitled to protection, may not be able to be returned from Australia. This includes stateless persons.

**RECOMMENDATION 5.21**

*That there should be a finite period of time after which, if persons remain non-returnable, they are able to regularise their immigration status and remain in Australia permanently.*

<sup>136</sup> Lester, E, 2000, 'The Privatisation of Refugees in Orbit – Not Exactly a P&O Cruise', *Human Rights Defender*, (9)1, pp.22-23.

## 6. Temporarily protected persons

RETURN is inherent in the notion of temporary protection. People with only temporary protection in Australia include those with temporary safe haven visas (TSHVs) and those granted temporary protection visas (TPVs) or temporary humanitarian visas (THVs).

The TSHV was created in 1999 in order that Kosovars fleeing the conflict in their homeland – and in which Australia's allies were involved – could be brought to Australia on a temporary basis.<sup>137</sup> The rationale behind temporary protection in this instance was that the granting of permanent residence to Kosovars could have played into the hands of the Milosevic forces which would have been happy to have expelled the Kosovars.

The TSHV has very limited entitlements attached to it. For example, TSHV holders are specifically barred from applying for another visa, including a protection visa, unless the Minister for Immigration uses his or her non-compellable, non-reviewable, discretionary power to allow them to.

The TSHV was a remarkably successful means of offering short-term protection and then returning those granted it. It would appear that the combination of preventing TSHV holders from applying for any other visa in Australia except with the express permission of the Immigration Minister and an unrelenting campaign promoting return by the government ensured that return occurred. Of the 4000 Kosovars who were brought to Australia in 1999 on TSHVs, only about two hundred and fifty remained in Australia – 192 had been granted permanent visas as at 31 January 2003<sup>138</sup> while 90 others were still awaiting Ministerial intervention as of March 2005.<sup>139</sup> Almost all of the 1800 East Timorese evacuees returned.<sup>140</sup>

Although the TSHV was created in response to offshore refugee crises, it has also been used for a small number of people who have arrived outside the Kosovar and East Timorese caseloads. The largest group is fourteen Ambonese who, after arriving in Australia by boat in January 2000 were granted TSHVs. The TSHV was deliberately designed to give the government the greatest control over its use, including giving the Immigration Minister the power to renew the TSHV at the his or her discretion. By mid-2004, the Ambonese had had their visas renewed no fewer than nine times.<sup>141</sup> The TSHV may be an effective mechanism for returning people who have sought protection, but the constant uncertainty of the Ambonese suggests that as a means of offering protection, it is also a cruel option.

### RECOMMENDATION 6.1

*That temporary protection only be used in cases of mass influx, or in circumstances in which the granting of permanent protection would encourage the further expulsion of certain groups from a state.*

<sup>137</sup> Taylor, S. 2000, 'Protection or Prevention? A Close Look at the Temporary Safe Haven Visa Class', *UNSW Law Journal: The Refugee Issue*, (23)3, pp.75-102.

<sup>138</sup> Answer to Question on Notice, Additional Estimates Hearing, 11 February 2003, Immigration and Multicultural and Indigenous Affairs Portfolio, Output 1.4 Safe Haven, question 83.

<sup>139</sup> The Kosovar figure comes from Senator Amanda Vanstone, Minister for Immigration and Multicultural and Indigenous Affairs, 'Kosovar caseload', VPS 044/2005, 11 March 2005, available [http://www.minister.immi.gov.au/media\\_releases/media05/v05044.htm](http://www.minister.immi.gov.au/media_releases/media05/v05044.htm).

<sup>140</sup> Ruddock, P. 1999, Minister for Immigration and Multicultural and Indigenous Affairs, 'East Timorese Evacuees Opt to Go Home', MPS 172/99, 6 December, available online at [http://www.minister.immi.gov.au/media\\_releases/ruddock\\_media99/r99172.htm](http://www.minister.immi.gov.au/media_releases/ruddock_media99/r99172.htm), downloaded 4 January 2006; Ruddock, P. 2000, Minister for Immigration and Multicultural and Indigenous Affairs, 'East Timorese Return Home from Temporary Safe Haven', MPS 023/2000, 27 February, available online at [http://www.minister.immi.gov.au/media\\_releases/ruddock\\_media00/r00023.htm](http://www.minister.immi.gov.au/media_releases/ruddock_media00/r00023.htm), downloaded 4 January 2006; Ruddock, P. 2000, Minister for Immigration and Multicultural and Indigenous Affairs, 'East Hills Safe Haven to Close', MPS 045/2000, 6 May, available online [http://www.minister.immi.gov.au/media\\_releases/ruddock\\_media00/r00045.htm](http://www.minister.immi.gov.au/media_releases/ruddock_media00/r00045.htm), downloaded 4 January 2006.

<sup>141</sup> Answer to Question taken on Notice, Budget Estimates Hearing, 26 May 2004, Immigration and Multicultural and Indigenous Affairs Portfolio, Output 1.4 Safe Haven, question 81.

