The Parliament of the Commonwealth of Australia

JOINT STANDING COMMITTEE ON MIGRATION

ASYLUM, BORDER CONTROL AND DETENTION

February 1994

Australian Government Publishing Service
Canberra

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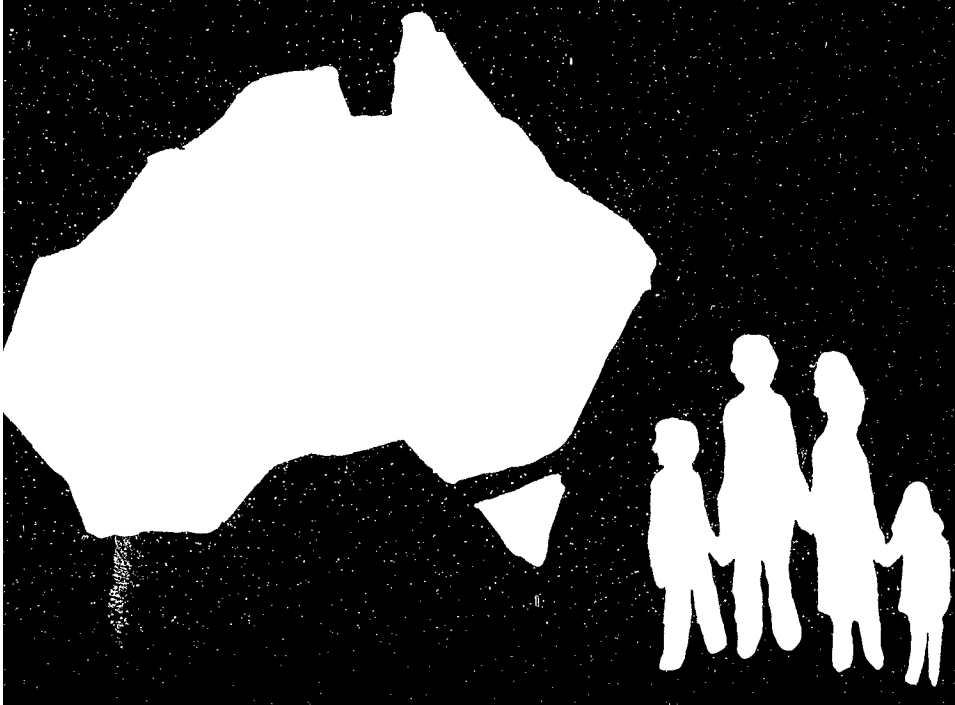

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Joint Standing Committee on Migration February 1994

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FOREWORD

Australia's immigration law includes provisions for the detention, in certain circumstances, of non-citizens who seek to enter or remain in Australia but do not have a valid visa or entry permit. Under the *Migration Act 1958*, such non-citizens can be detained, and in some circumstances must be detained, while their claims to enter or remain in Australia are determined.

In recent years, Australia's immigration detention arrangements have attracted much public comment. In particular, concerns have been expressed regarding the situation of persons who have arrived at Australia's shores by boat without a valid visa or entry permit and subsequently have sought refugee status. For a variety of reasons, some of those persons have remained in detention for over four years.

Over the past nine months, the Joint Standing Committee on Migration has investigated the complex issues relevant to immigration detention in Australia. The Committee consulted widely with community and government representatives. It visited various immigration detention centres around Australia and held discussions with staff and detainees at those centres.

In this report, the Committee presents a comprehensive and detailed analysis of the law and practice relating to immigration detention in Australia. The Committee also has examined the new legal regime which is set to come into force on 1 September 1994.

In formulating its recommendations, the Committee considered the recent history of immigration detention in Australia. The Committee's role, however, was not to justify past practice, nor to apportion blame for past mistakes. The Committee's principal objective was to determine the appropriateness or otherwise of detention within the context of Australia's orderly migration program.

The Committee deliberated on the various options relating to detention which were canvassed in submissions and at public hearings. The Committee also took into account the obligations which Australia has assumed as signatory to various international treaties.

The findings and recommendations of the Committee outlined in this report are based on the totality of evidence presented to it during the inquiry. These recommendations have the support of all but one member, whose dissenting report is at page 201. An addendum from another member on aspects of the report is at page 195.

The Committee's recommendations seek to ensure that Australia continues to provide an appropriate humanitarian response to those who are assessed as being refugees, including those who arrive at Australia's shores and those who seek Australia's assistance and protection from overseas. At the same time, the Committee's recommendations are aimed at maintaining the integrity of Australia's migration program.

As Chairman, I wish to express my appreciation to all those who have contributed to this inquiry and to the preparation of this report. In particular, I am grateful to all those who provided evidence to the Committee, both in written form and at public hearings. I also am grateful to my fellow Committee members for the time and effort they devoted to the inquiry. Special thanks are due to Dr Kathryn Cronin, the Committee's legal adviser, for her valuable advice and support, and to the Committee Secretariat, including the Committee Secretary, Mr Andres Lomp, staff members Ms Dianne Fraser and Ms Elizabeth Copp, and the Committee's parliamentary intern, Ms Saraswathi Karthigasu.

By presenting all the facts on immigration detention, this report will contribute to a better understanding of the issue.

Adoption of the Committee's recommendations will ensure that an appropriate immigration system operates in the best interests of Australia.

SENATOR JIM McKIERNAN
CHAIRMAN

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TERMS OF REFERENCE

Having regard to the passage of the *Migration Amendment Act 1992* and the *Migration Reform Act 1992* and the support of the major parties for the revised refugee determination process provided for by these laws, the Joint Standing Committee on Migration inquire into and report, on or before the first sitting day of December 1993, on:

(a) whether the policy of detaining in custody persons who arrive from overseas without a valid entry permit is the most appropriate policy available;

(b) whether the Bridging Visa system, by which non-citizens apprehended after the expiry of their entry visa may be released from detention for a period of time while their claims to stay in Australia are determined, should be extended to non-citizens at the border without an entry visa who make a claim to remain in Australia;

(c) whether other alternatives to detention such as the use of bonding systems, including the use of community-based sponsorships or parole arrangements, which have been tested and which operate overseas, could be appropriately applied in Australia; and

(d) what possible enforcement of such bonds or assurances could effectively be pursued.

MEMBERS OF THE COMMITTEE

Chairman:	Senator Jim McKiernan
Deputy Chairman:	Senator Jim Short
Members:	Senator Christabel Chamarette Senator Barney Cooney Mr Laurie Ferguson, MP Hon Clyde Holding, MP Mr Philip Ruddock, MP Rt Hon Ian Sinclair, MP Mrs Kathy Sullivan, MP Mr Harry Woods, MP
Secretary:	Mr Andres Lomp
Legal Adviser:	Dr Kathryn Cronin
Inquiry Staff:	Ms Elizabeth Copp Ms Dianne Fraser
Parliamentary Intern:	Ms Saraswathi Karthigasu

ABBREVIATIONS

ACC	Australian Council of Churches
AD(JR) Act	*Administrative Decisions (Judicial Review) Act 1977*
Amnesty	Amnesty International Australia
AIC	Australian Institute of Criminology
APS	Australian Protective Service
ASA	Asylum Seeker Assistance Scheme
BHP	Broken Hill Proprietary Company Limited
Committee	Joint Standing Committee on Migration
Convention Against Torture	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CRSS	Community Refugee Settlement Scheme
DIEA	Department of Immigration and Ethnic Affairs
DILGEA	Department of Immigration, Local Government and Ethnic Affairs
DORS	Determination of Refugee Status
FECCA	Federation of Ethnic Communities' Councils of Australia
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	The International Covenant on Civil and Political Rights 1966
INS	United States Immigration and Naturalization Service
IRT	Immigration Review Tribunal
Migration Act	*Migration Act 1958*
Migration Reform Act	*Migration Reform Act 1992*

Minister	Minister for Immigration and Ethnic Affairs
NSW	New South Wales
PIN	Personal Identification Number
Refugee Convention	United Nations Convention Relating to the Status of Refugees 1951
Refugee Protocol	United Nations Protocol Relating to the Status of Refugees 1967
RRT	Refugee Review Tribunal
RSRC	Refugee Status Review Committee
UNHCR	United Nations High Commissioner For Refugees
United States	United States of America
WA	Western Australia

RECOMMENDATIONS

Chapter Three: The Law On Immigration Detention

The Committee recommends that:

1. the Department of Immigration and Ethnic Affairs consider certain anomalies in the text of the *Migration Reform Act 1992*, as identified by the Committee and outlined at paragraphs 3.139, 3.140, 3.150 and 3.151 and 3.155 of this report, and overcome these anomalies before the commencement of the *Migration Reform Act 1992* on 1 September 1994;

2. as soon as possible, the Government provide to the Committee for examination the draft regulations which will accompany the *Migration Reform Act 1992*;

3. the decision on whether to include unauthorised border arrivals and clandestine entrants within the prescribed class of detention non-citizens, conferring on them eligibility to be released from detention with a bridging visa, be a decision of the Minister for Immigration and Ethnic Affairs personally which is not to be delegated. In addition, the mechanism for including such non-citizens within the prescribed class of detention non-citizens be structured carefully so as to allow for appropriate exercise of Ministerial discretion without inviting challenges for judicial review of such discretion;

4. the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903* be amended to specify that the *Migration Reform Act 1992* and its predecessors are enactments to which the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903* do not apply;

5. a leave provision be introduced such that applicants challenging decisions under the *Migration Act 1958* be required to obtain leave in order to apply for a review of Migration Act decisions to the Federal Court;

6. if the amendments in the *Migration Reform Act 1992* and the proposals in this report aimed at curtailing the recent trend to litigate migration decisions in the higher courts are not successful, consideration be given to implementing a new refugee determination process which would provide refugee claimants with access only to the two tier administrative process, and which would close off access to review and appeal in the higher courts, save for the right of access to the High Court which is guaranteed in the Australian Constitution; and

7. public funding be available through the Department of Immigration and Ethnic Affairs for the provision of legal advice and assistance to border refugee claimants in relation to the preparation of primary applications for refugee status and review applications to the Refugee Review Tribunal. Thereafter, publicly funded legal assistance to refugee claimants seeking review of a refusal decision to the Federal Court be provided only on the basis of a merits test. (paragraph 3.183)

Chapter Four: Detention Of Unauthorised Border Arrivals

The Committee recommends that:

8. as an absolute priority, the Department of Immigration and Ethnic Affairs and the Refugee Review Tribunal ensure that applications for refugee status are processed in a fair and expeditious manner, and that the processing of applications for refugee status from unauthorised border arrivals and persons held in detention continues to be given precedence;

9. all parties to litigation concerning and relating to refugee determinations make every effort to expedite the hearing of that litigation;

10. unauthorised border arrivals who claim refugee status be held in detention during the determination of their status, including during administrative processing, administrative review and any legal appeals, but that there be a capacity to consider release where the period of detention exceeds six months;

11. in cases where unauthorised border arrivals who claim refugee status have been held in detention for more than six months, and the continued detention has been brought about by a lack of action or administrative error by the Department of Immigration and Ethnic Affairs, the Minister for Immigration and Ethnic Affairs, in accordance with the Minister's powers under the *Migration Reform Act 1992*, give consideration to including such detained asylum seekers in a prescribed class of detention non-citizens eligible for the grant of a bridging visa, which secures release from detention. In considering whether to include in the prescribed class all or any such detainees, the Minister have regard to the following matters:

    - whether the applicant has a special need based on age, health, or previous experiences of torture and trauma;
    - whether the applicant has satisfied appropriate health, character and security checks;
    - the likelihood that the applicant would abscond if granted a bridging visa;
    - whether there is a reasonable basis for the applicant's claim to refugee status;
    - the timeliness of the lodgement of the application for refugee status;
    - the extent to which the applicant co-operated with the Department of Immigration and Ethnic Affairs in the provision of information relevant to the applicant's claims;
    - whether there will be adequate support arrangements if the applicant is released into the community; and
    - Australia's international obligations;

12. in determining whether to prescribe any unauthorised border arrivals as a class of detention non-citizens eligible for the grant of a bridging visa, the Minister for Immigration and Ethnic Affairs give particular consideration to the release of those persons who particularly are vulnerable to any effects of long term detention, namely those persons with a special need based on age, health, or previous experiences of torture and trauma;

13. in order to be granted a bridging visa, an unauthorised border arrival deemed eligible for release from detention should be required to agree that he/she will:

    - report regularly, at least once a fortnight, to a nominated office of the Department of Immigration and Ethnic Affairs;
    - reside at a nominated address notified in advance to the Department of Immigration and Ethnic Affairs;
    - notify the Department of Immigration and Ethnic Affairs at least one week in advance of any change of address; and
    - depart Australia or present for removal if he/she is refused refugee status; and

14. before unauthorised border arrivals who become eligible for the grant of a bridging visa in fact are released into the community, the Department of Immigration and Ethnic Affairs liaise with accredited community support or charitable organisations and relevant ethnic community groups to ensure that appropriate support arrangements are established to maintain such persons in the community. In addition, any government funding which may be provided to assist with such support arrangements be directed through accredited community support or charitable organisations. (paragraph 4.181)

Chapter Five: Immigration Detention Centres

The Committee recommends that:

15. an Immigration Detention Centres Advisory Committee be established, comprising representatives of the Department of Immigration and Ethnic Affairs, Australian Protective Service, detention centre residents, community based service providers and local community representatives. The terms of reference for the advisory committee should require it to consider and make recommendations on matters pertaining to the conditions and services provided within immigration detention centres. In considering such matters, the advisory committee should be required to take account of issues relevant to the refugee determination process, including the number of persons detained, the likely length of their stay, and the likelihood of their gaining refugee status in Australia;

16. having regard to the literacy levels of detainee children, the number of native languages spoken, the likelihood of the children being allowed to remain in Australia, and the standard of education provided within the centre in which the children are detained, the Department of Immigration and Ethnic Affairs consult with State Government education agencies to determine whether, in appropriate cases, children held at the detention centres might be able to attend local schools, and to consider whether education in a child's native language is viable and can be organised;

17. where a large group of detainees belonging to a particular ethnic group are held together in a particular immigration detention centre, the Department of Immigration and Ethnic Affairs make every effort to engage the services of medical personnel who can provide regular consultations in the native language of that ethnic group;

18. the Port Hedland Immigration Reception and Processing Centre be retained for the purpose of detaining unauthorised boat arrivals pending the determination of their status; and

19. should the number of detainees held at the Port Hedland Immigration Reception and Processing Centre decrease to the extent that it is no longer viable to operate the Centre, the Port Hedland Centre be decommissioned, but with the capacity to recommission the Centre should it be required in the future. (paragraph 5.127)

Chapter One

THE INQUIRY

Introduction

1.1 On 27 May 1993, the Senate passed a resolution requesting that the Joint Standing Committee on Migration (the Committee) conduct an inquiry into immigration detention practices in Australia.

1.2 The Committee agreed to the request from the Senate and adopted the terms of reference proposed by the Senate. The terms of reference are at page x.

1.3 The focus of the Committee's inquiry was the immigration detention arrangements for persons who arrive in Australia without authorisation (unauthorised arrivals)[1] and who claim refugee status upon arrival. Under the existing provisions of the *Migration Act 1958*, such persons are liable to be detained, and in some cases must be detained, until they gain an entry permit or are removed from Australia.

1.4 At the same time, the Committee gave consideration to the detention arrangements for persons who enter Australia with a valid entry permit and subsequently become illegal entrants. Illegal entrants are persons who overstay their visa, breach the conditions of their visa, or gain entry to or stay in Australia by deception, or enter without proper clearance in breach of health or character requirements. Such persons also are liable to detention, but tend to be released into the community while their claims to remain in Australia are processed.

1.5 During the inquiry, the Committee considered the immigration detention arrangements under the existing provisions of the Migration Act, as well as the proposed detention arrangements which will come into force when the *Migration Reform Act 1992* comes into operation on 1 September 1994.

Background to the inquiry

1.6 The inquiry was established following increased public concern and criticism regarding Australia's policy of mandatory detention of unauthorised arrivals who claim refugee status. Much of that concern has been generated as a result of the lengthy detention to which a number of boat arrivals have been subjected.

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1 A detailed explanation of the relevant terminology is provided in Chapter Three, which deals with the law on immigration detention.

1.7 The genesis of the existing problems with immigration detention can be traced back to 28 November 1989, when 26 Chinese and Vietnamese asylum seekers landed at Broome, in the north west of Australia. In the period 28 November 1989 to 27 January 1994,[2] a total of 18 boats arrived at Australia's shores, bringing with them 735 persons of varying nationality, mainly Cambodian, Chinese and Vietnamese. Most of these arrivals sought refugee status in Australia and were detained pending the determination of their claims. 32 children were born while these persons were in detention.[3]

1.8 The arrival of these boats coincided with significant changes to the Migration Act, in particular the abolition of the mechanism to obtain residence in Australia on strong compassionate and humanitarian grounds, and a dramatic increase in the number of applications for refugee status lodged by persons who already were present in Australia. The number of on-shore refugee applications lodged in Australia rose from 1,148 in 1989 to 11,335 in 1990 and 13,045 in 1991. This reduced to 4,025 applications in 1992 and 3,861 in 1993.[4] The increase was due mainly but not only to the large number of refugee applications lodged by citizens of the People's Republic of China present in Australia during and immediately after the Tiananmen Square incident of June 1989.

1.9 This dramatic increase in refugee applications led to processing delays for refugee applicants who were present in the Australian community, as well as for those who were detained upon arrival in Australia. For the unauthorised arrivals, these delays led to a significantly longer period of detention than was envisaged originally. Other factors also contributed to the increased length of detention, including delays in the lodgement of applications by the boat arrivals, and legal challenges by those refused refugee status. These issues are discussed in further detail later in the report.

1.10 The culmination of all this has been that a number of boat arrivals have remained in detention for a period of over four years. This prolonged detention led to calls for an examination and revision of Australia's immigration detention policy.

2 27 January 1994 is the date of the most recent statistics provided to the Committee by the Department of Immigration and Ethnic Affairs (DIEA).

3 Evidence, pp. S1303-S1336.

4 DIEA, Onshore Refugee Program statistics; Joint Standing Committee on Migration Regulations, *Australia's Refugee And Humanitarian System: Achieving A Balance Between Refuge and Control*, August 1992, AGPS Canberra, p. 2.

Conduct of the inquiry

1.11 The inquiry was advertised nationally on 9 June 1993. In addition, the Committee sought submissions directly from a variety of individuals and organisations, including government departments and agencies, immigration advice organisations, legal bodies, aid agencies and ethnic community organisations.

1.12 The original closing date for submissions was extended for two weeks when less than 30 submissions were received by that closing date.

1.13 There were 112 submissions to the inquiry, which are listed at Appendix One. These included supplementary submissions providing information requested by the Committee at public hearings. The formal submissions have been reproduced in five volumes. The Committee also received 15 exhibits, which are listed at Appendix Two.

1.14 As a commencement point for the inquiry, the Committee received an initial briefing from the Department of Immigration and Ethnic Affairs (DIEA) on 22 June 1993. A transcript of that briefing was authorised for publication. In addition, the Committee conducted inspections of the Port Hedland Immigration Reception and Processing Centre, in north west Western Australia, and the immigration detention centres at Villawood in Sydney, Westbridge Stage 2 (an annexe to Villawood), and Perth. The Committee also inspected Roebourne Prison, in north west Western Australia, where some unauthorised arrivals were held for a short time. During these inspections, the Committee held discussions with the staff at the various centres, and also held informal discussions with some of the detainees. The Committee is grateful to DIEA and the Western Australian Ministry of Justice for enabling the Committee to conduct its inspections, and to the staff at the detention centres and the detainees for their willingness to engage in frank and open discussions with Committee members.

1.15 Formal evidence was taken at public hearings held in Sydney, Perth, Melbourne and Canberra in August, September and October of 1993. Some evidence was taken in camera. The Committee heard from representatives of government departments and agencies, international agencies, community groups, including church representatives, legal bodies, and individuals who had experience dealing with detainees. A list of witnesses who gave evidence at the public hearings is provided at Appendix Three.

1.16 Copies of the transcripts of evidence and the volumes of submissions are available from the Committee Secretariat, or for perusal in the Parliamentary Library or the National Library of Australia. References to evidence in the text of this report relate to page numbers in the transcripts and volumes of submissions. Where the letter 'S' precedes a page number, this signifies evidence from the volumes of submissions.

1.17 In addition to the above evidence, the Committee commissioned a research paper on international law and practice regarding immigration detention. The research paper was prepared by the Committee's parliamentary intern, Ms Saraswathi Karthigasu, a student at the Australian National University who participated in the Parliamentary Internship Program. The Committee is grateful to Ms Karthigasu for the research paper which she prepared, and to those in the Canberra Office of the United Nations High Commissioner for Refugees (UNHCR), particularly Mr George Lombard, who assisted Ms Karthigasu in compiling information for the research paper. The research paper forms part of the inquiry evidence which is tabled in the Parliament in conjunction with this report. A summary of the research paper is provided at Appendix Four.

1.18 Relevant to international practice, the Committee held informal discussions with Dr Arthur Helton, the Director, Refugee Project, Lawyers Committee for Human Rights, New York, United States of America (United States), who has first hand experience with a pilot community release scheme for asylum seekers in the United States. During the Committee's meeting with Dr Helton, he presented to the Committee a paper assessing the pilot project, which has been included as Exhibit 1 in the records of the inquiry. The Committee is grateful to Dr Helton for providing Committee members with the opportunity to hold discussions with him.

Report structure

1.19 In the report, the Committee has focused on the following areas:

- a profile of immigration detention in Australia (Chapter Two);
- the law on immigration detention, from an Australian and international perspective (Chapter Three);
- the detention of unauthorised border arrivals in Australia (Chapter Four); and
- Australia's immigration detention centres (Chapter Five).

Chapter Two

IMMIGRATION DETENTION IN AUSTRALIA

Introduction

2.1 Migration legislation in Australia has included provisions relating to detention since the *Immigration Restriction Act 1901.*

2.2 Detention is one mechanism for ensuring compliance with Australia's immigration laws. Persons who arrive at the border without a visa and seek to enter Australia (unauthorised border arrivals) can be held in detention, as can persons who have entered Australia legally but subsequently have offended against Australia's immigration laws (illegal entrants).

2.3 Australia's existing immigration detention system consists of a complicated range of provisions. The current Migration Act sets down different detention requirements which vary according to the mode of transport which a person has used to arrive in Australia, and whether in law a person is considered to have entered Australia. These provisions are outlined in detail in Chapter Three.

2.4 As a commencement point for its inquiry, the Committee sought to gain an understanding of the basic facts relevant to the operation of immigration detention in Australia. The Committee examined the practice of immigration detention in Australia, in order to gain a clear picture regarding those persons liable to be detained under the Migration Act, and the term and conditions of their detention. The Committee also considered the issue of detention within the broader context of Australia's migration program.

Australia's migration program

2.5 Detention is one element of Australia's system of immigration control. A fundamental aim of that system is to ensure the integrity of Australia's migration program. Before detailing the facts and issues relevant to immigration detention, the Committee considered that it was important to outline the principal components of Australia's migration program, in order to provide some perspective as to the significance of the detention issue within the total framework of immigration policy.

2.6 The objective of Australia's migration program is 'to determine the flow of people into and out of Australia so that national and international benefits to the Australian community are maximised and costs are minimised'.[1] The migration program has four main components:

- family migration;
- skill migration;
- special eligibility; and
- humanitarian migration.

2.7 In the last three financial years, the number of settlers to arrive in Australia under the above four components of the migration program was 123,566 persons in 1990/91, 110,894 persons in 1991/92 and 79,773 persons in 1992/93.[2] These are arrival figures only and do not represent the net migration outcome, as they do not include the numbers of residents departing Australia for the long term in each of these years. For 1993/94, the projected figure for the four components of the migration program was 76,000 persons (see Table 2.1).[3]

Family migration

2.8 The family migration component includes two main categories:

- preferential family; and
- concessional family.

2.9 The preferential family category facilitates the entry to Australia of close or immediate family members, including spouses, fiances, unmarried dependent children and parents who meet a balance of family test introduced in December 1988 and are sponsored by an Australian citizen or permanent resident. The concessional family category provides for the reunion of extended family members who are assessed in a competitive test which awards points according to the attributes of applicants and their sponsor.

1 DIEA, *Annual Report 1992-1993*, p. 19.

2 Bureau of Immigration and Population Research, *Immigration Update*, September Quarter 1993, p. 33.

3 DIEA, *Annual Report 1992-1993*, pp. 28, 54.

2.10 The number of settlers arriving in Australia under the family migration component was 61,253 persons in 1990/91, 55,859 persons in 1991/92 and 45,254 persons in 1992/93.[4] For 1993/94, the projected figure for the family migration component was 45,000 persons (see Table 2.1).[5]

Skill migration

2.11 The skill migration component seeks to address specific skill shortages in Australia, while at the same time enhancing the size and quality of the Australian labour force. Migrant entry based on the targeting of skills occurs through:

- employer nomination;
- labour agreements, whereby agreement is reached between government, industry and relevant unions on the numbers of skilled persons to be selected;
- admission of people with special talents;
- independent entry, where applicants must satisfy a points test to assess their suitability for employment in Australia; and
- a business skills category, which aims to attract business people with the necessary skills, capital and commitment to settle and enter into businesses which will benefit Australia.

2.12 The number of settlers arriving in Australia under the skill migration component was 49,762 persons in 1990/91, 41,360 persons in 1991/92 and 21,304 persons in 1992/93.[6] For 1993/94, the projected figure for the skill migration component was 17,000 persons (see Table 2.1).[7]

Special eligibility

2.13 The special eligibility component provides for the entry of dependants of New Zealand citizens who intend to settle in Australia but are not New Zealand citizens themselves, former Australian citizens who unavoidably have lost their Australian citizenship and have maintained ties with Australia, and former residents of Australia who spent their formative years in Australia, left without acquiring citizenship and have maintained ties with Australia.

4 *Immigration Update*, op cit, p. 33.

5 DIEA, *Annual Report 1992-1993*, p. 28.

6 *Immigration Update*, op cit, p. 33.

7 DIEA, *Annual Report 1992-1993*, p. 28.

2.14 The number of settlers arriving in Australia under the special eligibility component was 1,222 persons in 1990/91, 1,666 persons in 1991/92, and 1,370 persons in 1992/93.[8] For 1993/94, the projected figure for the special eligibility component was 1,000 persons (see Table 2.1).[9]

Humanitarian migration

2.15 The humanitarian migration component incorporates three general entry categories:

- the refugee program, for persons who have fled their country because they have suffered or have a well-founded fear of persecution for reasons of race, nationality, religion, membership of a social group, or political opinion (the definition of a refugee in the United Nations Convention Relating to the Status of Refugees 1951);
- the global special humanitarian program, for persons outside their country who have experienced substantial discrimination amounting to a gross violation of their human rights; and
- a special assistance category for individuals or groups who are not victims of persecution or substantial discrimination but who are in vulnerable positions or suffering grave hardship either in or outside their country of normal residence.

2.16 In addition, the humanitarian component includes:

- a small in-country special humanitarian program for people experiencing persecution in their own countries; and
- special extension of stay concessions to allow people from countries experiencing civil unrest to extend temporarily their stay in Australia.

2.17 The number of settlers arriving in Australia under the humanitarian component was 11,329 persons in 1990/91, 12,009 persons in 1991/92 and 11,845 persons in 1992/93.[10] For 1993/94, the projected figure for the humanitarian migration component was 13,000 persons (see Table 2.1).[11]

8 *Immigration Update*, op cit, p. 33.

9 DIEA, *Annual Report 1992-1993*, p. 28.

10 *Immigration Update*, op cit, p. 33.

11 DIEA, *Annual Report 1992-1993*, p. 54.

TABLE 2.1

MIGRATION AND HUMANITARIAN PROGRAM OUTCOMES*

ELIGIBILITY CATEGORY	FINANCIAL YEAR									
	1990-91		1991-92		1992-93		1993-94 (projections)			
MIGRATION PROGRAM OUTCOME	No.	%	No.	%	No.	%	No.	%		
Family Migration										
Preferential	38 760	31.4	37 726	34.0	37 563	47.1	34 000	44.7		
Concessional	22 493	18.2	18 133	16.4	7 691	9.6	11 000	14.5		
Total	**61 253**	**49.6**	**55 859**	**50.4**	**45 254**	**56.7**	**45 000**	**59.2**		
Skill Migration										
Employer Nominations	7 532	6.1	5 595	5.0	4 796	6.0	3 000	3.9		
Business Migrants	6 975	5.6	6 230	5.6	3 328	4.2	1 500	2.0		
Special Talents	127	0.1	181	0.2	209	0.3	200	0.3		
Independent	35 128	28.4	29 354	26.5	12 971	16.3	12 300	16.2		
Total	**49 762**	**40.3**	**41 360**	**37.3**	**21 304**	**26.7**	**17 000**	**22.4**		
Special Eligibility	1 222	1.0	1 666	1.5	1 370	1.7	1 000	1.3		
TOTAL MIGRATION PROGRAM	**112 237**	**90.8**	**98 885**	**89.2**	**67 928**	**85.2**	**63 000**	**82.9**		
HUMANITARIAN PROGRAM OUTCOME										
Refugees/Special Humanitarian	11 329	9.2	9 646	8.7	6 42£	8.1	6 650	8.8		
Special Assistance	-	-	2 363	2.1	5 419	6.8	8 350	11.0		
TOTAL HUMANITARIAN PROGRAM	**11 329**	**9.2**	**12 009**	**10.8**	**11 845**	**14.8**	**13 000**	**17.1**		
TOTAL	**123 566**	**100.0**	**110 894**	**100.0**	**79 773**	**100.0**	**76 000**	**100.0**		

* The Program Outcome is the number of migrant visas issued overseas and those granted Permanent Resident Status in Australia.

Source: Bureau of Immigration and Population Research, *Immigration Update*, Sept. Quarter 1993, p. 38; DIEA *Annual Report*, 1992-1993, pp. 28, 54.

2.18 In relation to the 1993/94 projections, it is significant to note that while the general migration intake program was reduced, the humanitarian component was increased. This reflects Australia's continuing commitment to assisting those who are categorised as refugees, special humanitarian cases and special assistance cases. This commitment has been a prominent feature of Australia's immigration policy over the past five decades.

2.19 Relevant to this inquiry, it is important to note that over the past five decades Australia has played a leading role in the resettlement of refugees from various regions of the world. As noted in the report on Australia's refugee and humanitarian system by this Committee's predecessor, the Joint Standing Committee on Migration Regulations:

> Relative to population size, Australia and Canada have been two of the largest recipients of refugees in the post World War II era.[12]

2.20 The Department of Foreign Affairs and Trade stated in its *Human Rights Manual*:

> Australia's record in this field is a good one: over half a million refugees have been resettled in Australia since 1945. Internationally, Australia as a resettlement country ranks third in absolute terms and equal first on a per capita basis.[13]

2.21 The scope of Australia's commitment to the resettlement of refugees was summed up by the National Population Council in its 1991 *Refugee Review*. The Council commented that Australia has established itself as:

> ... a generous country of resettlement, an active participant in determining the international response to the evolving refugee situation, a regular donor to international refugee funds and a compassionate community, as reflected not least in the active support given the network of [non-government organisations] and their involvement in refugee work.[14]

12 Joint Standing Committee on Migration Regulations, op cit, p. 1.

13 Department of Foreign Affairs and Trade, *Human Rights Manual*, 1993, AGPS Canberra, p. 129.

14 National Population Council, *Refugee Review*, July 1991, AGPS Canberra, p. 67.

2.22 Up until 1989, Australia accepted refugees mainly through formal off-shore refugee resettlement programs. As noted at paragraph 1.8, from 1989 onwards, there was a dramatic increase in the number of on-shore applications for refugee status, rising from 1,148 in 1989 to 11,335 in 1990 and 13,045 in 1991. The number of applications reduced to 4,025 in 1992 and 3,861 in 1993.[15]

2.23 The need to consider a large number of on-shore applications for refugee status necessarily limits Australia's ability to respond to off-shore refugee situations. The increased volume of on-shore refugee applications has come at a time when the world as a whole is faced with a refugee crisis of proportions not experienced since the Second World War.

2.24 The Committee has raised these matters because it is of the view that the issue of immigration detention cannot be considered in isolation from Australia's impressive past record and continuing role in resettling refugees and humanitarian cases from around the world. Nor can the detention issue be assessed properly without reflecting on the importance of and the need to maintain the integrity of Australia's orderly migration program.

The rationale for detention

2.25 It is a fundamental legal principle, accepted in Australian law and in international law, that, as a natural incidence of Australia's national sovereignty, the State determines which non-citizens can gain entry to Australia, the conditions under which such non-citizens are admitted or permitted to remain, and the conditions under which they may be deported or removed (*Robtelmes v Brenan* (1906) 4 CLR 395). In the recent High Court case brought by a detained Cambodian litigant (*Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* ((1992) 110 ALR 97, 176 CLR 1) (the *Lim* case), this sovereignty principle was said to confer upon the Executive authority to detain a non-citizen in custody for the purposes of expulsion or deportation, and in order to receive, investigate and determine an application by that non-citizen for an entry permit, and, after that determination, in order to admit or deport that non-citizen.

2.26 Immigration to Australia is controlled by a variety of means. As noted at paragraph 2.5, immigration detention is one control component. All non-citizens coming to Australia, except for those who are exempt[16], are required to have a visa. The visa provides them with the authority to travel to Australia. It also is an indicator that their identity and their reasons for travelling to Australia have been

15 DIEA, Onshore Refugee Program statistics; Joint Standing Committee on Migration Regulations, op cit, p. 2.

16 The list of exempt persons is published in Gazette GN 45 of 20 November 1991 and includes, for example, royal, government, diplomatic and military personnel, crew of vessels, citizens of New Zealand, and permanent residents of the Territory of Norfolk Island.

ascertained. Those who arrive without a visa or with a defective visa, including a visa which is obtained fraudulently or is inappropriate to the person's circumstances, are liable to be refused entry and/or detained. In some instances, they must be detained until granted an entry permit or removed from Australia.

2.27 Detention is one mechanism for ensuring that Australia's entry system is not undermined. In this regard, DIEA stated:

> The rationale for detaining unauthorised arrivals is to ensure that they do not enter Australia until their claims to do so have been properly assessed and found to justify entry.[17]

2.28 After entry, detention serves to ensure that those who have overstayed the terms of their entry permit, breached the conditions of their entry permit, or gained entry or stay by deception can be identified, can have any claim to remain processed, and, if that claim is unsuccessful, can be available for removal.