**RECOMMENDATION 6.2**

*That temporarily protected persons have access to the refugee determination process. To this end, the bar on TSHV holders from applying for protection under the onshore determination process except through the Minister's discretionary power should be removed.*

**RECOMMENDATION 6.3**

*That a maximum time limit be set for temporarily protected persons to have only temporary protection. To this end, the government should establish a maximum time limit for TSHV, after which time, TSHV holders, by virtue of their ongoing need for protection, be granted a more secure status.*

The TSHV led the way in Australia's recent push towards temporary protection. The three-year Temporary Protection Visa was created in 1999 in response to the increase in boat arrivals with prima facie protection needs. Under the TPV regime, people who are found to have a well-founded fear of persecution are granted only temporary residence. The establishment of the TPV regime was a radical development in Australia's response to asylum seekers and was meant as a further plank in the government's deterrence strategy. It deliberately penalised refugees who arrived by boat and created a two-class refugee system, the first class consisting of those chosen by Australia from overseas and granted permanent residence here, and the second, those on TPVs. The TPV not only prolonged the uncertainty of refugees' stay in Australia, it also denied them family reunion rights. Further, by depriving TPV holders of the right to leave and then re-enter Australia, Australian policy exacerbated the trauma of family separation on the part of recognised refugees.

The TPV regime, including its impact on separated families, precipitated an increase in the proportion of women and children seeking to make the dangerous journey to Australia by boat.<sup>142</sup> The large number of women and children who perished on SIEV X in an attempt to be with their menfolk is significantly the result of the TPV system.

In 2001, the TPV regime was expanded to include people from the Pacific Solution. The 'Secondary Movement Offshore Entry' and 'Secondary Movement Relocation Visas'<sup>143</sup> formed the new Temporary Humanitarian Visa regime. The Secondary Movement Offshore Entry visa is a three-year visa for people who entered Australia but were transferred to Pacific island detention camps. Holders of this visa are denied the opportunity to apply for permanent residence in Australia. If their need for protection is ongoing, they can apply for continued temporary protection.

The Secondary Movement Relocation Visa is a four and a half year visa for people in Pacific island detention centres who were intercepted before setting foot in Australian territory. Secondary Movement Relocation Visa holders are entitled to apply for permanent residence in Australia.

There is nothing explicit in international refugee law that compels states to grant refugees permanent residence. This notwithstanding, Australia has historically granted permanent residence to refugees, importantly because refugees were treated as immigrants and fitted Australia's nation-building goals. The argument for temporary protection suggests that national self-interest is not reason enough for granting permanent residence to refugees. Further, there may be good reasons for granting only temporary protection to refugees. For example, by compelling refugees to return to their homelands once the causes of their flight have been eliminated, space is created for others whose need for protection is more urgent to settle in countries such as Australia. And by compelling to return refugees whose status has ceased, states such as Australia might even be contributing to post-conflict reconstruction by ensuring that people with skills and resources return to help in this process.

Such arguments, however, are unpersuasive. The suggestion that returning refugees will in

<sup>142</sup> Crock, M and Saul, B. 2002, *Future Seekers: Refugees and the Law in Australia*, The Federation Press, Leichardt, pp.78 & 107.

<sup>143</sup> DIMIA Fact Sheet 65. New Humanitarian Visa System, revised 19 July 2002.

effect 'free up' protection places is based on an assumption that international protection is a non-renewable and fixed resource. In fact, notwithstanding the fragile public support for refugee protection in Australia, it is a resource that is better conceived as organic, its health determined to a significant degree by political factors.

More concretely, arguments for the temporary protection of refugees are unconvincing because of the human cost of the TPV.<sup>144</sup> A sense of certainty is a key factor in rebuilding a life shattered by the refugee experience.<sup>145</sup> Temporary protection undermines this and prolongs the dislocation associated with being a refugee.

#### **RECOMMENDATION 6.4**

*That because of the human cost of temporary protection, refugees should be granted permanent residence in Australia, including the right to family reunion.*

The granting of permanent residence to refugees should not exclude them from returning to their homeland at some point in the future. Sweden, for example, has a system whereby refugees and others who have been granted protection can be assisted to return if they freely choose to do so (see Box 6.1 return checklist)

#### **RECOMMENDATION 6.5**

*That the government provide opportunities for refugees to return to their countries of origin after the cessation of the causes of their flight. The decision to return should be entirely voluntary, meaning that refugees should maintain their legal status as permanent residents in Australia and should in no way be compelled to return.*

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<sup>144</sup> Senate Legal and Constitutional Committee, Administration and operation of the Migration Act 1958, Commonwealth of Australia, March 2006, pp.247-252, available online at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/Migration/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/Migration/report/report.pdf), accessed 23 May 2006.

<sup>145</sup> Victorian Foundation for Survivors of Torture, 1998, *Rebuilding Shattered Lives*, chapter 3, Parkville.

## BOX 6.1 CHECKLIST FOR VOLUNTARY RETURN

Below is an edited version of a checklist developed by the Swedish Migration Board and Swedish NGOs to assist refugees and others thinking about return. The Swedish checklist is available at [http://www.migrationsverket.se/infomaterial/atervandring/sokande/stodpkt\\_en.pdf](http://www.migrationsverket.se/infomaterial/atervandring/sokande/stodpkt_en.pdf)

### Things to think about...

#### ... health

- Find out about the healthcare system in the country you're moving to.
- Check about obtaining any medication there that you need.
- Investigate as to whether you can get the medical aids you need there.
- What immunization do you need before you leave?
- Gather all the medical records you need to take with you (get them translated if necessary).
- .....

#### ... work

- Enroll in repatriation projects that can help you get a better job in the country that you are moving to.
- Make sure you have all the certificates and letters of reference (translated if necessary) that could make it easier to get the kind of job you want in the country that you are moving to.
- Make a list of all the phone numbers and addresses in Australia that you might need after you leave.
- Get a certificate of employment from the company that is hiring you in the country that you are moving to.
- .....

#### ... school

- Get in touch with the authorities in the country that you are moving to for information about their educational system.
- Make sure you have all the school transcripts you need in order to study in the country that you are moving to.
- Make sure that all the training you have received in Australia has been certified.
- Get your transcripts and grades from Australian schools and courses translated.
- .....

#### ... safety and security

- What are the laws in the country to which you are moving that affect you? If necessary, call the country's nearest consulate or embassy.
- What are your rights and obligations in the country that you are moving to?
- Find out about hazards (mines, grenades, etc.) in previous war zones.
- Learn about ethnic conflicts that have not been resolved.
- .....

#### ... housing in Australia

- Notify your landlord within the required period of time that you are leaving.
- Submit a change of address form to the post office.
- Cancel your phone, newspaper subscription, etc.
- .....

#### ... housing in country of return

- What is the housing market like there?
- Make sure you have written confirmation that you can move into your new housing.
- Get any legal assistance you may need.
- Have necessary repairs done in the apartment or house to which you are moving.
- Let your friends and acquaintances know what your new address will be.
- .....

#### ... finances in Australia

- Find out about the regulations of the taxation office concerning pension savings, disability pension, child allowance etc. when you return to your native country and what happens to them if you aren't an Australian citizen.
- Pay off any loans or reach agreement about installment payments before you leave Australia.
- Apply for financial assistance if appropriate.
- .....

#### ... finances in country of return

- How does the country's social insurance system work, including agreements, pension, benefits, etc?
- How does the educational system work – is it free of charge, can you get student aid or stipends?
- Can you get subsidies to help pay your rent or to start your own business or cooperative?
- Are there volunteer organizations in the country that can assist you?
- .....

#### ... travel

- Plan your trip and shipping of furniture well ahead of your departure.
- Get any travel and shipping insurance that you need.
- Make sure you have all the papers you need, including passport, civic registration certificate, ID, driver's license, résumé (CV), your most recent tax returns, and customs documents.
- .....

Encourage your family members to talk honestly about their plans and expectations. Make sure that your children understand what is happening.

In August 2004, amendments were introduced to the temporary protection and humanitarian regimes.<sup>146</sup> A new visa, the Return Pending Visa (RPV) was introduced for people who while not entitled to further protection, needed time to arrange for their return to their home countries. The Return Pending Visa allowed holders a further 18-month stay in Australia with access to a range of social entitlements.

The August 2004 changes also entitled TPV, THV and RPV holders to apply for a host of onshore mainstream migration visas in Australia. This meant that people who might not be able to demonstrate an ongoing need for protection could apply to remain permanently in Australia because of their links to the community or the skills they could offer.

In June 2005, in response to pressure from a group of backbenchers, the Prime Minister announced further changes in the processing of further protection applications by TPV holders.<sup>147</sup> That their cases would be decided 'on the papers' seemed to indicate that decision makers would be generally favourable to the applicants.

The following month, the Full Federal Court determined that the government must change the way it was assessing the claims of temporary refugees who applied to remain here permanently.<sup>148</sup> The court determined that because the decision to strip refugee status from a person is so grave, rather than refugees having to prove that they have an ongoing need for protection from persecution, the onus must fall on Australia's immigration officials to prove that it is safe for such people to return. The return of people granted only temporary protection seemed increasingly unlikely until in November 2006, the High Court of Australia overturned the Federal Court's decision in QAAH.<sup>149</sup> At the time of writing, the impact of the High Court's decision on return practice was still to be determined.

As a mechanism to encourage return, the TPV and THV have been largely unsuccessful. For example, only 34 Afghans on TPVs have accepted the Australian government's voluntary repatriation package and returned to Afghanistan since 2002. As part of the August 2004 amendments, the government announced a reintegration package like those it had offered to Afghans and Iranians in detention to all current and former TPV and THV recipients. By the end of June 2005, only four people had returned under the repatriation scheme.<sup>150</sup> The very rationale for the August 2004 changes entitling TPV and THV holders to apply for mainstream migration visas suggests that the government has come to accept the limitations of temporary protection as a means of promoting return. According to the government's documents:

*Some Temporary Protection Visa (TPV) and Temporary Offshore Humanitarian Visa (THV) holders have made important contributions to the community during their time in Australia, particularly in rural and regional areas and some have particular skills that would otherwise qualify them for a migration visa.*

*Others have established strong links to Australian citizens and permanent residents and may be able to qualify for the grant of a mainstream visa.<sup>151</sup>*

<sup>146</sup> DIMIA, 'Measures for Temporary Protection and Temporary Humanitarian Visa Holders', available online at [http://www.immi.gov.au/refugee/tpv\\_thv/index.htm](http://www.immi.gov.au/refugee/tpv_thv/index.htm) accessed 6 January 2006.