2.29 The importance of detention within the total framework of immigration control was highlighted by the previous Minister for Immigration, Local Government and Ethnic Affairs, the Hon Gerry Hand, MP, when he stated in the House of Representatives on 5 May 1992:

> I believe it is crucial that all persons who come to Australia without authorisation not be released into the community. Their release would undermine the Government's strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. The Government is determined that a clear message be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.
>
> Australia will, of course, continue to honour its statutory obligations as it has always done. Any claims made by these people will be fully and fairly considered under the available processes, and any person found to qualify for Australia's protection will be allowed to enter. Until the process is complete, however, Australia cannot afford to allow unauthorised boat arrivals to simply move into the community.[18]

17 Evidence, p. S654.

18 Parliamentary Debates (Hansard), House of Representatives, 5 May 1992, p. 2371.

2.30 During the inquiry, some groups argued, on the basis of this statement, that one of the principal reasons for detention is to deter further unauthorised arrivals to Australia. These groups went on to say that deterrence is an inappropriate reason for detaining unauthorised arrivals.[19]

2.31 DIEA, however, responded that 'the rationale behind detention is not cemented on deterrence'.[20] DIEA indicated that while it does seek to deter unauthorised arrivals to Australia, detention is not the principal mechanism for achieving this objective. Rather, the universal visa system is the principal mechanism for deterring unauthorised arrival to Australia.[21] This is not to say that detention is not an important part of immigration control. However, in the view of DIEA, detention is not the only or indeed major element of Australia's immigration control system. (see also paragraphs 4.8 to 4.19).

The detention profile

2.32 The number of persons held in immigration detention in Australia has increased during the past decade (see Table 2.2). The statistics provided by DIEA, which list the number of persons held in detention as at 1 January and 1 July for each of the past ten years, show a definite and substantial increase in the use of immigration detention between 1985 and 1993. For example, while only five persons were held in immigration detention as at 1 January 1985, as at 1 January 1992 this had increased to 478 persons. This increase has continued, with the highest January figure of the past decade recorded in 1993. As at 1 January 1993, 560 persons were held in immigration detention.[22]

2.33 Two factors contributed to this increase in immigration detainees. The first was the landing in Australia of 735 unauthorised border arrivals during the period 28 November 1989 to 27 January 1994, and the birth in Australia of 32 children to some of these arrivals.[23] The second was increased compliance activity against illegal entrants.

19 Evidence, pp. S131, S150, S164, S395, S428, S579, S793.

20 Evidence, p. 995.

21 Evidence, p. S655.

22 Evidence, p. S1050.

23 Evidence, pp. S1303-S1336.

TABLE 2.2 DETENTION NUMBERS JANUARY AND JULY 1985-1993

The numbers of immigration offenders detained as at 1 January and 1 July in each of the last ten years:

Date	Illegal Entrants (see notes)	Criminal Deportees	Boat People	Total
1 Jan 1985	5	0	0	5
1 Jul 1985	12	0	0	12
1 Jan 1986	25	0	0	25
1 Jul 1986	74	0	0	74
1 Jan 1987	15	1	0	16
1 Jul 1987	30	0	0	30
1 Jan 1988	46	0	0	46
1 Jul 1988	33	2	0	35
1 Jan 1989	60	0	0	60
1 Jul 1989	77	0	0	77
1 Jan 1990	86	0	26	112
1 Jul 1990	152	1	224	377
1 Jan 1991	152	1	230	383
1 Jul 1991	218	1	261	480
1 Jan 1992	115	1	362	478
1 Jul 1992	139	3	415	557
1 Jan 1993	164	3	393	560
1 Jul 1993	156	1	290	447

Note 1: Data on Illegal Entrants includes information on persons (other than boat people) detained under the provisions of Sections 88 and 89. These are unauthorised border arrivals who would have travelled to Australia by airline or ship.

Note 2: It has not been possible to identify separately which detainees in this column were also border claimants. However, Attachment F to the Department's submission to the Committee gives details of airport border claimants in Section 89 custody for more than one week, since 1 January 1990.

Source: Evidence, p. S1050.

Unauthorised border arrivals

2.34 In a strict sense, an unauthorised border arrival is any person who is required to have a visa for entry to Australia but arrives at the border without such a visa. Some persons are eligible to obtain a visa at the border, including the spouse and children of Australian citizens and permanent residents, and some students. The term unauthorised border arrival is used more commonly in reference to those persons who are required to have a visa, arrive without a visa, and are unable to be granted a visa immediately upon arrival. It is this usage of the term which the Committee has adopted in this report.

2.35 Unauthorised border arrivals fall into two broad categories:

- persons without a visa who are refused entry and are turned around within a relatively short time frame (mostly less than a week), usually returning to the country from which they originated their travel to Australia. Such persons spend little time in detention; and
- persons without a visa who claim protection and are detained pending lodgement and processing of their applications for refugee status.

2.36 In relation to the first category of unauthorised border arrivals, from 1 July 1989 to 30 June 1993, 2,329 persons were refused entry and turned around at the border, including 2,214 unauthorised arrivals by air and 115 unauthorised arrivals by boat.[24] Most of those turned around have been unauthorised persons arriving by air.

2.37 The turn around figures for the past four financial years are as follows:

- 704 persons in 1989/90, all unauthorised air arrivals;
- 528 persons in 1990/91, all unauthorised air arrivals;
- 530 persons in 1991/92, all unauthorised air arrivals; and
- 567 persons in 1992/93, comprising 452 unauthorised air arrivals and 115 unauthorised boat arrivals.[25]

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24 Evidence, pp. S1261, S1291-S1332. The unauthorised boat arrivals turned around were those persons who arrived on the boats codenamed Norwich and Otter, were refused entry, were not arrested under Division 4B of the Migration Act, and were detained for a relatively short time before being repatriated.

25 Evidence, pp. S1261, S1291-S1332.

2.38 In relation to the second category of unauthorised border arrivals, from 1 January 1990 to 31 December 1993, 833 persons were detained upon arrival and held in custody pending the lodgement and determination of an application to remain in Australia, generally an application for refugee status. The larger percentage in this category has been unauthorised arrivals by boat. Over the past four years, the number of persons who arrived unauthorised and were placed in detention pending the determination of their status was:

- 302 persons in 1990 (198 arrivals by boat and 104 by air);
- 245 persons in 1991 (214 arrivals by boat and 31 by air);
- 143 persons in 1992 (101 arrivals by boat and 42 by air); and
- 143 persons in 1993 (81 arrivals by boat, 57 by air and 5 by ship).[26]

2.39 As a result of the existing legislative scheme, which establishes different detention requirements according to the mode of transport used to arrive in Australia, most of the statistics provided by DIEA on unauthorised border arrivals who are detained were grouped under the three categories of unauthorised border arrivals recognised within the existing legislative scheme. These are:

- unauthorised arrivals by boat (commonly referred to as boat people);
- unauthorised arrivals by air (sometimes referred to as 'jumbo people'); and
- unauthorised arrivals by ship (examples being stowaways and ship jumpers).

2.40 As noted in Chapter One, in terms of unauthorised boat arrivals, 735 unauthorised persons in 18 boats arrived at Australia's shores during the period 28 November 1989 to 27 January 1994 (see Table 2.3). All of these persons were placed in detention upon arrival. While in detention, 32 children were born to these persons.[27]

2.41 Eleven nationality groups were included among these boat arrivals. The largest nationality groups were the citizens of the People's Republic of China, with 326 arrivals, and Cambodians, with 315 arrivals (see Table 2.3).[28]

26 Evidence, pp. S1291-S1332.

27 Evidence, p. S1303-S1336.

28 Evidence, pp. S1303-S1336.

TABLE 2.3 UNAUTHORISED BOAT ARRIVALS IN AUSTRALIA FROM NOVEMBER 1989 (as at 27 January 1994)

Boat Date of arrival	Place of arrival	Persons on board	Nationality	Approved for refugee status	Removed	Other	Number still in detention
Pender Bay 28 November 1989	Broome	26 (1 Aust born)	25 Cambodian 1 Vietnamese	15	5 (1 Aust born)	1 granted residence on marriage 1 escaped 1 granted 774 e/p	3
Beagle 31 March 1990	Broome	119 (15 Aust born)	116 Cambodian 3 Vietnamese	17 (3 Aust born)	34 (3 Aust born)	15 escaped 1 to New Zealand 1 to USA 1 to Austria 5 granted border visas 1 released 27/8/93 without entry permit; 27/10/93 went to USA 9 granted 774 entry permits	44 (35 + 9 Aust born)
Collie 1 June 1990	Darwin on HMAS Townsville	79 (1 Aust born)	79 Cambodian	8	40	1 escaped 4 granted border visas 2 granted 774 entry permits	25 (24 + 1 Aust born)
Dalmation 4 March 1991	Darwin	33	20 PRC 5 Vietnamese 8 Macanese	16 (2 Aust born)	14 (1 Aust born)	3 released 26/8/93 without entry permit	0
Echo 6 March 1991	Darwin	35 (2 Aust born)	34 Cambodian 1 Vietnamese	22 (2 Aust born)	7	1 granted border visa 1 escaped	4
Foxtrot 24 March 1991	Darwin	3	1 Bangladeshi 2 Indonesian		3		0
George 26 April 1991	Darwin	77 (4 Aust born)	61 Cambodian 14 Vietnamese 2 PRC	23	16 (2 Aust born)	3 migrated to Canada 1 granted border visa 3 released 26/8/93, 2 released 17/9/93 and 2 released 3/10/93 without entry permit 2 granted 774 entry permit	27 (25 + 2 Aust born)
Harry 9 May 1991	Darwin	10 (1 Aust born)	10 Vietnamese	10 (1 Aust born)			0
Isabella 31 December 1991	Montague Sound WA	56 (1 Aust born)	56 PRC	30 (1 Aust born)		26 released 13/8/93 without entry permits	0

Boat Date of arrival	Place of arrival	Persons on board	Nationality	Approved for refugee status	Removed	Other	Number still in detention
Jeremiah 10 May 1992	Darwin	10	10 PRC		8		2
Kelpie 21 May 1992	Saibai Island Torres Strait	12 (1 Aust born)	12 Polish		12 (1 Aust born)		0
Labrador 23 August 1992	Christmas Island	68 (1 Aust born)	68 PRC	19 (1 Aust born)	20		29
Mastiff 28 October 1992	Torres Strait	11 (1 Aust born)	11 Romanians	2	9 (1 Aust born)		0
Norwich 30 October 1992	Christmas Island	113	113 PRC		113		0
Otter 3 November 1992	Torres Strait	2	1 Somali 1 Nigerian		2		0
Pluto 24 November 1993	Darwin	53	53 (most believed to be Sino-Vietnamese residents of PRC)				53
Quokka 5 December 1993	Broome	24 (1 Aust born)	24 PRC				25 (24 + 1 Aust born)
Roger 20 December 1993	Troughton Island WA	4 Turks (Kurds)					4
TOTAL		620 (32 Aust born)	620	162 (10 Aust born)	168 (9 Aust born)	87	216 (203 + 13 Aust born)

Source: Evidence, pp. S1333-1335.

TABLE 2.4 UNAUTHORISED AIR ARRIVALS (s 89 DETAINEES) DETAINED FOR MORE THAN ONE WEEK DURING 1990

(as at 24 January 1994)

		Applications for Refugee Status				Review Applications					
Nationality	Number Detained	Number Lodged	Average days arrival to application	Average days to decision	Number approved at primary	Number lodged	Average days primary decision to review appl.	Average days to decision	Number approved at review	Not in custody now Average total days	Still in custody Average total days
Bulgarian	3	3	11	151	0	3	14	215	0	417	-
Ethiopian	1	1	9	210	0	1	7	321	0	645	-
Ghanaian	2	0	-	-	-	-	-	-	-	113	-
Iranian	8	4	16	126	2	1	45	442	1	327	-
Iraqi	3	3	20	123	3	-	-	-	-	153	-
Liberian	2	1	2	230	1	-	-	-	-	131	-
Malaysian	1	0	-	-	-	-	-	-	-	185	-
Moroccan	4	4	36	345	0	4	15	110	0	508	-
Nigerian	1	1	14	421	0	1	26	64	0	550	-
Pakistani	6	0	-	-	-	-	-	-	-	22	
Peruvian	3	0	-	-	-	-	-	-	-	47	-
Samoan	1	1	18	364	1	-	-	-	-	16	-

		Applications for Refugee Status				Review Applications					
Nationality	Number Detained	Number Lodged	Average days arrival to application	Average days to decision	Number approved at primary	Number lodged	Average days primary decision to review appl.	Average days to decision	Number approved at review	Not in custody now Average total days	Still in custody Average total days
Somali	65	57	44	310	52	5	33	82	5	349	-
Sri Lankan	2	1	3	220	0	0	-	-	-	136	-
Turkish	1	1	19	97	0	0	-	-	-	116	-
Unknown	1	0	-	-	-	-	-	-	-	8	-

Source: Evidence, pp. S1291-1295.

TABLE 2.5 UNAUTHORISED AIR ARRIVALS (s 89 DETAINEES) DETAINED FOR MORE THAN ONE WEEK DURING 1991 (as at 24 January 1994)

		Applications for Refugee Status				Review Applications					
Nationality	Number Detained	Number Lodged	Average days arrival to application	Average days to decision	Number approved at primary	Number lodged	Average days primary decision to review appl.	Average days to decision	Number approved at review	Not in custody now Average total days	Still in custody Average total days (to 24/01/1994)
Bangladeshi	1	0	-	-	-	-	-	-	-	63	-
Filipino	1	0	-	-	-	-	-	-	-	14	-
Ghanaian	2	0	-	-	-	-	-	-	-	21	-
Indian	1	1	27	81	0	1	451	61	0	531	-
Iranian	12	12	55	147	2	10	93	214	3	(11) 642	(1) 877
Moroccan	1	0	-	-	-	-	-	-	-	57	-
Pakistani	1	0	-	-	-	-	-	-	-	23	-
PR China	1	1	11	79	0	0	(escaped IDC)	-	-	111	-
Somali	9	9	38	161	9	0	-	-	-	225	-
Sri Lankan	2	2	32	20	1	1	43	274	0	225	-

Source: Evidence, pp. S1295-S1297.

TABLE 2.6 UNAUTHORISED AIR ARRIVALS (s 89 DETAINEES) DETAINED FOR MORE THAN ONE WEEK DURING 1992 (as at 24 January 1994)

		Applications for Refugee Status				Review Applications					
Nationality	Number Detained	Number Lodged	Average days arrival to application	Average days to decision	Number approved at primary	Number lodged	Average days primary decision to review appl.	Average days to decision	Number approved at review	Not in custody now Average total days	Still in custody Average total days (to 24/01/1994)
Albanian	1	1	22	59	0	1	39	143	0	111	-
Bangladeshi	1	0	-	-	-	-	-	-	-	179	-
Bulgarian	2	2	2	14	0	2	41	36	0	108	-
Ethiopian	1	1	27	116	0	1	22	164	0	523	-
Ghanaian	1	1	66	29	0	1	26	114	0	-	450
Indian	2	2	33	63	0	2	44	175	0	(1) 585	(1) 407
Iranian	6	6	36	89	1	5	35	177	1	(3) 289	(3) 623
Lebanese	2	1	3	164	0	1	35	197	0	219	-
PR China	1	0	-	-	-	-	-	-	-	11	-
Somali	21	18	29	78	16	2	23	137	2	138	-
Sri Lankan	4	3	19	68	0	3	26	124	3	280	-

Source: Evidence, pp. S1297-S1299.

TABLE 2.7 UNAUTHORISED AIR ARRIVALS (s 89 DETAINEES) DETAINED FOR MORE THAN ONE WEEK DURING 1993 (as at 24 January 1994)

		Applications for Refugee Status				Review Applications					
Nationality	Number Detained	Number Lodged	Average days arrival to application	Average days to decision	Number approved at primary	Number lodged	Average days primary decision to review appl.	Average days to decision	Number approved at review	Not in custody now Average total days	Still in custody Average total days (to 24/01/1994)
Ghanaian	7	7	26	39	0	6	5	75 3 pending	0 3 pending	(2) 198	(4) 163
Indian	4	4	5	20	0	4	7	63 2 pending	0 2 pending	(1) 166	(3) 176
Iranian	2	1	3	15	0	1	6	55	0	-	106
Iraqi	1	1	15	pending	-	-	-	-	-	-	40
Pakistani	1	1	5	28	0	0	-	-	-	52	-
PR China	5	4	7	49 1 pending	0 1 pending	1	4	pending	-	(2) 72	(3) 63
Saudi Arabia	1	1	5	111	0	0	-	-	-	119	-
Somali	30	27	16	22	24 3 pending	-	-	-	-	(24) 54	(6) 53
S. African	1	1	5	-	pending	-	-	-	-	-	103
Turkish	2	2	3	120	0	0	-	-	-	(1) 75	(1) 227
Yugoslavian	1	1	4	20	0	1	6	78	0	-	140
Zairean	1	1	5	121	1	-	-	-	-	-	127

Source: Evidence, pp. S1299-S1301.

TABLE 2.8 UNAUTHORISED AIR ARRIVALS (s.89 DETAINEES) DETAINED FOR MORE THAN ONE WEEK DURING 1994 (as at 24 January 1994)

		Applications for Refugee Status				Review Applications					
Nationality	Number Detained	Number Lodged	Average days arrival to application	Average days to decision	Number approved at primary	Number lodged	Average days primary decision to review appl.	Average days to decision	Number approved at review	Not in custody now Average total days	Still in custody Average total days (to 24/01/1994)
Somali	2	0	-	-	-	-	-	-	-	-	27
Sri Lankan	2	0	-	-	-	-	-	-	-	-	12

Source: Evidence, p. S1302.