<sup>147</sup> Howard, J. 2005, 'Immigration Detention', Press Statement, 17 June, available online at [http://www.pm.gov.au/news/media\\_releases/media\\_Release1427.html](http://www.pm.gov.au/news/media_releases/media_Release1427.html).

<sup>148</sup> QAAH v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 136 (27 July 2005) available online at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/136.html>.

<sup>149</sup> High Court of Australia Transcripts, Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 [2006] 53 (15 November 2006), available online <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/2006/53.html?query=qaah>. See also NBGM v Minister for Immigration and Multicultural Affairs [2006] HCA 54 (15 November 2006) available online at [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2006/54.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2006/54.html).

<sup>150</sup> DIMIA Annual Report 2004-05, p.159.

<sup>151</sup> DIMIA, Measures for Temporary Protection and Temporary Humanitarian Visa Holders, Access to Mainstream Visas, available online at [http://www.immi.gov.au/refugee/tpv\\_thv/mainstream/1.htm](http://www.immi.gov.au/refugee/tpv_thv/mainstream/1.htm), accessed 4 January 2006.

## 7. Monitoring the safety of returnees

IN 2000, the Senate Legal and Constitutional References Committee recommended that Australia seek to develop a system of informal returnee monitoring.<sup>152</sup> The government has not responded to this recommendation.<sup>153</sup>

There are a number of obstacles to monitoring returnees. First, the government argues that Australia has no obligations toward people who are rejected by Australia's refugee determination process. Such people do not invoke Australia's protection obligations and therefore ought to be removed from the country.

Second, to engage in monitoring such people, Australia would be required to breach the sovereign territory of other states.<sup>154</sup> Australia has no right to encroach on the sovereign jurisdiction of another state in order to assess the way that state treats its own citizens.

Third, monitoring returnees may pose risks to returnees themselves. Monitoring the safety of returnees may place them in danger by drawing them to the attention of local authorities.

Fourth, there are only limited actions to be taken if it was discovered that returnees were indeed at risk of persecution or human rights violation. Given that returnees are beyond the sovereign jurisdiction of the monitoring state, what, save further encroaching on the sovereignty of the country of return, can the returning state do to rectify a situation of abuse?

Fifth, monitoring the safety of returnees from developed regions in countries of dire insecurity and desperate need seems a poor targeting of resources especially when there are vast numbers of people who, *prima facie*, do need protection but for whom resources are scarce.

Finally, there are practical difficulties involved in designing and implementing a monitoring regime. How might research be designed that provides a systematic insight into the plight of returnees? Could a random sample of returnees ever be taken? How might those who were most vulnerable be monitored? In practice, how can returnees be tracked? How can any claims to mistreatment be verified?

Notwithstanding these objections and difficulties, there is a need for a mechanism for monitoring the safety of returnees. There are real potential benefits attached to monitoring, both for Australia's protection determination process and for individuals seeking protection.

Monitoring the safety of returnees is the ultimate test of the effectiveness of protection determination processes. Such processes exist in order to ensure that people who need to be protected are not returned to situations of danger. If the determination processes are effective, then returnees will be safe. If returnees are safe, then independent monitoring will enhance the credibility of the protection determination system.<sup>155</sup> A system that is accurate and seen to be so may assist in ensuring that those who are deemed not to have protection obligations do indeed return. People whose claims for protection have been rejected are less likely to return if they consider that their case for protection has not been properly considered or understood. An effective monitoring program may assist in this regard. Further, the transparency associated with monitoring could also be a means of countering

<sup>152</sup> SLCRC, *op.cit.*, recommendation 11.1.

<sup>153</sup> Edmund Rice Centre for Justice and Community Education, 2004, *op.cit.*, p.42.

<sup>154</sup> SLCRC, *op.cit.*, p.333.

<sup>155</sup> In a bizarre understanding of the monitoring process, an EC official in Brussels told me that European countries were against monitoring because it undermined the credibility of the protection determination systems.

claims from refugee advocates and activists that the decision-making process is flawed.

If returnees are not safe, problems exist in the determination processes. Monitoring returnees is likely to expose the failures of the protection determination system. This is indeed what following up returnees from Australia has done to date. While the asylum seeker issue is politically charged such an outcome is undesirable on the part of government. From a systemic perspective, however, highlighting the shortcomings of the process is an important step in designing better policy and practice. From this perspective, monitoring could be seen as a means by which decisions can be improved. This would benefit individuals seeking protection and contribute to better policy.