TABLE 2.9 UNAUTHORISED AIR ARRIVALS (s 89 DETAINEES) DETAINED FOR MORE THAN ONE WEEK (AS AT 24 JANUARY 1994)

SUMMARY OF AVERAGES

	Applications for Refugee Status		Review Applications			
Year detained	Average days arrival to application	Average days to decision	Average days primary decision to review application	Average days to decision	Not in custody now Average total days	Still in custody Average total days
Detained in 1990	38	284	23	155	304	0
Detained in 1991	44	137	118	206	346	877
Detained in 1992	28	76	33	143	188	545
Detained in 1993	13	36	5	69	71	110
Detained in 1994						20
TOTAL	31	133	45	143	227	310

NOTES:

1. This table lists people who have been detained for more than one week.

2. Table was compiled through extraction of records kept by compliance and detention officers around Australia. There is no centralised data base of IDC occupants.

3. The matching of custody and DORS records is not 100% accurate as names given by detainees on arrival at IDC's frequently differ markedly from the names they subsequently provide on their DORS applications.

Source: Evidence, p S1302.

2.42 Of these 735 boat arrivals and their 32 Australian born children, DIEA advised that the outcomes in relation to these persons, as at 27 January 1994, were as follows:

- 172 persons had been granted refugee status;
- 26 persons had been granted entry on grounds such as dependency and marriage;
- 115 persons not arrested under Division 4B of the Migration Act had been removed shortly after their arrival (these persons had not lodged an application for refugee status);
- 7 persons had departed Australia for other countries;
- 177 persons had departed Australia, mostly because they had been refused refugee status, although some had not applied for refugee status;
- 134 persons had been refused refugee status at the primary and review stages and remained in detention pending the outcome of legal challenges to the Federal Court;
- 36 persons had been refused refugee status at the primary and review stages, had been released into the community following a Federal Court ruling on the length of their detention, and were awaiting the outcome of legal challenges to the Federal Court;[29]
- 82 persons, including 81 who arrived in November and December 1993 and 1 Australian born child, were being held in detention pending the determination of their applications for refugee status; and
- 18 persons had escaped and remained at large.[30]

2.43 As the Committee was finalising this report, certain detained Cambodians returned voluntarily to Cambodia on the understanding that they could qualify to return to Australia after 12 months. This was in accordance with the provisions of the Cambodian Assistance Scheme announced by the Minister for Immigration and Ethnic Affairs (the Minister) on 19 October 1993. The purpose of

29 A total of 37 persons were released as a result of the Federal Court ruling in the case of *Tang Jia Xin v The Minister for Immigration and Ethnic Affairs* (1993) 116 ALR 329, but one person departed for the United States after having been accepted for migration there (see also paragraph 4.125).

30 Evidence, pp. S1303-S1336.

the scheme is to enable people who would otherwise not be eligible for migration to Australia to settle in Australia permanently. The scheme is open to persons who have a near relative who is either an Australian citizen or permanent resident, and to persons who arrived in Australia illegally by boat from Cambodia between 28 November 1989 and 26 April 1991 and were held in immigration detention for the greater part of their stay before returning to Cambodia. A near relative or supporting community organisation will be required to provide a written undertaking with regard to assistance for successful applicants during the first six months after their arrival in Australia.[31]

2.44 In regard to unauthorised air arrivals, in the period 1 January 1990 to 24 January 1994, 238 persons were held in detention for more than one week (see Tables 2.4 to 2.9). DIEA noted that, as at 24 January 1994, the outcomes in relation to these persons were as follows:

- 128 persons had been granted refugee status;
- 1 person had been granted an entry permit;[32]
- 45 persons had not made a claim to remain in Australia and had departed or had been removed;
- 2 persons had withdrawn their applications for refugee status and had departed;
- 33 persons had been refused refugee status and had departed or had been removed;
- 1 person had been refused refugee status at the primary stage and had escaped from detention; and
- 28 persons remained in detention, of which
  - 6 persons had not lodged an application for refugee status;
  - 5 persons were awaiting a primary decision on refugee status;

31 Minister for Immigration and Ethnic Affairs, Media Release No. B36/93, 19 October 1993.

32 This person was the holder of a People's Republic of China temporary entry permit who left Australia and subsequently returned. Upon his return, he was detained for a short period of time before being released into the community on the basis that he was the holder of a People's Republic of China temporary entry permit.

- 1 person had been refused refugee status at the primary stage and had not lodged an application for review;

- 6 persons had been refused refugee status at the primary stage and were awaiting a review decision; and

- 10 persons had been refused refugee status at the primary and review stages.[33]

2.45 A total of 25 nationality groups were included among the unauthorised air arrivals detained for more than a week from 1 January 1990 to 24 January 1994. Somalis featured as the main nationality group during this time.[34]

2.46 As for unauthorised arrivals by ship, five stowaways have been held in detention over the past three years, with all of them arriving in 1993. They include one Russian, who arrived on 6 June 1993, and four Romanians, who arrived on 13 August 1993. The Russian was granted refugee status on 22 December 1993. As at 27 January 1994, the four Romanians had been refused refugee status at the primary stage and were awaiting the decision on their review applications.[35]

2.47 Overall, by international standards, the number of persons arriving in Australia without authorisation has remained small. The relative security of Australia's border derives from a range of factors. These include Australia's universal visa system noted above, the absence of land borders, Australia's position as a final route of destination on almost all international airline routes, and the penalties applying to airlines carrying unauthorised arrivals.

Illegal entrants and deportees

2.48 The other groups of persons liable for detention under the Migration Act are illegal entrants and deportees. They include:

- persons who have overstayed their visas or entry permits;

- persons who have evaded immigration control or entered or secured stay by deception;

- persons who have breached the conditions of their visas or entry permits and have had their visas or entry permits cancelled; and

33 Evidence, pp. S1291-S1302.

34 Evidence, pp. S1291-S1302.

35 Evidence, p. S1337.

- persons who are the subject of a deportation order.

2.49 As at 31 December 1992, 81,162 persons in Australia had overstayed their visas. At that time, approximately 4,537 overstayers (5.6 percent) were seeking to regularise their status in Australia and had an application for resident status or review of a resident status decision before DIEA. 14,703 overstayers (18 percent) had a refugee status application or a refugee review application in process.[36]

2.50 It is not possible to quantify how many persons currently in Australia have evaded immigration control, entered or secured stay by deception, or breached the conditions of their visas. As such, the overall number of illegal entrants in Australia is likely to be considerably higher than the 81,162 persons listed as overstayers.

2.51 During the financial year 1992/93, 14,874 illegal entrants were located by DIEA. The majority of these, 12,977 persons (87 percent), became illegal when their entry permits expired. 578 persons (3.9 percent) became illegal as a result of a breach of the terminating conditions attached to their entry permits. 525 persons (3.5 percent) became illegal following cancellation of their entry permits. 774 persons (5.2 percent) became illegal either by entering Australia without a valid entry permit, entering by deception, or entering as an exempt person with an exemption which subsequently expired or was terminated.[37]

2.52 Of the 14,874 illegal entrants located, 3,833 persons were detained after being located. Of those detained, 1,537 subsequently were released. The remainder stayed in custody until either their departure from Australia was enforced or they were granted an entry permit. Only a small number have remained in custody pending determination of their cases.[38] The number of illegal entrants located and subsequently detained is not a static figure and depends to a large extent on the success of compliance activity.

2.53 With regard to those illegal entrants released, a range of conditions were imposed. 667 persons (43 percent) were released conditionally subject to providing a surety and reporting as required. 30 persons (2 percent) provided a surety but were not required to report. 648 persons (42 percent) were released on a condition of reporting as required, with no surety taken. 85 persons (6 percent) were released on other conditions, with those conditions not specified within the statistical information available to DIEA. 107 persons (7 percent) were released unconditionally.[39]

36 Evidence, p. S1126.

37 Evidence, p. S1115.

38 Evidence, p. S1051.

39 Evidence, p. S1051.

2.54 In terms of the success rate of the conditions imposed, 28 out of 648 persons (4.3 percent) have breached the reporting conditions and 11 out of 697 sureties (1.6 percent) have been forfeited.[40]

2.55 As for the outcomes in relation to those released, 881 persons (57 percent) departed Australia under the supervision of DIEA, 92 persons (6 percent) were deported, 38 persons (2.5 percent) were granted an entry permit, 39 persons (2.5 percent) were in breach of the release conditions, and 487 persons (32 percent) had cases before DIEA.[41]

Absconding

2.56 Relevant to the Committee's consideration of the detention issue was the available evidence on the number of persons who do not depart Australia after having been refused refugee status, as well as the number of persons who escape from detention. In this report, the term absconding is used in reference to persons who fail to depart Australia when required and/or persons who escape from detention.

2.57 A total of 57 unauthorised boat arrivals escaped from detention between 28 November 1989 and 31 October 1993. Of these:

- 25 unauthorised boat arrivals escaped in 1991, including:
  - 10 detained at the Enterprise Migrant Centre in Melbourne;
  - 2 detained at the temporary detention facility at Berrimah in Darwin, both of whom were apprehended the following day; and
  - 13 detained at Westbridge, 7 of whom later returned voluntarily;
- 22 unauthorised boat arrivals escaped in 1992, including:
  - 6 detained at Port Hedland, all of whom were captured within a few hours of escape; and
  - 16 detained at Westbridge, four of whom were apprehended and nine of whom returned voluntarily; and
- 10 unauthorised boat arrivals escaped in 1993 (to 31 October 1993), including:
  - 6 detained at Port Hedland, 1 of whom returned voluntarily; and
  - 4 detained at Westbridge, 2 of whom returned voluntarily.[42]

2.58 As at 27 January 1994, 18 unauthorised boat arrivals remained at large in the community.[43]

2.59 In relation to those persons who are able to reside in the community while their applications for refugee status are determined, namely illegal entrants, DIEA noted that, as at November 1993, approximately 14,000 persons either had been refused refugee status at the primary decision stage and had not sought review of the refusal decision, or had proceeded to the review stage and the original refusal decision had been upheld. Of those 14,000 persons, DIEA provided statistics on status of 8,000 persons which showed that:

- 3,224 persons (40 percent) had departed, with 1,957 departing of their own accord and 1,267 having had their departure enforced by DIEA;
- 2,297 persons (29 percent) held a valid entry permit;
- 308 persons (4 percent) had an outstanding application before DIEA; and
- 2,171 persons (27 percent) did not have a valid entry permit and remained unlawfully in the country.[44]

Detention arrangements

2.60 Persons detained under the Migration Act generally are held in specialised facilities for immigration detention. In some cases, where a particular difficulty arises in relation to the conduct of the detainee, persons are held in State prisons.

40 Evidence, p. S1052.

41 Evidence, p. S1051.

42 Evidence, p. S1287.

43 Evidence, p. S1336.

44 Evidence, p. S1279.

2.61 Currently, there are six immigration detention facilities in Australia. A detailed description of these facilities is provided in Chapter Five. The facilities include:

- Maribyrnong Immigration Detention Centre in Melbourne;
- Perth Immigration Detention Centre at Perth Airport;
- Port Hedland Immigration Processing and Reception Centre in north west Western Australia;
- Villawood Immigration Detention Centre in Sydney;
- Westbridge Stage 2, which is an annexe to Villawood; and
- Wacol, a dedicated wing in the remand centre of the Arthur Gorrie Correctional Centre in Brisbane.[45]

Duration of detention

2.62 Community concern about the length of detention endured by unauthorised boat arrivals in Australia acted as a major catalyst for the inquiry. During the course of the inquiry, it was the dominant issue for consideration by the Committee.

2.63 As at 27 January 1994, 216 unauthorised boat arrivals were held in detention. Of those:

- 84 persons had been detained for less than 6 months;
- 1 person had been detained for 8 months;
- 31 persons had been detained for periods of 12 to 18 months;
- 6 persons had been detained for periods of 18 to 24 months;
- 26 persons had been detained for periods of 30 to 36 months;
- 2 persons had been detained for periods of 36 to 42 months;
- 63 persons had been detained for periods of 42 to 48 months; and

45 Evidence, p. S640.

- 3 persons had been detained for 50 months.[46]

2.64 As at 24 January 1994, 28 unauthorised air arrivals had been held in detention for more than one week. Of those:

- 7 persons had been detained for 1 month or less;
- 4 persons had been detained for 2 months;
- 7 persons had been detained for periods of 3 to 6 months;
- 4 persons had been detained for periods of 6 to 9 months;
- 2 persons had been detained for periods of 12 to 18 months;
- 3 persons had been detained for periods of 18 to 24 months; and
- 1 person had been detained for 29 months.[47]

2.65 As at 27 January 1994, 4 unauthorised ship arrivals were held in detention. All had been in custody for 5 months.[48]

2.66 Various factors have contributed to the length of detention endured particularly by the unauthorised boat arrivals. Included among these have been delays in the lodgement of applications for refugee status, the subsequent length of time taken to reach a final determination on refugee status for these persons, and the length of time associated with the pursuit of legal actions by detainees who were refused refugee status.

2.67 In relation to the three boats which arrived in November 1989 (Pender Bay), March 1990 (Beagle) and June 1990 (Collie), it took an average of 523 days, 612 days and 238 days respectively from the date of initial lodgement of the applications for refugee status to the primary decisions on refugee status (see Table 2.10). In relation to these arrivals, it is important to note that the initial applications were returned to enable new applications to be prepared with legal assistance. There were substantial delays in the lodgement of the new applications, contributing to the length of time taken to make a primary decision (see also paragraph 2.70). Once the primary decisions were made, it then took an average of 542 days, 304 days and 222 days respectively from the lodgement of the review applications to the review decisions on those applications.[49]

46 Evidence, pp. S1303-S1332.

47 Evidence, pp. S1291-S1302.

48 Evidence, p. S1337.

49 Evidence, p. S1263.

TABLE 2.10 DURATION OF DETENTION OF UNAUTHORISED BOAT ARRIVALS (FROM NOVEMBER 1989 TO 31 JANUARY 1994)

KEY

Column 1 = average days, arrival to lodgement of primary application
Column 2 = average days, lodgement to primary decision
Column 3 = average days, primary decision to lodgement of review
Column 4 = average days, lodgement to review decision
Column 5 = average days, review decision to 31 January 1994
Column 6 = number entered Australia
Column 7 = number departed Australia
Column 8 = number released from detention without entry permit
Column 9 = number still in detention as at 31 January 1994
Column 10= average days in detention as at 31 January 1994 for those still in detention on that date

Boat Name	1	2	3	4	5	6	7	8	9	10
Pender Bay	11	523	27	542	422	17	6	-	3	1525
Beagle	40	612	40	304	415	23	41	-	53	1248*
Collie	430	238	35	222	403	14	44	-	21	1288
Dalmatian	233	133	29	361	293	18	15	3	-	-
Echo	170	219	30	230	403	25	7	-	4	1062
George	165	191	36	228	391	26	25	7	23	975*
Harry	162	151	34	246	-	11	-	-	-	-
Isabella	61	17	11	347	220	31	-	26	-	-
Jeremiah	6	11	9	90	515	-	8	-	2	631
Kelpie	19	11	11	86	-	-	13	-	-	-
Labrador	19	20	13	213	229	20	21	-	29	526
Mastiff	35	6	13	144	215	2	10	-	-	-
Pluto	24	-	-	-	-	-	-	-	53	68
Quokka	9	48	-	-	-	-	-	-	25	57
Roger	31	11	-	-	-	-	-	-	4	42

* Average has been reduced due to recent Australian-born children.

NOTE: "Foxtrot" and "Norwich" Boats are not included, as refugee applications not lodged; Otter Boat not included, as the 2 persons not taken into Division 4B custody and refugee applications lapsed when they left Australia.

Source: Evidence, pp. S1263, S1303-S1336.

2.68 DIEA acknowledged that the decision making process in relation to the first boat arrivals 'was not speedy'.[50] In its view, a major contributing factor was the significant increase in applications for refugee status which were received from persons already in Australia in the period when the first boats arrived at Australia's shores. DIEA stated:

> Through the initial years covered by the boat arrivals the refugee determination system was under stress and was undergoing considerable change.[51]

2.69 As noted at paragraph 2.22, the number of on-shore applications for refugee status, overwhelmingly from persons who had overstayed their entry permits, rose from 1,148 in 1989 to 11,335 in 1990 and 13,045 in 1991. The number of applications reduced to 4,025 in 1992 and 3,861 in 1993.[52] Approximately two thirds of these applications were from citizens of the People's Republic of China. DIEA indicated that this increase placed a serious additional burden on the resources for decision making.[53]

2.70 At the same time, the role of legal advisers within the determination process was evolving. As legal assistance became a recognised part of the process, original applications for refugee status from the arrivals on the first three boats were returned to enable fresh applications to be prepared in consultation with independent legal advisers. This resulted in significant delays. For the legal advisers, continued changes in the legislation and lack of experience in dealing with boat arrivals also contributed to the delays in lodging the applications. For those who arrived in November 1989 on the Pender Bay, the revised applications were not lodged until April 1991. For those who arrived in March 1990 on the Beagle, the revised applications were not lodged until June 1991. For those who arrived in June 1990 on the Collie, the revised applications were not lodged until November 1991.[54]

2.71 As a result of the increased number of applications for refugee status, a new processing system was introduced on 10 December 1990, along with a major expansion of staffing.[55] The new system, which was modified in February 1992, involved a two tier decision making process. The primary decision was taken by a DIEA case officer. Applicants who were unsuccessful at the primary stage could

50 Evidence, p. S657.

51 Evidence, p. S657.

52 DIEA, Onshore Refugee Program statistics; Joint Standing Committee on Migration Regulations, op cit, p. 2.

53 Evidence, p. S657.

54 Evidence, p. S657.

55 Evidence, p. S657.

apply for a full merits review of the primary decision. From 10 December 1990 to 30 June 1993, the review was conducted by the Refugee Status Review Committee (RSRC), which included one representative each from DIEA, the Attorney-General's Department and the Department of Foreign Affairs and Trade, as well as one community representative nominated by the Refugee Council of Australia. On 1 July 1993, the RSRC was replaced by the Refugee Review Tribunal (RRT), comprised of independent single member panels.

2.72 Modifications to the primary decision stage made in February 1992 were aimed at further streamlining the decision making process for asylum seekers arriving by boat. The modifications included shorter time periods for responding to information and applying for review. According to DIEA, the intention of these changes was 'to minimise the period of detention for boat people while ensuring that this was not at the expense of a fair and thorough decision making process'.[56]

2.73 As a result of these changes, the processing times for refugee applications decreased considerably. For the three boats which arrived in May 1992 (Kelpie) and October 1992 (Labrador and Mastiff), the average number of days from the lodgement of applications for refugee status to the primary decisions on those applications was 11 days, 20 days and 6 days respectively. The average number of days from lodgement of review applications to the review decisions was 86 days, 213 days and 144 days respectively.[57]

2.74 In regard to those who arrived by ship or airline, DIEA advised that, in 1992, a primary decision was received on average within 76 days of application, and a review decision was received on average within 137 days of a review application. DIEA also advised that, for the first six months of 1993, on average detainees received their primary decisions in 26 days and their review decisions in 61 days.[58]

2.75 In terms of continued detention, the final factor to take into consideration is that the pursuit of legal remedies through the court system by many of the detainees prolonged considerably the duration of their detention. For those who arrived on the first boat, the Pender Bay, and who were in detention awaiting the outcome of litigation in the Federal Court, as at 31 January 1994, they had spent an average of 422 days in detention since the completion of their refugee determinations. For those who arrived on the Labrador in August 1992, as at 31 January 1994, they had spent an average of 229 days in detention since the completion of their refugee determinations (see Table 2.10).[59]

56 Evidence, p. S657.

57 Evidence, p. S1263.

58 Evidence, p. S659.

59 Evidence, pp. S1303-S1332.

Access to benefits and services

2.76 While the main focus of the inquiry was the appropriateness of the existing system of immigration detention, the Committee also gave consideration to the conditions under which immigration detainees are held. Given that many asylum seekers arriving in Australia have limited means of support, it was important for the Committee, in assessing the feasibility of alternatives to detention, to understand the existing support arrangements for those asylum seekers held in detention as compared to those who are allowed to reside in the community pending a determination of their claims to refugee status.

2.77 For asylum seekers detained upon arrival in Australia, interpreters funded by DIEA are available at interviews relating to their applications for refugee status. In addition, government funded legal advisers are provided to assist with the lodgement of refugee applications at the primary and, if necessary, review stages.[60]

2.78 Within the detention centres, DIEA is responsible for the upkeep of detainees and either provides directly or arranges on a contract basis a number of facilities and services, including:

- accommodation;
- food;
- health care and medical treatment;
- education;
- recreational equipment and services;
- welfare services; and
- counselling services.

2.79 In addition, detainees have access to telephones and postal services, and are able to receive visitors.

2.80 The level of services provided within each detention centre depends upon whether the detainees are being held there on a short term or longer term basis. A detailed description of these services is provided in Chapter Five.

2.81 In comparison to the services provided to detainees, the government support arrangements for asylum seekers who reside in the community are much more limited, and DIEA's involvement is focused mainly on assistance with their applications for refugee status and emergency support. Refugee applicants in the

60 Evidence, pp. S1121-S1122.

community can seek assistance in lodging their applications from the Refugee Advice and Casework Service, which is funded by DIEA for this purpose. In addition, persons awaiting a decision on their application and who are experiencing hardship may apply for permission to work, in order that they may support themselves. They also may seek emergency assistance through the Asylum Seeker Assistance (ASA) Scheme. ASA is administered nationally by the Australian Red Cross. DIEA is responsible for the determination and monitoring of applicant eligibility for ASA.

2.82 The number of applications for permission to work was 10,311 in 1991/92 and 8,952 in 1992/93. This included both principal applicants for refugee status and their dependants, who also may apply for permission to work. The permission to work applications which were finalised included 56.7 percent approvals in 1990/91, 67.9 percent approvals in 1991/92, and 57.3 percent approvals in 1992/93.

2.83 The ASA Scheme seeks to assist those asylum seekers without means of support or disposable assets to meet some of their basic food and shelter needs. In a supplementary submission, DIEA noted that it was negotiating with the Australian Red Cross to develop a health care component of the ASA Scheme to provide for the basic health care needs of eligible recipients. DIEA advised that an interim arrangement already was in place under which the Australian Red Cross could request that approval be given to fund health care for asylum seekers in urgent need.[61]

2.84 ASA is available to all asylum seekers at the primary, review and judicial (administrative) review level who meet the following criteria:

- the applicant must have been awaiting a refugee status determination decision for at least six months;
- if the applicant arrived on a visa, that the applicant had undertaken to support himself/herself for the period of his/her stay, and that period has expired;
- the applicant is not in detention; and
- the applicant does not have access to mainstream welfare benefits.[62]

2.85 Eligibility for ASA ceases once an administrative review decision has been made on a refugee status case.[63]

61 Evidence, p.S1262.

62 DIEA, *Onshore Refugee Program, Annual Summary 1992/93 Financial Year*, p. 35.

63 ibid.

2.86 The assistance levels are based upon the Special Benefit, rental and family allowance schemes and are discounted by approximately 11 percent. The maximum level of fortnightly assistance which can be provided to an applicant is $310 per fortnight for a single person and $495 per fortnight for a couple. Additional assistance of $80 per fortnight for each dependant under 13 years of age or $110 per fortnight for each dependant over 13 years of age also may be given.[64]

2.87 As at 30 June 1993, approximately 2,680 persons, including principal refugee applicants and their dependants, were in receipt of ASA. Between 4 January 1993 and 30 June 1993, approximately 3,300 persons, including principal refugee applicants and their dependants, were assisted under the ASA Scheme.[65]

Costs

2.88 The cost of maintaining persons in detention as compared with the costs associated with releasing persons into the community also was relevant to the Committee's deliberations. In a number of submissions, the cost of detention was raised as a factor favouring community release.

2.89 There is a range of primary costs associated with the detention of both unauthorised border arrivals and illegal entrants, including:

- capital costs for the detention centres;
- fixed operating costs for the detention centres;
- the costs of maintaining persons held in detention; and
- the costs of providing various services to persons held in detention.

2.90 In its submission and supplementary evidence to the inquiry, DIEA provided various details regarding expenditure on the detention and processing of asylum seekers. Expenditure details provided to Senate Estimates Committee F also were available for the scrutiny of this Committee. The figures provided by DIEA indicated broad expenditure on:

- immigration detention in general;
- the detention and processing of unauthorised boat arrivals since November 1989; and

64 Evidence, p. S1262.

65 DIEA, *Onshore Refugee Program, Annual Summary 1992/93 Financial Year*, p. 35.

- the provision of facilities and services at the two detention centres accommodating unauthorised boat arrivals, namely the Port Hedland Immigration Reception and Processing Centre and Westbridge Stage 2.

2.91 In relation to the general costs of detention, DIEA advised that in 1992/93 it spent a total of $18.43 million on the detention of illegal entrants and unauthorised arrivals. This included expenditure on detainees and the detention facilities.[66]

2.92 With regard to unauthorised boat arrivals, DIEA noted that from November 1989 to June 1993, it spent $21.60 million on reception, detention, refugee status application assessment and repatriation for unauthorised boat arrivals. This expenditure included $0.61 million from November 1989 to June 1990, $5.55 million in 1990/91, $7.44 million in 1991/92 (including the cost of purchasing the Port Hedland Centre) and $8 million in 1992/93.[67]

2.93 In addition, DIEA provided funding of $778,030 in 1991/92 and $773,553.32 in 1992/93 to cover the costs of legal assistance to unauthorised boat arrivals. The funding was provided to the Refugee Council of Australia, its subsidiary the Refugee Advice and Casework Service, and Australian Lawyers for Refugees Incorporated to assist and advise unauthorised boat arrivals in relation to the preparation of their primary and review applications for refugee status.[68] Alongside this expenditure on legal assistance, there also have been costs for DIEA in mounting defences against the large number of legal actions taken by those unauthorised boat arrivals who have been refused refugee status. Many of these legal actions have yet to be finalised.

2.94 Various figures were obtained by the Committee in relation to the costs of maintaining unauthorised boat arrivals in the Port Hedland Immigration Reception and Processing Centre and Westbridge Stage 2.

2.95 The first set of figures was provided to the Senate Estimates Committee F on 11 May 1993. At the Senate Estimates Committee hearing, DIEA noted that the cost of maintaining a person at Port Hedland was $38.50 per day. This included $6.30 for medical and other personal needs, $2.40 for education and clothing and recreation, $8.00 for custodial services and $21.80 for administration, utilities, maintenance, catering, linen and cleaning.[69] In comparison, DIEA noted

66 Evidence, p. S1058.

67 Evidence, p. S662.

68 Evidence, p. S1060.

69 Senate Estimates Committee F, Transcript of Evidence, 11 May 1993, p. 26.

that the cost in other immigration detention centres was approximately $200 per person per day, but it did not provide a breakdown of those costs. Explaining the difference in costs, DIEA stated:

> The overheads of maintaining Port Hedland are much lower - it is a low security facility ... security is very light. Its perimeter security and custodial services are very low. ... costs are much reduced as compared to traditional detention centres where guarding ratios are higher.[70]

2.96 A second set of figures was provided by DIEA in its principal submission to the inquiry. Those figures represented the 1992/93 costs associated with the detention of unauthorised boat arrivals at Port Hedland and Westbridge Stage 2. DIEA indicated that the total cost of this detention was $5,319,000 at Port Hedland and $1,960,000 at Westbridge. A breakdown of these figures is provided at Table 2.11. In considering these figures, it is important to note that the Westbridge figure only represents the proportion of costs attributable to unauthorised boat arrivals detained there. DIEA noted that as Westbridge/Villawood also holds a number of illegal entrants, the basic custodial costs for the complex are not included, as these would need to be paid whether or not unauthorised boat arrivals are held there.[71]

2.97 The total 1992/93 cost of detaining unauthorised boat arrivals can be broken down to give a daily figure for detaining one unauthorised boat arrival at each of the centres. This can be achieved by dividing the total custody days with the total detention cost for each centre. DIEA noted that in 1992/93 the total number of custody days was 95,587 days at Port Hedland and 33,508 days at Westbridge.[72] Accordingly, the detention cost for unauthorised boat arrivals at Port Hedland calculates to $55.65 per person per day, comprising $3.04 for medical, $0.96 for welfare, $1.38 for interpreters, $1.64 for education, $25.93 for security and $22.67 for administration, maintenance, catering and cleaning.[73] At Westbridge, the cost calculates to $58.49 per person per day, comprising $5.01 for medical, $1.37 for welfare, $0.06 for interpreters, $1.25 for education, $9.19 for security, and $41.60 for administration, maintenance, catering and cleaning.

70 ibid.

71 Evidence, p. S750.

72 Evidence, p. S750.

73 Evidence p. S750.

2.98 In a supplementary submission dated 13 October 1993, the above calculations were confirmed. DIEA noted that the 1992/93 cost for the detention of unauthorised boat arrivals was $55.60 per day at Port Hedland (giving an annual figure of $20,300 per person) and $58.50 per person per day at Westbridge (giving an annual figure of $21,400).[74]

2.99 In its supplementary submission, DIEA also sought to explain the different figures which often are quoted in relation to the costs of detention. The figures listed in paragraphs 2.95 to 2.97 represent actual expenditure on detention for unauthorised boat arrivals. The other figures which are often provided represent the gazetted daily detention cost. This gazetted cost is the charge which DIEA makes against deportees for each day which they are held in custody. It is the rate for which deportees accrue debt. DIEA noted that at that time the gazetted cost of detention at Port Hedland was $37 per day, while the gazetted cost of other immigration detention centres was $202 per day. DIEA advised that the gazetted cost for the other centres soon was to be reduced to $139 per person per day.[75]

2.100 While on face value the above figures suggest that it is slightly more cost effective to detain persons at the Port Hedland Immigration Reception and Processing Centre than at Westbridge Stage 2, DIEA advised that the costs of detention at Port Hedland and Westbridge are not directly comparable. DIEA stated:

> ... some of the base Westbridge operating costs (eg base level security at the Centre) are excluded entirely, while others (eg rates contribution, buildings and grounds maintenance) are included on a pro-rata basis only. The result of this approach is that the Port Hedland costs shown represent the full cost of operations at that Centre, while the Westbridge costs show only the differential cost of placing some boat people at that Centre. Unlike the Port Hedland Centre, the Westbridge detention facility, with its capacity of about 200, was established primarily for illegal entrants and its capacity and use is geared to complement the operation of the compliance program in NSW.[76]

2.101 At the same time, it is important to note that the figures provided by DIEA do not incorporate certain costs associated with detaining persons at Port Hedland, such as the travel and accommodation costs for DIEA officers conducting refugee determinations.

74 Evidence, p. S1160.

75 Evidence, p. S1160.

76 Evidence, p. S662.

TABLE 2.11 1992/93 COSTS ASSOCIATED WITH DETENTION OF UNAUTHORISED BOAT ARRIVALS AT PORT HEDLAND AND WESTBRIDGE CENTRES

Service	Port Hedland		Westbridge	(1)
Medical	291,000		168,000	
Welfare	92,000	(2)	46,000	
Interpreters	132,000	(2)	2,000	
Education	157,000		42,000	
Security	2,479,000		308,000	(3)
Administration, maintenance, catering, cleaning, utilities	2,167,000		1,394,000	(4)
TOTAL	**5,318,000**		**1,960,000**	
Custody Days	*95,587*		*33,508*	
Cost per custody day	55.64		58.49	

NOTES: The above costs exclude costs associated with on arrival, and refugee processing task forces, repatriation, staff housing and accommodation charges for detainees held temporarily at Perth, Melbourne and Brisbane.

(1) The Westbridge Centre holds a number of illegal entrant detainees as well as unauthorised boat arrivals. Costs shown represent only that portion attributable to boat people in detention at Westbridge.

(2) Includes airfares and expenses for interstate and intrastate staff.

(3) Basic custodial costs for the Villawood/Westbridge detention complex not shown as these would need to be paid whether or not boat people were held there.

(4) The Westbridge Centre is operated on a turn-key arrangement and it is not possible to break down costs precisely.

Source: Evidence, p. S750.

TABLE 2.12 BOARDING MODEL (PRIVATE HOMES)

Suitable mostly for a small group (2 - 3) of single individuals or a parent with a young child

Expenses	Cost per person per week
Food and groceries	$40.00
Cleaning	$0.00
Communications	$10.00
Energy	$10.00
Transport and fares	$15.00
Personal items and postage	$20.00
Repairs and maintenance	$0.00
Salaries	$0.00
Total	$95.00

TABLE 2.13 HOSTEL MODEL (INSTITUTIONAL)

Suitable mostly for families but can also include individuals for whom boarding style accommodation cannot be found

Expenses	Cost per person per week
Catering	$25.00
Cleaning	$1.50
Communications	$10.00
Energy	$4.50
Transport	$5.00
Welfare (Personal items)	$20.00
Repairs and maintenance	$4.50
Salaries	$13.00
Total	$83.50

Source: Evidence, p. S1226.

2.102 In considering the cost effectiveness of detention, it is necessary to have some understanding of the potential costs associated with any alternatives to detention. Only limited evidence in this regard was available to the Committee.

2.103 The Society of St Vincent de Paul provided the Committee with estimates of the weekly costs of maintaining asylum seekers in boarding style accommodation and hostel style accommodation (see Tables 2.12 and 2.13). The figures were based on the Society's existing experience in operating such arrangements.[77]

2.104 The Society of St Vincent de Paul estimated that the cost in a boarding style arrangement would be $95.00 per person per week, while the cost in a hostel style arrangement would be $83.50 per person per week. This would include food, cleaning, communications, energy, transport, personal items, repairs, and salaries and on-costs.[78] A breakdown of these figures is provided at Tables 2.12 and 2.13.

2.105 The Society also estimated that an initial amount of $200 per person would be required for relocation, resettlement and associated purchases.[79]

2.106 In providing these figures, no estimation was made of the capital costs of accommodation, on-going maintenance of that accommodation, and the costs which would be associated with medical requirements, counselling, education and recreation, all of which are catered for in the detention centres. The Society of St Vincent de Paul acknowledged that significant costs can be associated with medical and dental requirements. In addition, the Society stated:

> Both models ... are considered by Society members to be inadequate for more than short term (three to four months) accommodation. Beyond this time period, the more substantial costs associated with independent living will need to be provided. These expenses will be commensurate with normal living costs (normally considered to be more than the poverty line).[80]

77 Evidence, p. S1226.

78 Evidence, p. S1226.

79 Evidence, p. S1226.

80 Evidence, p. S1226.

Conclusions

2.107 In this chapter, the Committee has sought to present the basic facts relevant to immigration detention in Australia. The Committee has outlined broadly the reasons for detention, the profile of those detained, the arrangements for detention, and the costs of detention. This broad outline summarises the existing situation with regard to detention, at the same time providing some of the background which has led to the present situation.