### **RECOMMENDATION 7.1**

*That Australia create and fund an independent returnee monitoring commission to monitor the safety of returnees. The returnee monitoring commission should produce regular reports which, within the bounds of confidentiality and with due regard to the safety issues involved, should be public. The returnee monitoring commission should have a constitutional commitment to the maintenance of human rights and the yardstick for measuring the safety of returnees should be Australia's international protection and human rights obligations.*

### **RECOMMENDATION 7.2**

*That as a way of minimising the concern that in monitoring returnees Australia would breach the national security of other states, the returnee monitoring commission be funded by government, but be independent of government.*

There is considerable interest among European and north American non-governmental organisations in monitoring the safety of returned failed asylum seekers. A more expansive returnee monitoring body might be set up in co-operation with European and north American countries, thereby further separating the returning country from accusations of encroaching on the country of return's national sovereignty.

It is possible that monitoring could also be a means of improving protection outcomes for asylum seekers who are mistakenly returned to persecution or other serious threats to their fundamental human rights. For example, after identifying people who were incorrectly returned, Australia could negotiate with countries of return to ensure protection is assured or improved. Alternatively, Australia might seek to facilitate the return to Australia of those people deemed in need of protection or assist such people to travel to a safe third country. These are, it must be recognised, possibilities whose outcomes cannot be guaranteed and it is clearly more desirable that people in need of protection not be returned to situations of danger.

### **RECOMMENDATION 7.3**

*That the returnee monitoring commission have the institutional resources to ensure that, should it express concerns for the safety of returnees, those safety concerns be addressed by or through the Australian government.*

### **RECOMMENDATION 7.4**

*That the returnee monitoring commission have clear links into the policy- and decision-making processes related to protection in Australia.*

The returnee monitoring commission would be charged with developing a research methodology to ensure that its findings are credible and that the safety of those being monitored is of the highest importance. In developing its methodology, the commission should convene a meeting or series of

meetings with relevant academics and international organisations with expertise in the fields of refugee protection and human rights monitoring, and with links in countries to which failed asylum seekers are returned. Methodological issues to be discussed would include how to maintain the safety of those being monitored and ways of ensuring that the research was based, as far as possible on a representative sample while ensuring that those at particular risk, including those forcibly returned and those returned from beyond the state's borders, are targeted for monitoring. It may be necessary for the commission to outsource some of its research functions to organisations with a local presence or to academics with appropriate expertise. Outsourcing functions, including the on-the-ground monitoring in certain circumstances, would allow a further degree of separation from the Australian government, thereby creating a barrier to claims that Australia is interfering into the sovereignty of countries of return.

At present, the Australian government does not disclose personal information related to returnees on the grounds that it may compromise their safety and confidentiality. Informed consent would need to be a central component to monitoring the safety of returnees.

### RECOMMENDATION 7.5

*That the Australian government establish clear means by which the returnee monitoring commission can have access to returnees pre-return, including those facing forced removal and those interdicted overseas and turned around before passing through Australia's migration zone, in order to discuss monitoring protocols including informed consent.*

Australia has signed a number of return agreements with other states, including Iran, Afghanistan and the People's Republic of China. One of the means of ensuring the safety of returnees might be to ensure that states of return are accountable for the safety of returnees. Monitoring returnees would be an important component of accountability. While there are clearly limitations to such agreements, as demonstrated in Box 7.3, monitoring the safety of returnees should be a fundamental component of any return agreements Australia signs.

### RECOMMENDATION 7.6

*That Australia should ensure that any return agreements it signs with other states include the ability of the Australian government to assess the safety and wellbeing of returnees.*

## BOX 7.3 US/CUBAN MONITORING MODEL

In 1995, the Clinton Administration signed an agreement with Cuba for the processing of Cubans intercepted on the sea while trying to get to the US. Under the agreement, the US State Department is required to monitor Cubans that the US returns to Cuba to ensure that they are not punished for attempting to leave the island state.

However, in May 2004, the State Department reported that it had been unable to monitor returnees outside the Cuban capital since March the previous year. Scheduled twice yearly migration talks between the two countries have not occurred since January 2004 because, among other things, Cuba refuses to discuss its responsibility to allow US diplomats to travel to monitor returnees.<sup>156</sup>

Haitians interdicted have no guarantees upon return and their safety is not monitored.

<sup>156</sup> Wikipedia, Wet Feet/Dry Feet Policy, available online at [http://en.wikipedia.org/wiki/Wet\\_Foot-Dry\\_Foot\\_Policy#Reference](http://en.wikipedia.org/wiki/Wet_Foot-Dry_Foot_Policy#Reference), accessed 24 April 2006.