2.108 The existing immigration detention system is based on the principle that those without a valid visa or entry permit should not be allowed to enter or stay in Australia. That principle applies equally to those who arrive unauthorised and seek entry at the border, and those who become illegal after entry. Detention is one mechanism used for enforcing that principle.

2.109 The recent public attention directed to the situation of unauthorised boat arrivals has arisen not because of the existence of detention per se, but rather because of the length of detention which many boat arrivals since November 1989 have endured. From the Committee's analysis of the events of this period, it is evident that a range of factors has contributed to this long term detention. No single factor can be attributed as the sole cause of this problem. The significance of individual factors has varied over time.

2.110 More importantly, significant changes already have been implemented in response to the difficulties encountered over the last four years. A more expeditious refugee determination process has been established. Legal assistance has been made available for detained unauthorised arrivals seeking asylum. Independent merits review has come into operation. Each of these measures has been directed towards ensuring that detention during the processing of refugee determinations is for as short a time as is possible.

2.111 Despite these changes detention has continued for many of those who have arrived over the past three years. Where refugee status has been refused, detention has been extended as a result of the legal challenges which the detainees have mounted against those refusal decisions.

2.112 As the periods of detention have continued, public attention also has been directed to the cost of maintaining unauthorised arrivals in detention. The information provided by DIEA confirms that significant funds have been expended in processing and detaining unauthorised arrivals over the past four years.

2.113 While many of the submissions to the inquiry questioned the desirability of the existing detention arrangements, limited evidence was available on the alternatives to detention. In particular, there was limited evidence on the full costs of supporting asylum seekers in the community should community release be made available. In this regard, it is important to note that within the detention centres, detainees are provided with a range of facilities and services, including

accommodation, food, health care, counselling, education and some recreation. In contrast, asylum seekers who are illegal entrants and who are allowed to reside in the community pending the determination of their claims generally must fend for themselves. They currently do not have access to Medicare. While over half of those who apply for permission to work have their applications in this regard approved, it can be a lengthy process and there are no statistics available on how many actually obtain employment. The only government support available to them is emergency assistance through the ASA Scheme.

2.114 In addition, the estimates provided to the Committee regarding the costs associated with maintaining asylum seekers in the community provided only a limited analysis of the actual costs which would be involved. Those estimates did not cover the full gamut of costs associated with living in the community.

2.115 In the chapters which follow, the Committee has outlined the major issues relevant to immigration detention in Australia. The basic facts of detention, as outlined above, have been considered in much detail by the Committee in the formulation of its findings and recommendations.

Chapter Three

THE LAW ON IMMIGRATION DETENTION

Introduction

3.1 The issue of immigration detention has long been a vexed legal question.

3.2 Provisions for immigration detention have been included in Australia's migration legislation since colonial times. It is worth noting that Australia's first significant immigration case concerned the issue of immigration detention. In that case (*Musgrove v Chung Teeong Toy*, 1891 A.C. 272), the Privy Council held that a non-citizen had no right to recover damages for false imprisonment when he was detained and refused entry into Victoria.

3.3 Since that time, the issue of immigration detention has arisen in a number of immigration cases. The courts have considered the constitutional validity of immigration detention provisions, and also have decided whether litigants could be released from detention pending review of their applications to enter or stay on in Australia. Included within such litigation is a spate of recent cases initiated by unauthorised boat arrivals who have arrived in Australia since November 1989.

3.4 Australia's present arrangements for immigration detention are in the process of change. New arrangements are set to come into force from 1 September 1994.

3.5 During the inquiry, it was important for the Committee to gain an understanding of the recent history of immigration detention legislation in Australia, particularly the recent experience with border refugee claimants. More importantly, it was the Committee's responsibility to consider, with the benefit of past experience, the appropriateness and adequacy of the proposed arrangements for the future.

3.6 In considering Australia's arrangements for immigration detention, both present and future, it is important to recognise that Australia's law and practice has been and continues to be influenced by Australia's international obligations arising from the various treaties and agreements to which Australia is a signatory. From an international perspective, the Committee also found it useful to consider some examples of detention practices in comparable countries. After all, the issues and problems which Australia is addressing are as relevant to and of crisis proportions amongst developed and developing countries in Europe, North America and Asia.

The legal basis of immigration detention

3.7 A non-citizen in Australia enjoys the protection of Australia's laws. Even so, as the High Court observed in the case of *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 97, 176 CLR 1, the non-citizen's 'status, rights and immunities under that law differ from the status, rights and immunities of an Australian citizen in a variety of important respects'. In the *Lim* case, the High Court stated:

> For present purposes, the most important difference ... lies in the vulnerability of the alien to exclusion or deportation. That vulnerability flows from both the common law and the provisions of the Constitution ... its effect is significantly to diminish the protection which ... the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process. (Brennan, Deane and Dawson JJ, at p. 116)

3.8 Justice McHugh (at p. 144) noted further:

> Parliament can make laws imposing burdens, obligations and disqualifications on aliens which could not be imposed on members of the community who are not aliens. In *Polites v Commonwealth* (1945) 70 CLR 60, at 69, Latham CJ, after referring to the aliens power, said:
>
> > The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications.

3.9 Immigration detention is categorised properly as a form of administrative detention. Administrative detention has a particular legal meaning and refers to detention that is a deprivation of personal liberty other than as a result of conviction for an offence. Administrative detention per se is not prohibited under Australia's Constitution or international law. In this regard, Australia is no different to other countries, in that virtually all countries provide in their legislation for detention where the power to detain lies solely with an administrative authority.

3.10 The entity authorising administrative detention is the Executive. According to the High Court, such detention 'takes its character from the Executive powers to exclude, admit and deport non-citizens'. Such authority is conferred on the Executive without infringing the Constitution's exclusive vesting of the judicial power of the Commonwealth in the courts (per Brennan, Deane and Dawson, the *Lim* case, at p. 118).

3.11 In the *Lim* case, Justice McHugh commented on the characteristics of administrative detention. He noted that detention is always punitive in character unless it is set to achieve some legitimate non-punitive object. In the case of a deportation, detention is to ensure that the deportee is excluded from the community pending removal. In the case of detention pending the determination of an alien's application for entry, the detention is for the legitimate purpose of preventing the alien from entering the community until the determination is made. If the detention goes beyond what is reasonably necessary to consider the application for entry or effect deportation, the detention will be regarded as punitive in character and therefore invalid. A law authorising detention beyond what is necessary to effect the entry or exclusion of a non-citizen likewise might be invalid as an infringement of the judicial power of the courts.

3.12 Justice McHugh (at pp. 148-150) elaborated on the requirements for lawful immigration detention. In the *Lim* case, the High Court was considering the Migration Act, Division 4B, which provides for the mandatory detention of certain designated boat arrivals. Justice McHugh stated:

> First, the Division [4B] does not specify that an individual or group of ascertainable individuals is or are to be deprived of rights. It operates upon a class of persons in the same way that legislation imposes obligations or disqualifications on other groups such as lawyers, doctors, bankrupts or felons. It is a general enactment which provides objective criteria for determining which aliens are to be detained in custody pending the determination of their status. The persons who would be affected by the enactment of Div 4B could not be identified at the time it became law. While the legislation was intended to ensure that persons such as the plaintiffs would be kept in custody pending the determination of their status, it applies to an unknown number of persons who satisfy the criteria set out in the definition of 'designated person' in 54K.
>
> Secondly, no punishment or penalty is imposed by Div 4B in its ordinary operation. Although detention under a law of the Parliament is ordinarily characterised as punitive in character, it cannot be so characterised if the purpose of the imprisonment is to achieve some legitimate non-punitive object. Thus, imprisonment while awaiting trial on a criminal charge is not punitive in nature because the purpose of the imprisonment is to ensure that the accused person will come before the courts to be dealt with according to law. Similarly, imprisonment of a person who is the subject of a deportation order is not ordinarily punitive in nature because the purpose of the imprisonment is to ensure that the deportee is excluded

from the community pending his or her removal from the country. Likewise, the lawful imprisonment of an alien while that person's application for entry is being determined is not punitive in character because the purpose of the imprisonment is to prevent the alien from entering into the community until the determination is made. But if the imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.

Certainly, Div 4B deprives designated persons of the right to seek their release from custody. But they have been deprived of that right not because the Parliament wishes to punish them but because it wishes to achieve the non-punitive object of ensuring that aliens who have no entry permit or visa are kept under supervision and control until their claims for refugee status or entry are determined.

It is true that a designated person can be detained in custody for a period of nine months together with such additional periods as result from the delays in dealing with the application occasioned by persons or events beyond the control of the department. In other words, the designated person can be detained for at least nine months for the sole purpose of enabling the department to consider the application for entry and make its own examination and investigation. Inordinately long as the potential period of detention may seem to be, it has to be evaluated in the context of the allegation in the plaintiffs' statement of claim, which the defendants admit, that, in addition to the plaintiffs, there are approximately 23,000 applicants for refugee status in Australia at the present time. The appropriateness of the period of detention for the individual cannot be isolated from the administrative burden cast on the department in investigating and determining the vast number of applications by persons claiming refugee status.

Furthermore, even if the provisions of ss 54L, 54N, and 54R, standing alone, could be characterised as punishment, the effect of s 54P(1) is that a designated person may release himself or herself from the custody imposed or enforced by those sections. Section 54P(1) requires an officer to remove a designated person from Australia as soon as practicable 'if the designated person asks the Minister, in writing, to be removed'. That provision makes it impossible to regard Div 4B in its

ordinary operation as a punishment. It is true that a designated person, having regard to his or her claim for refugee status, might regard the choice between detention and leaving the country as not a real choice. But for the purpose of the doctrine of the separation of powers, the difference between involuntary detention and detention with the concurrence or acquiescence of the 'detainee' is vital. A person is not being punished if, after entering Australia without permission, he or she chooses to be detained in custody pending the determination of an application for entry rather than to leave the country during the period of determination.

Consequently, the period of detention authorised by Div 4B does not constitute a punishment for the purpose of the doctrine concerning Bills of Pains and Penalties.

3.13 In the *Lim* case, the plaintiffs contended that the Division 4B detention provisions not only were unconstitutional, but also were invalid or inapplicable to the extent that they removed, limited or excluded rights which the plaintiffs had under the ICCPR and the Refugee Convention. The High Court declined to consider or rule on this submission, observing that the provisions of Division 4B unmistakably and unambiguously evinced a legislative intent to prevail over any other law in force in Australia and those international treaties.

International instruments relevant to immigration detention

3.14 In addition to the authoritative pronouncements of the High Court on detention, there are a number of international instruments which deal with issues relating to detention, including administrative detention, such as immigration detention. The principal international agreements relevant to a consideration of Australia's immigration detention arrangements are:

- the United Nations Convention Relating to the Status of Refugees 1951, which was acceded to by Australia on 22 January 1954, and the United Nations Protocol Relating to the Status of Refugees 1967, which was acceded to by Australia on 13 December 1973;
- the International Covenant on Civil and Political Rights 1966, which was ratified by Australia on 13 August 1980;
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Convention Against Torture), which was ratified by Australia on 18 August 1989; and

- the Convention on the Rights of the Child 1989, which was ratified by Australia on 17 December 1990.

3.15 In addition to these instruments, various Conclusions of the Executive Committee of the UNHCR Programme, of which Australia is a member, provide guidance on accepted international practice relevant to detention of refugee claimants.

Refugee Convention and Protocol

3.16 The Refugee Convention and Refugee Protocol provide for rights and guarantees which are applicable specifically to refugees. In the preamble to the Refugee Convention, it is noted that the objects and purposes of the Convention are to provide a framework within which States Parties would cooperate to assure to refugees the enjoyment of the fundamental rights and freedoms set out in the Charter of the United Nations and the Universal Declaration of Human Rights.

3.17 As at 25 January 1994, 117 States were party to both the Refugee Convention and Refugee Protocol. Alongside Australia, this included the following countries in the regions of Asia and Oceania:

- Cambodia;
- China;
- Fiji;
- Japan;
- Korea, Republic of;
- New Zealand;
- Papua New Guinea;
- Philippines; and
- Tuvalu.

3.18 In addition, as at 25 January 1994, three States were party only to the Refugee Convention, with Samoa being the only one in the regions of Asia and Oceania. Four States were party only to the Refugee Protocol, including the United States. Two States were in the process of acceding to both the Refugee Convention and Refugee Protocol.

3.19 Although non-signatory countries do undertake a significant share of responsibility towards refugees, it is clear from the above that many of Australia's neighbouring countries are not party to the Refugee Convention and Refugee Protocol. This includes certain countries such as Cambodia, Indonesia, Malaysia, Thailand and Vietnam through which numbers of refugee applicants travel en route to Australia.

3.20 Under the Refugee Convention, as modified by the Refugee Protocol, a refugee is defined as any person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (Article 1A(2))

3.21 Implicit in the Refugee Convention's references to refugees is the obligation to determine their status. The Department of Foreign Affairs and Trade and UNHCR submitted that, until this is done, asylum seekers are to be treated as potential refugees.[1]

3.22 The detention of refugees and asylum seekers is raised by implication in Article 26 and Article 31 of the Refugee Convention.

3.23 Article 26 provides that each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

3.24 Article 31 deals with refugees unlawfully in the country of refuge. It provides that:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

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1 Evidence, pp. 814, S821.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those necessary and such restrictions shall only be applied until their status is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all necessary facilities to obtain admission into another country.

3.25 While Article 31(1) forbids Contracting States penalising refugees for illegal entry alone, it was put to the Committee that for this Article to apply there is a requirement that refugees come 'directly' from a territory where their lives or freedom were threatened. The Department of Foreign Affairs and Trade suggested that under the directness requirement, if refugee applicants arriving by boat have spent some time in a third country en route, they are not entitled to claim the protection of Article 31.[2] The purpose of the exclusion is to bind all countries to the principle of first asylum and to discourage 'asylum country shopping', whereby asylum seekers choose the country in which they wish to seek protection.

3.26 The Department of Foreign Affairs and Trade further put to the Committee that Article 31 also is worded to exclude from protection certain persons who, having arrived in the asylum country, seek to enter or remain by fraudulent means.[3] While Article 31 is designed to protect those who must use unauthorised and even fraudulent means to gain entry to an asylum country, the protection is limited to those who upon or soon after arrival can explain their reasons for using such unauthorised or fraudulent means to gain entry.

3.27 In relation to those refugees who are in the territory of a Contracting State illegally, Article 31 allows Contracting States to apply 'necessary' restrictions to their movement. The term 'necessary' is not defined in the Refugee Convention. State practice has become an important indicator of the extent of the obligation pertaining to Article 31(2). In this regard, a number of countries, including Australia, the United States, the United Kingdom, Hong Kong, the Scandinavian countries, the Netherlands, Germany and Belgium, have determined that necessity can permit some form of detention of asylum seekers.

UNHCR Executive Committee Conclusions

3.28 Conclusions of the UNHCR Executive Committee are interpretative statements which elaborate on the provisions of the Refugee Convention. Detention of asylum seekers is raised in various UNHCR Executive Committee Conclusions, with Conclusion No. 44 being the principal one among these.

2 Evidence, p. S821.

3 Evidence, p. S821.

3.29 UNHCR Executive Committee Conclusion No. 44 states:

> ... in view of the hardship which it involves, detention should normally be avoided.

3.30 Conclusion No. 44 provides that, if necessary, detention may be resorted to only on grounds prescribed by law to:

- verify identity;
- determine the elements on which the claim to refugee status or asylum is based;
- 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
- protect national security or public order.

3.31 The other principal concerns embraced by Conclusion No. 44 are that:

- national legislation and/or administrative practice should make a distinction between the situation of refugees/asylum seekers and that of other aliens;
- there should be fair and expeditious procedures for determining refugee status;
- detention should be subject to judicial or administrative review; and
- the conditions of detention must be humane.

3.32 Other UNHCR Executive Committee Conclusions provide that:

- asylum seekers should not be exposed to unfair treatment solely on the ground that their presence in the country is considered unlawful, and should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order (No. 22);
- States should intensify their efforts to avoid unnecessary and severe curtailment of refugees' freedom of movement (No. 65(c)); and

- States, UNHCR and other concerned parties should take all necessary measures to ensure that refugees are protected from arbitrary detention and violence (No. 50(i)).

3.33 UNHCR Executive Committee Conclusion No. 47 deals specifically with children. In Conclusion No. 47, the UNHCR Executive Committee 'condemned the exposure of refugee children to physical violence and other violations of their basic rights, including through sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation or arbitrary detention, and called for national and international action to prevent such violations and assist the victims'. The UNHCR Executive Committee also 'noted with serious concern the detrimental effects that extended stays in camps have on the development of refugee children, and called for international action to mitigate such effects and provide durable solutions as soon as possible'.

International Covenant on Civil and Political Rights

3.34 The ICCPR is one of the major international instruments on human rights. In the preamble to the ICCPR, it is stated:

> ... the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights ... .

3.35 The rights and guarantees of the ICCPR are applicable to all individuals physically present within a State's territory, regardless of whether in law the person is taken to have entered that territory. Non-citizens do not have a right in international law to freely enter or reside in the territory of a State of which they are not a citizen. Consent for entry may be subject to conditions relating to, for example, movement, residency and employment. In principle, it is a matter for the State to decide whom it will admit to its territory. However, in certain circumstances a non-citizen may enjoy the protection of the ICCPR even in relation to entry or residence. For example, a non-citizen is protected by and enjoys the principle of non-discrimination, the prohibition on inhuman treatment, and the right to liberty and security of the person.[4]

3.36 The ICCPR applies to citizens and non-citizens of a State Party, regardless of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status. Thus, to the extent provided for in the ICCPR, non-citizens in Australia have the same rights and protections as Australian citizens.[5]

4 Evidence, p. S848.

5 Evidence, p. S848.

3.37 The ICCPR provides a number of rights and guarantees relevant to persons held in detention. In general, it asserts the principle that detention of a person must be done for a specified reason and subject to specific laws.

3.38 Article 9 of the ICCPR provides that:

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

3.39 Article 9 also provides that:

- anyone arrested shall be informed at the time of arrest of the reasons for their arrest and shall be informed promptly of any charges against them;
- anyone arrested or detained on criminal charges shall be brought promptly before a judge or other officer authorised by law to exercise judicial power, and shall be entitled to trial within a reasonable time or to release;
- anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay the lawfulness of the detention and order release if the detention is not lawful; and
- anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

3.40 Alongside these specific provisions on detention, the ICCPR also contains more general provisions relevant to persons held in detention, including:

- a prohibition on torture and other cruel, inhuman or degrading treatment or punishment (Article 7);
- a requirement that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person (Article 12);
- a recognition that all persons are equal before the courts and tribunals (Article 14); and
- a recognition that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law (Article 26).

3.41 The Human Rights Committee, which is established under Article 28 of the ICCPR and is regarded as the foremost treaty body in the United Nations human rights system, has responsibility for monitoring the measures taken by States Parties to give effect to the rights recognised in the ICCPR. This includes monitoring the progress made in the enjoyment of those rights, and monitoring any factors and difficulties affecting the implementation of the ICCPR. Under the First Optional Protocol to the ICCPR, to which Australia acceded on 25 September 1991, the Human Rights Committee may consider communications received from individuals who claim to be victims of a violation by a State Party of any rights set down in the ICCPR.

3.42 As the rights and freedoms recognised in the ICCPR are framed in broad, general terms, interpretative assistance is provided by statements of the Human Rights Committee. These statements are contained in General Comments on the ICCPR, and in decisions on individual complaints brought under the First Optional Protocol of the ICCPR.

3.43 General Comment 8, adopted in 1982, provides some guidance on the prohibition on arbitrary detention in Article 9 of the ICCPR. General Comment 8 states in relation to Article 9:

> ... paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, ... immigration control, etc. ... the important guarantee laid down in paragraph 4, ie the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.

3.44 General Comment 8 also states:

> ... if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, ie it must not be arbitrary, and must be based on grounds and procedures established by law ... and court control of the detention must be available ... .

3.45 Cases brought under the First Optional Protocol to the ICCPR and considered by the Human Rights Committee also provide some elaboration on that Committee's interpretation of Article 9. In *Alphen v The Netherlands*,[6] the Human Rights Committee considered the prohibition on arbitrary arrest and detention in Article 9(1) of the ICCPR. The case under consideration involved pre-trial detention for the purposes of a criminal investigation. While Dutch law provided for a normal limit of 16 days detention, the complainant in fact was detained for nine weeks. The Human Rights Committee found that the facts of the case disclosed a violation of

6 Communication No. 305 of 1988, Human Rights Committee Decision, 29 March 1989.

Article 9(1) because the prolonged detention was not necessary in all the circumstances. In so concluding, it suggested a broad interpretation of the term arbitrary in the context of the ICCPR. The Human Rights Committee stated:

> The drafting history of Article 9, paragraph 1 confirms that arbitrariness is not to be equated as 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.

3.46 In *Torres v Finland*,[7] the Human Rights Committee considered the provisions of Article 9(4), which require that persons who are detained be entitled to proceedings before a court so that the court may determine without delay the lawfulness of the detention. The case involved a person initially detained under the Finnish Aliens Act for less than five days, and subsequently detained under a law relating to extradition of criminals. Under the Finnish Aliens Act, detention for a period of less than seven days could not be challenged in the Finnish courts, although there was provision for an appeal against the detention to the Ministry of the Interior. In the view of the Human Rights Committee, the possibility of an appeal to the Ministry of the Interior did not satisfy the requirements of Article 9(4). Accordingly, the detention was found to be in violation of Article 9. The Human Rights Committee noted that Article 9(4) envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control.

3.47 In its decision on this case, the Human Rights Committee also commented on the timeliness of courts in handing down decisions on the lawfulness of detention. It indicated that, as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible. However, it noted that this does not mean that precise deadlines for the handing down of judgements must be set. Rather, it considered that the question of whether a decision was reached without delay must be assessed on a case by case basis. In relation to the case under consideration, the Human Rights Committee noted that a period of almost three months between the filing of the claimants appeal and the decision by the court in principle was too extended.

7 Communication No. 291 of 1988, Human Rights Committee Decision, 2 April 1990.

3.48 While the above cases may illustrate particular interpretations of the Human Rights Committee given to Article 9 of the ICCPR, it is important to note that in so far as the law and practice on immigration detention in Australia is concerned, the authoritative and binding statements on such matters are those of Australia's courts, most relevantly the High Court in the *Lim* case.

3.49 After Australia acceded to the First Optional Protocol of the ICCPR on 25 September 1991, a communication regarding alleged breaches of the ICCPR by Australia was forwarded to the Human Rights Committee in June 1993. In the communication, which was lodged by an Australian barrister and solicitor on behalf of a Cambodian asylum seeker detained at Port Hedland, it was alleged, amongst other matters, that the detention of the asylum seeker is arbitrary and therefore in breach of Article 9 of the ICCPR.[8] As at February 1994, the Human Rights Committee has yet to declare the case admissible and has not set a date for consideration of the matter.

Convention Against Torture

3.50 The general prohibition on torture and inhuman or degrading treatment contained within Article 7 of the ICCPR, and the general requirement that persons deprived of liberty be treated with humanity and respect for the inherent dignity of the human person in Article 10 of the ICCPR, are elaborated upon in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In particular, the Convention Against Torture includes an expanded prohibition on cruel, inhuman or degrading treatment or punishment. Article 16 of the Convention Against Torture states:

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

3.51 No definition, however, is provided of what constitutes cruel, inhuman or degrading treatment or punishment. According to the Department of Foreign Affairs and Trade, there are no accepted international definitions of these terms, although European and United States cases suggest that such treatment or punishment might include:

- intimidation and humiliation;
- prolonged solitary confinement or denial of exercise;

8 Exhibit 4.

- insulting language;
- deprivation of sleep, food or drink;
- overcrowded detention quarters;
- lack of proper facilities, including water, heating and lavatory;
- lack of health or dental care;
- heavy handed methods of interrogation, both physical and mental;
- holding prisoners incommunicado; and
- separation of families.[9]

Convention on the Rights of the Child

3.52 The Convention on the Rights of the Child expands and elaborates upon a number of the human rights recognised in international instruments such as the ICCPR by providing a particular focus on the rights of the child. The Convention on the Rights of the Child recognises that children are entitled to distinct human rights.

3.53 Article 3 provides that, in all actions concerning children, the best interests of the child shall be a primary consideration. In this regard, States Parties are required to guarantee such protection and care as is necessary for the child's well-being, taking into account the rights and duties of the child's parents, legal guardians, or other individuals legally responsible for the child.

3.54 Included in the Convention on the Rights of the Child are specific provisions relevant to detention of children. Article 37 requires that:

- no child shall be deprived of his or her liberty unlawfully or arbitrarily;
- the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time;
- every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons their age; and

9 Evidence, p. S827.

- every child deprived of liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge their deprivation of liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

3.55 Special consideration also is given to children seeking refugee status. Article 22 provides that States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee, whether unaccompanied or accompanied by his or her parents or any other person, receives appropriate protection and humanitarian consideration.

3.56 Other more general provisions in the Convention on the Rights of the Child regarding the fundamental rights of all children are relevant equally to children in detention and children seeking refugee status. Those provisions include recognition of a child's right to:

- religion (Article 14);
- recreation (Article 31);
- education (Articles 28 and 29);
- medical and dental care (Article 24); and
- measures to assist children suffering from torture and trauma (Article 39).

3.57 Article 29(1) stipulates that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to the fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

3.58 Article 39 provides that:

States Parties shall take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment that fosters the health, self-respect and dignity of the child.

International practice

3.59 During the inquiry, the Committee also gave consideration to the immigration detention practices adopted in various comparable countries. A research paper on overseas detention practice was prepared for the Committee. A summary of that paper is provided at Appendix 4.

3.60 It is clear from the evidence available that there is a variety of practice relating to immigration detention around the world. All countries examined appear to have some arrangement for immigration detention, particularly with regard to non-citizen border arrivals. Some differences arise, particularly in relation to the permissible periods of detention and the categories of person detained.

3.61 Many countries allow for the detention of persons who arrive unauthorised at the border, as well as persons who are detected as being in the country without authority. However, there is varying practice in relation to the time limits applying to detention and the arrangements allowing for release. The differences in practice reflect the particular circumstances of each country, including, for example, the numbers of refugee claimants, the procedures for determining refugee claims and the judicial systems within each country.

3.62 In a number of countries, detention must be approved by an independent authority within a short time frame after arrest. For example, in Canada, detention beyond seven days must be authorised by an Immigration and Review Board adjudicator. In Finland, detention beyond four days requires a court order. In Sweden, detention is subject to administrative review every 14 days. In

Denmark, unauthorised persons can be held for up to 72 hours before they must be brought before a court.[10]

3.63 Many countries allow for release of border asylum seekers into the community. However, varying requirements are placed on such asylum seekers before release can be secured. For example, in Canada, persons whose identities have been established, who have been assessed as eligible to apply to remain, and who have met the further tests of not being a threat to public safety and not being likely to abscond, are released on bond pending the completion of their asylum hearings.[11] In the United Kingdom, border asylum seekers may qualify for release if the decision maker is satisfied that the person will not disappear into the community. Bail provisions can be applied, including requirements that the applicant and two members of the community lodge a surety, and the applicant specify a place of residence and report to the police. Those with frivolous applications or whose applications are likely to be rejected cannot qualify for release.[12] In Japan, provisional release is available for an alien detained under a written detention order. The alien has to deposit a bail bond not exceeding three million yen, has to adhere to restrictions on area of movement and place of residence, and has to appear when summoned. A letter of guarantee may be submitted by a person other than the alien detained which can be substituted for the bail bond.[13]

3.64 While at first glance it would appear that many countries around the world provide varying opportunities for unauthorised arrivals to enter the community, recent trends indicate a more stringent attitude to border arrivals. This stricter approach has arisen because of the large number of unauthorised persons arriving at the borders of countries in Europe, Asia and North America.

3.65 Many countries, such as Italy and Denmark, currently are experimenting with strict turn around procedures for persons not authorised to gain entry to the country.[14] Other countries, such as France, Germany and the Netherlands, have established exclusion zones at airports coupled with rapid determination of refugee claims.[15] For example, Germany, which in recent years

10 Karthigasu S, 'Strangers At The Doorstep: What Do We Do With Them?', A report on overseas detention practices, October 1993, pp. 3, 21, 24, 26.

11 ibid, p. 28; see also Employment and Immigration Canada, *Immigration Manual* IE 2..01, 2.12, 2.73, 10.40-10.50.

12 Karthigasu, op cit, p. 19; see also MacDonald I and Blake N, *MacDonald's Immigration Law and Practice*, Butterworths 1991, pp. 422-426.

13 ibid, p. 31.

14 ibid, pp. 5, 13; *Migration News Sheet*, various issues 1992 and 1993.

15 Karthigasu, op cit, pp. 7, 13; *Migration News Sheet*, various issues 1992 and 1993; Stanley A, 'The Legal Status of International Zones: The British Experience with Particular Reference to Asylum Seekers', *Immigration and Nationality Law and*

has borne the brunt of the massive movement of persons across Europe, has introduced measures whereby arrivals by air, and asylum applicants who arrive by air from safe countries of origin, are no longer granted entry automatically or easily. Instead, they are detained at a special centre at the airport. Asylum applications are decided within two days, with three days given to lodge an appeal against a refusal. If an application is assessed as manifestly unfounded, the person is returned to the home country. Entry is permitted only if an application cannot be decided in two days or if an appeal cannot be decided by a court within 14 days. Those persons permitted entry are accommodated at asylum seeker hostels pending finalisation of their applications.

3.66 The United States is another country which has responded to the large number of persons arriving at the border without valid entry documents. It has tightened its procedures on detention and has undertaken off-shore interdiction of boat arrivals, particularly Haitians. In the United States, unauthorised border arrivals, termed excludable aliens, are detained for further inquiry and do not qualify for release until their applications to enter and remain in the United States are determined, unless they are in one of the following categories:

- aliens with serious medical conditions;
- pregnant women;
- juveniles who are anticipated to remain in detention for more than 30 days;
- an alien who has relatives in the United States who may file a petition on his/her behalf;
- aliens who are to be witnesses in certain legal proceedings in the United States; and
- aliens whose continued detention is not in the public interest.[16]

3.67 While release from detention is possible for aliens in one of the above categories, before the alien can be released, there is a requirement to ensure that the alien will not abscond or pose a security risk. Those who are not released are held in detention facilities or prisons until their applications to enter and remain in the United States are determined.[17]

Practice, Vol. 6, No. 4, 1992, p. 126.

16 ibid, p. 37; see also Schmidt T W, 'Detention of Aliens', *San Diego Law Review*, Vol. 24, 1987, p. 305.

17 Karthigasu, op cit, p. 37.

3.68 In 1992, a parole scheme to allow the release of aliens from detention was introduced in the United States. At present, the scheme caters for 'deportable aliens', that is aliens who already have entered the United States and are subject to a deportation order. From the evidence available to the Committee, it presently does not cater for excludable aliens (see also paragraphs 4.91 to 4.104).

3.69 The Committee also sought information on the arrangements in neighbouring Asian countries for the processing of asylum seekers. Such information was difficult to obtain. Some examples of practice in such countries were obtained by the Committee.

3.70 In Hong Kong, all Vietnamese migrants who have arrived since 16 June 1988 have been treated as illegal immigrants, unless they have been determined by a screening procedure to be refugees as defined by the Refugee Convention. Upon interception in Hong Kong waters, Vietnamese migrants are informed of this policy. They also are informed that they are free to leave. If they do not, and later are found not to be refugees under the screening procedures, they will be detained temporarily without access to resettlement and then repatriated promptly to Vietnam.[18]

3.71 The screening procedure in Hong Kong is carried out by immigration officers under UNHCR guidelines. UNHCR officials monitor the screening procedures and participate in the preparation of appeals against refusal to grant refugee status. Those persons screened in as refugees are accommodated in open centres together with other refugees, whereas those screened out as non-refugees are held in detention centres pending repatriation to Vietnam.[19]

3.72 The policy in Hong Kong implements an agreement reached between the Governments of the United Kingdom, Hong Kong and Vietnam. Under that agreement, those who return voluntarily to Vietnam and then go back to Hong Kong would be the first to be returned. In addition, all new arrivals from 29 October 1991 are to be screened on arrival. Following the outcome of any appeal, those found to be non-refugees are to be returned home promptly. Under the agreement, all who return home voluntarily or otherwise will receive guarantees from the Vietnamese Government and reintegration assistance from UNHCR, which will monitor their treatment after return. They also will be eligible for assistance under a European Community Program, which aims to provide job creation opportunities, start-up loans for businesses, vocational training courses and other community assistance.[20]

18 Hong Kong Government, Fact Sheet - 'Vietnamese Migrants in Hong Kong', November 1993.

19 ibid.

20 ibid.

3.73 In Malaysia, there are no provisions for refugees in national legislation. In determining refugee status, Malaysian officials apply the Refugee Convention definition and follow the procedures set out in the UNHCR Handbook for Procedures and Criteria for Determination of Refugee Status, as well as prevailing directives on protection. Individuals are interviewed by a Protection Assistant/Clerk who makes recommendations to the Representative/Eligibility Officer, who makes the final decision. Persons recognised as refugees remain as illegal immigrants in the absence of necessary visas and/or valid passports.[21]

3.74 All refugees/asylum seekers are allowed to stay in Malaysia only temporarily. Even at its best, their status is comparable to that of an ordinary visitor. They have no legal right to practice a profession or trade or attend education institutions. Recognised refugees are issued with an attestation letter, which normally is accepted by the police and immigration authorities. Nevertheless, they are liable at any time to arrest, detention and deportation. A special tolerance has been shown for particular groups, such as Burmese Muslims, who have been known to remain in Malaysia for years without any major problems.[22]

3.75 A variety of country detention practices shows that countries, and indeed regions, are developing particular legislative responses to meet their particular border control problems. Countries with large numbers of border refugee claimants are opting for border detention, mainly at airports, combined with speedy processing and turn around provisions. Greater emphasis also is being placed on the principle of first asylum, whereby refugee claimants who arrive from a safe country are returned to that country for their asylum claims to be assessed in that first country of asylum.[23]

3.76 The continuing pressure of increasing numbers of unauthorised arrivals is resulting in a greater emphasis on fast determination of border claims to enter a country, and prompt removal of such claimants where refugee claims are assessed as unfounded. The need for fast decisions necessarily reduces the capacity of immigration authorities within such countries to give detailed consideration to each and every case.[24]

21 Malaysian Government Information Sheet, 'Protection Issues in Malaysia - Non-Indochinese Case Load', November 1993.

22 ibid.