# List of Recommendations

## RECOMMENDATION 1.1

*That the issue of 'return' be understood as part of Australia's broader protection obligations. A successful return should be understood as one in which returnees' human rights are protected. This understanding should be clearly articulated in government policy and should frame Australia's approach to return. To this end, Australia must ensure that people who need protection are indeed granted protection.*

## RECOMMENDATION 1.2

*That Australia implement a complementary protection regime in order to ensure that non-citizens who are not Convention refugees, but who nonetheless cannot be removed from Australia because of risks to their fundamental human rights are protected in Australia.*

## RECOMMENDATION 2.1

*That Australia develop a protocol for overseas airline liaison officers (ALOs) to respond to 'potentially inadmissible passengers' in need of protection. This should include a clear process by which protection concerns are identified. It should require that the ALO outline to passengers that they are suspected as being inadmissible to Australia and that unless they can show protection concerns, they may be prevented from boarding the vessel.*

## RECOMMENDATION 2.2

*That Australia train ALOs about Australia's international obligations, detecting protection concerns and the protocols for protecting 'potentially inadmissible passengers' with protection concerns.*

## RECOMMENDATION 2.3

*That Australia clarify the roles and responsibilities of itself and airlines where 'potentially inadmissible passengers' are deemed to have protection concerns. Airlines should not be in a position to determine protection concerns. Nor should they be sanctioned for bringing inappropriately documented persons with protection concerns to Australia.*

## RECOMMENDATION 2.4

*That Australia formalise its relationship with UNHCR at overseas airports in which ALOs are posted. 'Potentially inadmissible passengers' with protection concerns should be referred to the UNHCR for a refugee status determination.*

## RECOMMENDATION 2.5

*That Australia develop a mechanism for non-citizens intercepted by Australian ALOs and subsequently found by the UNHCR to be refugees to be brought to Australia. Such a mechanism should reflect Australia's responsibility in sharing the international protection burden.*

## RECOMMENDATION 2.6

*That Australian immigration officials at Australian airports clearly state to non-citizens who are about to be turned around that this is the situation and that unless they have protection concerns, they will be removed from the country.*

**RECOMMENDATION 2.7**

*That Australia develop a transparent process whereby any protection related concerns on the part of a potential unauthorised non-citizen at Australian airports can be articulated. These protection concerns should take account of the Refugees Convention as well as other international human rights instruments to which Australia has acceded. The process for determining whether a non-citizen has protection concerns might be based on the US credible fear test. It might also include UNHCR and legal and welfare organisations.*

**RECOMMENDATION 2.8**

*That in situations of offshore interceptions Australian officials be required to provide a statement, in a language that asylum seekers understand, that they are about to be returned to Indonesia and give any individuals who have a reason to fear returning the opportunity to state their concerns to Australian officials. Australia should set in place a mechanism by which such people can have their claims for protection assessed in a fair, credible and accurate process.*

**RECOMMENDATION 2.9**

*That Australia negotiate an agreement with Indonesia that ensures that people Australia returns are not endangered in Indonesia and that an independent monitoring body is able to monitor the fate of such people.*

**RECOMMENDATION 2.10**

*That Australia clarify its relationship with Indonesia to ensure that those it is returning have a legal basis to be in Indonesia.*

**RECOMMENDATION 2.11**

*That Australia clarify the Royal Australian Navy's responsibilities to ensure that the safety of asylum seekers remains paramount. The threshold for embarking asylum seekers onto RAN vessels for their own safety should be low, acknowledging that the line between a 'barely seaworthy' and an unseaworthy vessel is thin and might be rapidly crossed.*

**RECOMMENDATION 2.12**

*That Australia empower an independent monitoring body to investigate and produce regular reports regarding the efficiency and effectiveness of its non-entrée policies and practices. The measure of the efficiency and effectiveness ought to include both border control factors as well as protection considerations.*

**RECOMMENDATION 3.1**

*That asylum seekers transferred to offshore processing centres be provided with high quality legal advice and assistance in order that they can best make their case for protection.*

**RECOMMENDATION 3.2**

*That the protection determination process in Australia's offshore processing centres be efficient, transparent and accurate. Those rejected at the first instance should have access to a meaningful and independent appeals process.*

**RECOMMENDATION 3.3**

*That as well as Australia's protection obligations under the 1951 Refugee Convention, other international instruments to which Australia is a party be considered in the granting of protection.*

**RECOMMENDATION 3.4**

*That conditions of reception in Australia's offshore processing centres be humane and allow for a dignified existence. Opportunities for meaningful activities, including educational and vocational training that equip asylum seekers to continue their lives whether the outcome of their protection claim is positive or not, should be provided. The conditions of offshore processing centres should not be used as a means of pressuring asylum seekers to return to their homelands or to third countries.*

**RECOMMENDATION 3.5**

*That vulnerable groups, including children, single women, torture survivors and the seriously ill, should not be transferred to offshore processing centres, but be brought to the Australian mainland for care and processing.*

**RECOMMENDATION 3.6**

*That in view of the deleterious psychological effect of extended stay in an offshore processing centre, a limit be placed on the time an asylum seeker or refugee can remain in such a place before they are resettled in Australia.*

**RECOMMENDATION 3.7**

*That Australia's offshore processing centres be subject to regular independent monitoring. Australia's agreements with the countries in which the centres are located should include provision for media and others to access the camps.*

**RECOMMENDATION 4.1**

*That Australia implement a more nuanced detention regime, such as that proposed by the Justice for Asylum Seekers Alliance, to eliminate the negative mental health implications of long-term, indefinite detention and to ensure that the policy goal of return might be realistically achieved.*

**RECOMMENDATION 4.2**

*That alternatives to detention be developed as part of a holistic reception paradigm, including the development of a case management approach to community-based asylum seekers.*

**RECOMMENDATION 4.3**

*That detention for the purposes of removal should be available only when a failed asylum seeker is assessed as a flight risk. In such instances, a time limit on detention should also be in place. Stateless persons should not be detained pending removal because, by definition, they cannot leave Australia and go to another state. Persons who are unable to access necessary travel documentation should be released from detention until arrangements can be put in place for their removal. Children should not be detained.*

**RECOMMENDATION 4.4**

*That the detention of failed asylum seekers be subject to regular administrative review as a means of guarding against arbitrary and extended detention.*

**RECOMMENDATION 5.1**

*That the refugee determination process be made as efficient as possible, reducing the length of time a person waits for a final decision, without compromising the quality of decision-making. Decision-makers should be encouraged to make quick decisions while erring on the side of caution.*

**RECOMMENDATION 5.2**

*That there be a period of time, after which, regardless of the fear of persecution, an asylum seeker should not be compelled to leave Australia. This ought not to be an automatic grant of residence, but in order to prevent spurious cases that are prolonged specifically to delay appropriate removal, should include an administrative process whereby asylum seekers need to prove that they have sought a resolution of their case.*

**RECOMMENDATION 5.3**

*That the government encourage all asylum seekers to access legal advice. To this end, the government should ensure that adequate funding is available for community-based, not-for-profit immigration law services. In a case management model it would be the role of Immigration Department case managers to ensure that all asylum seekers are referred to appropriate legal advisors.*

**RECOMMENDATION 5.4**

*That the protection determination process be fair, accurate and timely and should include a mechanism for protection of people who are not Convention Refugees but who nevertheless should be protected.*

**RECOMMENDATION 5.5**

*That asylum seekers within the Australian community have access to publicly funded medical care.*

**RECOMMENDATION 5.6**

*That asylum seekers be encouraged to work or attend vocational training designed with the dual ends of return or settlement in Australia in mind. Training obligations should be developed as part of a case management model within the Immigration Department.*

**RECOMMENDATION 5.7**

*That a database of short-term vocational training courses be developed by the Immigration Department in order that case managers can refer asylum seekers to appropriate courses. The attendance of such courses could be part of the case plan and form the basis of providing asylum seekers with the skills to move permanently into the Australian community, or to return to their homelands with increased employment opportunities.*

**RECOMMENDATION 5.8**

*That asylum seekers in assisted removal procedures not be detained unless deemed to be at risk of absconding.*

**RECOMMENDATION 5.9**

*That the government provide assistance and incentives for failed asylum seekers to return. These could include both cash and in-kind support and could be delivered by community-based organisations.*

**RECOMMENDATION 5.10**

*That the Immigration Department further develop its case management approach. The case management approach should require community-based asylum seekers to have regular contact with a case manager within the Department. The case manager should, with the asylum*

seeker, develop a case plan which sets out the goals and responsibilities of the case manager and the asylum seeker for the duration of the determination process, taking into account the possible outcomes of that process. Part of the case manager's role, consistent with the case plan, would be to ensure that the asylum seeker has access to the legal, medical and welfare resources necessary for a dignified existence. In order to meet these needs, case managers should refer asylum seekers to relevant community-based organisations. The case manager should oversee the case while community-based support workers should undertake the practical tasks of ensuring that the needs of asylum seekers are met.

Regular meetings between the case manager and the asylum seeker should focus on meeting the expectations agreed to in the case plan. The regular meetings between the case manager and the asylum seeker would also be opportunities to discuss the option of return and the process by which this might occur. Additionally case conferencing with key stakeholders involved in the case are vital to ensure that intervention plans are understood by all parties and structured to best equip asylum seekers for the potential outcomes of their determination processes.

#### **RECOMMENDATION 5.11**

*That front-end discussion with all asylum seekers be initiated, stating clearly that their claims for protection will be treated confidentially and will be processed with diligence, but also outlining the prospect that their applications for protection may be rejected. It should be made clear that in such an event, they will be required to leave Australia and that if they do not do so voluntarily, steps will be taken to ensure their removal. There should be an absolute commitment to protection while also informing the applicant of the right of the government to remove those found not to be in need of protection.*

#### **RECOMMENDATION 5.12**

*That migration agents be required, as a condition of their licence to practice, to inform their clients that their application for protection may result in a rejection and that in such circumstances, they will be required to leave Australia. If they do not do so voluntarily, they will be compelled to do so by the state.*

#### **RECOMMENDATION 5.13**

*That community-based organisations be funded to discuss the prospect of return with asylum seekers. Such organisations should be charged with discussing the range of factors associated with return. These organisations should not promote return. Nor should they be funded to have any role in organising or facilitating the actual return. Their role should be strictly confined to counselling around the option of return. Government funding should not be tied to return rates. Such organisations should be able to contribute into the Pre-Return Case Consultation (see recommendation 5.16) should they determine that a protection need has been overlooked.*

#### **RECOMMENDATION 5.14**

*That the Immigration Department engage with the local communities of significant asylum seeker producing countries to discuss the government's immigration goals and the issue of return.*

#### **RECOMMENDATION 5.15**

*That the Australian government fund fact-finding missions to countries of major return destination. Local ethnic community leaders and representatives of asylum seeker community organisations should be funded to attend.*

**RECOMMENDATION 5.16**

*That a final step in the protection/removal process be established called a 'pre-removal case consultation'. The consultation should be facilitated by the Immigration Department case manager, and bring together the asylum seeker, their legal representatives and their welfare support workers. The discussion should focus around two issues: 1. Any protection-related concerns that have arisen in the period between the second tier process and the asylum seekers' pending return. If any are identified, the caseworker should be responsible for triggering the Minister's discretionary power to intervene to overturn a decision in the national interest. 2. The issues that would most effectively facilitate the return of the failed asylum seeker. This would include matters in Australia that need to be finalised and issues in the country of return. A pre-removal case contract would replace the case plan, stipulating the actions required of the asylum seeker to finalise matters in Australia and organise for their return, setting up timeframes of no longer than three months to fulfil these obligations, and outlining the actions of the case manager to ensure that matters of concern in the country of return are dealt with. These might include ensuring that housing, employment, on-arrival support, etc are organised. The case manager would be responsible for organising or outsourcing to non-government organisations the facilitation of such activities.*

**RECOMMENDATION 5.17**

*That the Immigration Department establish a database and provide training for case managers around accessing organisations, goods and services for the facilitation of return to ensure that the reintegration of the returnee is as smooth as possible.*

**RECOMMENDATION 5.18**

*That detention for the purpose of removal be for the shortest possible length of time. Failed asylum seekers whose removal is not imminent or for whom return will be delayed should be released from detention into a lesser form of monitoring.*

**RECOMMENDATION 5.19**

*That Australia develop guidelines on the use of force in removing failed asylum seekers making specific reference to Australia's international human rights obligations.*

**RECOMMENDATION 5.20**

*That Australia not outsource the forcible removal of failed asylum seekers to private companies.*

**RECOMMENDATION 5.21**

*That there should be a finite period of time after which, if persons remain non-returnable, they are able to regularise their immigration status and remain in Australia permanently.*

**RECOMMENDATION 6.1**

*That temporary protection only be used in cases of mass influx, or in circumstances in which the granting of permanent protection would encourage the further expulsion of certain groups from a state.*

**RECOMMENDATION 6.2**

*That temporarily protected persons have access to the refugee determination process. To this end, the bar on TSHV holders from applying for protection under the onshore determination process except through the Minister's discretionary power should be removed.*

**RECOMMENDATION 6.3**

*That a maximum time limit be set for temporarily protected persons to have only temporary protection. To this end, the government should establish a maximum time limit for TSHV, after which time, TSHV holders, by virtue of their ongoing need for protection, be granted a more secure status.*

**RECOMMENDATION 6.4**

*That because of the human cost of temporary protection, refugees should be granted permanent residence in Australia, including the right to family reunion.*

**RECOMMENDATION 6.5**

*That the government provide opportunities for refugees to return to their countries of origin after the cessation of the causes of their flight. The decision to return should be entirely voluntary, meaning that refugees should maintain their legal status as permanent residents in Australia and should in no way be compelled to return.*

**RECOMMENDATION 7.1**

*That Australia create and fund an independent returnee monitoring commission to monitor the safety of returnees. The returnee monitoring commission should produce regular reports which, within the bounds of confidentiality and with due regard to the safety issues involved, should be public. The returnee monitoring commission should have a constitutional commitment to the maintenance of human rights and the yardstick for measuring the safety of returnees should be Australia's international protection and human rights obligations.*

**RECOMMENDATION 7.2**

*That as a way of minimising the concern that in monitoring returnees Australia would breach the national security of other states, the returnee monitoring commission be funded by government, but be independent of government.*

**RECOMMENDATION 7.3**

*That the returnee monitoring commission have the institutional resources to ensure that, should it express concerns for the safety of returnees, those safety concerns be addressed by or through the Australian government.*

**RECOMMENDATION 7.4**

*That the returnee monitoring commission have clear links into the policy- and decision-making processes related to protection in Australia.*

**RECOMMENDATION 7.5**

*That the Australian government establish clear means by which the returnee monitoring commission can have access to returnees pre-return, including those facing forced removal and those interdicted overseas and turned around before passing through Australia's migration zone, in order to discuss monitoring protocols including informed consent.*

**RECOMMENDATION 7.6**

*That Australia should ensure that any return agreements it signs with other states include the ability of the Australian government to assess the safety and wellbeing of returnees.*

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