23 Feller E, 'Carrier Sanctions and International Law', *International Journal of Refugee Law*, Vol. 1, No. 1, January 1989, p. 48; M. Kjaerum, 'The Concept of Country of First Asylum', *International Journal of Refugee Law*, Vol. 4, No. 4, 1992, p. 365.

24 European Consultation for Refugees and Exiles, 'Synthesis of Country Reports', from ECRE Bi-annual meeting, 23-25 April 1993; Gillespie J, 'Report on Immigration and Asylum Procedure and Appeal Rights in the 12 Member States of the European Community', unpublished report, Immigration Law Practitioners' Association, March 1993.

3.77 The refugee issue is markedly different in Australia. While the Committee was interested in the information on overseas practice, this information did not point to an appropriate model for Australia to adopt. Australia is the only country of those examined which requires mandatory detention of certain border claimants and which for the future has proposed mandatory detention for all those in breach of immigration law. Australia's response in this regard must be set alongside its full and detailed consideration of refugee claims, and its extensive opportunities to challenge adverse decisions on claims to refugee status.

Australia's law on immigration detention

3.78 It is a requirement of Australian immigration law that all non-citizens travelling to Australia, other than those who are exempt, for example New Zealanders, require a visa or entry visa to authorise their travel to Australia. In addition, all non-citizens entering or staying on in Australia require an entry visa or entry permit authorising their entry or stay in Australia.[25] The entry visa or permit records the term and conditions attaching to the non-citizen's entry or stay in Australia.[26] Those who breach immigration law, either by neglecting to obtain a visa, by overstaying the term of their permit, or by breaching a condition of their entry visa or permit, are liable to be arrested and detained.[27]

3.79 Parliament's power to make laws with respect to entry, stay, detention and removal of non-citizens derives from the Constitution, in particular section 51(xix), which empowers the Parliament to legislate with respect to aliens. In the *Lim* case, which challenged the constitutional validity of the detention provisions in Division 4B of the Migration Act, Mason CJ (at p. 100) stated that the Aliens power conferred upon the Executive authority to detain an alien in custody for the purposes of expulsion and deportation and to receive, investigate and determine an application by that alien for an entry permit, and after that determination, to admit or deport that alien. Gaudron J (at p. 138), by contrast, considered that there are certain limitations on the scope of the Aliens power which permits Parliament to pass legislation imposing special obligations or disabilities on aliens, providing these are 'connected with their entitlement to remain in Australia and ... appropriate and adapted to regulating entry or facilitating departure as and when required'. All the legislative provisions set down below derive from the Aliens power.

3.80 The Migration Act provides for the detention of non-citizens who have travelled to Australia without a visa or who upon arrival produced a fraudulent, defective or inappropriate visa, as well as for the detention of illegal entrants and

25 Migration Act, s 14(1); Migration Regulations, reg 2.30.

26 Migration Regulations, reg 2.33(2).

27 Migration Act, ss 14, 92.

deportees in Australia.[28] Generally speaking, illegal entrants are those non-citizens who have overstayed the terms of their entry visas or permits, have had their entry visas or permits cancelled, or have secured entry to or stay in Australia by deception.

3.81 This is not to say that all unauthorised arrivals and illegal entrants in fact are detained. As noted in Chapter Two, most illegal entrants are permitted to remain in the community pending their departure or removal, or the processing of their applications to stay. Further, as to unauthorised border arrivals, some are detained, others are turned around, and others are freely admitted. The Migration Regulations make provision for some persons who arrive at the border without a visa to qualify on arrival for a border visa, which permits them entry into Australia. These arrivals include the spouse or children of Australian citizens and residents, or returning temporary permit holders, including students, provided they can show reasonable grounds for having failed to acquire a visa, and compelling reasons for entering Australia.[29]

3.82 The Migration Act employs a variety of terms to describe the non-citizens who are liable to immigration detention, and sets down different detention regimes which vary according to the mode of transport which the person has used to arrive in Australia, and whether the non-citizen is detained on arrival or after entry into Australia. Non-citizens who arrive without a valid visa and who are detained on arrival at an airport or prior to disembarkation from a vessel are by law considered not to have entered Australia.[30]

3.83 There are in fact six different provisions in the Migration Act which authorise detention. The different detention provisions reflect the history of border and after entry controls. The border arrangements originally dealt with ship passengers. With advances in technology, the legislation was augmented by a provision to deal with unauthorised airline passengers. Recent additions make provision for detention of unauthorised boat arrivals. Outlining the range of different detention powers under the Migration Act, DIEA noted:

> Each is designed to cover a particular set of circumstances relating to arrival in Australia, and while not all are specific to unauthorised arrivals, all have at some time been used to detain unauthorised arrivals.[31]

28 Migration Act, ss 88, 89, 89A, 92, 93.

29 Migration Regulations, Border visa and entry permit Class 733.

30 Migration Act, s 4(5), (5A).

31 Evidence, p. S642.

TABLE 3.1 CUSTODY IN WHICH BOAT ARRIVALS HELD (FROM NOVEMBER 1989)

Name of boat	Arrival date	Initial custody	Subsequent custody
Pender Bay	28.11.1989	S36*	Division 4B
Beagle	31.03.1990	S88	Division 4B
Collie	01.06.1990	S88	Division 4B
Dalmatian	04.03.1991	S88	Division 4B
Echo	06.03.1991	S88	Division 4B
Foxtrot	24.03.1991	S88	-
George	26.04.1991	S88	Division 4B
Harry	09.05.1991	S88	Division 4B
Isabella	31.12.1991	S92	Division 4B
Jeremiah	10.05.1992	Division 4A	Division 4B
Kelpie	21.05.1992	S92	Division 4B
Labrador	23.08.1992	S88	. Division 4B/4A
Mastiff	28.10.1992	S92	Division 4B
Norwich	30.10.1992	Division 4A	-
Otter	03.11.1992	S92	-

* NOTE: before 19 December 1989, Section 88 was known as Section 36

Source: Evidence, p. S649.

3.84 DIEA indicated that the existing legislative provisions 'have evolved to deal with specific new classes of people where legislative provisions in place at the time were seen to be inadequate for the circumstances'.[32] This is illustrated in Table 3.1, which shows that, during various stages of their detention, some unauthorised border arrivals have been held under different custody provisions of the Migration Act.

Unauthorised ship arrivals

3.85 Section 88 is the provision which deals with unauthorised ship arrivals, including stowaways, who are detained by authorised officers prior to disembarkation, that is, prior to their entry to Australia. Section 88 makes explicit provision for the custody of stowaways, unauthorised arrivals, arrivals who sought and have been refused an entry permit, and unauthorised passengers on board a vessel which an officer reasonably believes was used in connection with an offence against Commonwealth, State or Territory laws.

3.86 Section 88 provides for the detention of unauthorised ship arrivals, including stowaways, who are refused entry. An immigration officer can detain such persons until the departure of the vessel from its last port of call in Australia, or until the person is granted an entry permit, or until such earlier time as an authorised officer directs. Unauthorised ship arrivals detained on vessels used in connection with an offence may be kept for a period not exceeding 14 days, as required for a decision on whether to prosecute the person in connection with the offence, or if a prosecution is instituted within 14 days, for such period as is required for that prosecution, which includes the serving of any custodial sentence imposed on the person.

3.87 Prior to May 1992, all unauthorised boat arrivals were detained under section 88. In most instances following their detention, their boats were destroyed or sold, pursuant to section 72 of the *Customs Act 1901*. The Government's view was that where a vessel could never leave Australia because it had been destroyed, temporary custody of the arrivals under section 88 could continue indefinitely. This issue was litigated in the *Lim* case, and also considered by Wilcox J in the case of *Lek Kim Sroun v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455 (the *Lek* case). In the *Lim* case, for example, Toohey J (at p. 127) noted that section 88 contemplated a vessel which arrived at a port in Australia in the course of a continuing longer journey, and leaves from a port in Australia. It was accepted in the *Lim* case that section 88 authorised the detention of boat arrivals up until the time that their boat was burned and was unable to depart Australia, but thereafter the continued detention of the boat passengers was unlawful (per Brennan, Deane and Dawson JJ, at p. 109). In the *Lek* case, Wilcox J observed that section 88(1) contemplated a vessel in transit, and the temporary

32 Evidence, p. S640.

custody of the people who arrived on the vessel until it finally was ready to depart Australia. Section 88 had no application to vessels, such as those used by recent boat arrivals, which came to Australia as their point of final destination.

Unauthorised airline arrivals

3.88 Section 89, introduced in 1979 as section 36A, concerns the detention arrangements for unauthorised airline arrivals as well as airline stowaways and those airline arrivals who sought and have been refused an entry permit. The section is a companion piece to section 88 and provides that such non-citizen passengers may be detained if an authorised officer so directs, until such time as the person is removed from Australia or the person is granted an entry permit. The duration of the custody is not linked to the stay of the aircraft in Australia.

3.89 The purpose of this section is to 'provide a facility for the apprehension of prospective illegal entrants before they pass beyond the proclaimed place of the airport, and to provide for their expeditious and economic removal from the country'. The time limits within which these purposes may be achieved are not prescribed by the duration of the stay in Australia of the aircraft on which the illegal entrant has arrived.

3.90 In the case *Vilbert Bet Khoshabeh v the Minister for Immigration and Ethnic Affairs* (Fed C of A, Ryan J, No VG 354 of 1993, Melbourne, 10 November 1993, unreported), Ryan J refused to release the applicant from detention. The applicant was a refugee claimant detained on arrival at the airport. Ryan J held that an immigration officer has no discretion under section 89 to release the applicant from custody prior to the grant of any entry permit or decision on removal. The effect of such release would be that the applicant would become an illegal entrant liable to arrest and deportation. Ryan J observed that it was difficult to impute to Parliament an intention to confer upon an officer a discretion to release which would result in the person becoming an illegal entrant. The criminal provisions in the Act signified legislative disapproval of illegal entrants. Such discretion would contradict legislative policy. Ryan J concluded that section 89 provided no general residual discretion to the respondent to authorise release of the applicant.

Processing centres

3.91 In December 1991, sections 88 and 89 were supplemented by Division 4A (sections 54A to 54H).[33] Division 4A sets down the detention arrangements for unprocessed persons. Unprocessed persons are unauthorised border arrivals, whether arriving by boat, ship or air, for whom an authorised officer reasonably considers that it is impracticable or inconvenient to determine their claims for entry

33 *Migration Amendment Act 1991*, No. 86.

immediately.[34] In most instances, unprocessed persons will be refugee claimants. Unprocessed persons can be held in custody at a processing centre as directed by an authorised officer until granted an entry permit or until the unprocessed person becomes a prohibited person.[35] A prohibited person is one who gives an authorised officer a written request to leave Australia, who does not apply for an entry permit before the end of seven days after receiving notice of the time limit for lodging an entry permit, or who is refused an entry permit.[36] Division 4A was introduced because of lengthy processing delays experienced with border refugee claimants. It was considered that sections 88 and 89 were not appropriate in the circumstances, as those provisions were designed for cases where a decision to turn around the person or to allow the person to enter could be made quickly.[37]

3.92 Section 89A provides for a person in section 88 or section 89 custody to be taken to a processing area. If a person is taken to a processing area, Division 4A applies to that person, and that person ceases to be in custody under section 88 or section 89, whichever the case may be.

Unauthorised boat arrivals

3.93 Division 4B (sections 54J to 54W), which commenced on 6 May 1992, sets down a single legislative scheme for the compulsory detention in custody of certain non-citizens termed 'designated persons'.[38] Such persons are undocumented boat arrivals who arrived after 19 November 1989 and were given a 'designator' by DIEA. The 'designator' recorded a name for their boat and identified the non-citizen as a person arriving on that boat.[39] Section 54U provides that 'a statement by an officer, on oath or affirmation, that the Department has given a particular person a designation ... is conclusive evidence of the designation'. The term designated person includes children born in Australia to a designated person. Designated persons must be detained and kept in custody until granted an entry permit or removed from Australia.[40] Section 54R states that a court is not to order the release from custody of a designated person. The term of the detention is set not to exceed 273 days. However, there are a series of discounted days which do not count towards the 273 day total. The 273 day 'clock' stops when DIEA is waiting for information from persons not under the control of DIEA, when court or tribunal proceedings have begun but are not finalised, when dealings with the application are

34 Migration Act, s 54B.

35 Migration Act, s 54C.

36 Migration Act, s 54D.

37 Evidence, p. S645.

38 *Migration Amendment Act 1992*, No. 24.

39 Migration Act, s 54K.

40 Migration Act, s 54K.

at a stage where the duration is under the control of the designated person or his/her representative, and when continued dealings with the application are otherwise beyond the control of DIEA.

3.94 Since its commencement in May 1992, there have been several court cases concerning the Division 4B provisions. The most significant of these was the High Court challenge in the *Lim* case, in which the plaintiffs claimed that sections 54L, 54N and 54R were beyond the legislative power of the Commonwealth. The *Lim* case was brought by two groups of Cambodian boat people who had arrived in Australia in 1989/90 and who were held in detention at the Port Hedland Immigration Reception and Processing Centre. The history of their litigation discloses the origin of Division 4B.

3.95 In the *Lim* case, the plaintiffs' claims for refugee status had been refused. They initially sought judicial review of those refusals in the Federal Court. The Court set aside the decisions refusing refugee status and referred the matters back to the Minister for determination. The plaintiffs' outstanding application for release from custody was adjourned for a later hearing. Two days before the scheduled hearing date, the Commonwealth Parliament passed the *Migration Amendment Act 1992*, which inserted Division 4B into the Migration Act. Division 4B came into effect on the proposed hearing date and, in its terms, ensured that the plaintiffs would not be released from detention. From the date of the enactment, they were detained compulsorily as designated persons. The High Court intimated that one of the objects of the Migration Amendment Act was 'to clothe with legislative authority the custody in which the 'boat people' were being kept, a custody that might have been brought to an abrupt end once a court ascertained that that custody was unlawful'(per Brennan, Deane and Dawson JJ, at p. 112).

3.96 In the *Lim* case, the High Court's reasons for judgement concern relevant aspects of immigration detention, including the Division 4B detention arrangements. The High Court's findings included the following:

- the Court confirmed that aliens in Australia, whether lawfully or unlawfully, can be dealt with only in accordance with the positive authority of the law. Aliens have standing to involve the intervention of a court;

- the Court held that the Division 4B detention regime was not punitive. The object of such immigration custody was not to punish the detainees but to ensure that they are kept under supervision and control. There is no punishment if a person chooses to be detained in custody pending the determination of an application rather than leave the country';

- the Court, with some reservation by Gaudron J, held that the provisions in Division 4B were made validly under the Aliens power; and

- a majority of the Court held that section 54R, which provides that a court shall not order the release from custody of a designated person, derogates from the direct vesting of judicial power in the courts, and purports to remove ultra vires Acts of the Executive from the control of the High Court. This was said to constitute impermissible intrusion into the judicial power which Chapter III of the Constitution vests exclusively in the courts. Even so, section 54R was said to be severable from the remaining Division 4B provisions and did not affect their validity.

3.97 Other aspects of the Division 4B arrangements were considered in the Federal Court case of *Tang Jia Xin v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 116 ALR 329, brought by a designated person who had been detained in custody at the Port Hedland Immigration Reception and Processing Centre from 18 January 1992 pending a final decision on his application to be recognised as a refugee. In that case, at first instance, Neaves J held that Tang was entitled to be released as a person kept in application custody for periods totalling 273 days. In counting the days in 'application custody', it was held that when DIEA made a request for information about the application, DIEA was not waiting for information relating to the application to be given by a person who is not under the control of the Department, until the time for replying to the request nominated by DIEA had passed, or if no time was nominated by DIEA, until a reasonable time for a response had elapsed. It followed that the nominated or reasonable periods of time spent waiting for information comprised time spent in application custody and counted towards the 273 day term limit. Further, on the question whether the applicant was presently lawfully detained, the Court held that the terms of the statute provided no sound foundation upon which the Court could be satisfied that a person should be kept in custody pending the judicial review application, where, as here, the decision to refuse the entry application had been made after the person had been in application custody for 273 days. The Minister appealed this decision, but the decision by Neaves J was upheld on appeal by the Full Federal Court (*The Minister for Immigration, Local Government and Ethnic Affairs v Tang Jia Xin* (1994) ACL Rep (Iss 1) 77 FC 11). An application for special leave to appeal to the High Court was lodged on 23 December 1993. As at 10 February 1994, a hearing date for that special leave application had not been set.

Illegal entrants and deportees

3.98 The remaining Migration Act detention provisions deal with non-citizens who are illegal entrants and deportees. These non-citizens are taken in law to have entered Australia. Some may have entered illegally, either clandestinely or by exercising a fraud. Most have entered lawfully but subsequently have overstayed or otherwise breached conditions of their permit.[41] Due to the way

41 Migration Act, ss 14, 20.

'entry' presently is defined in the Migration Act,[42] certain boat arrivals who disembarked from their vessels without being detained were in law illegal entrants and initially were detained under section 92 of the Migration Act. A notable example occurred with boat arrivals from the People's Republic of China on the boat codenamed Isabella, who landed in Western Australia and wandered about lost for some weeks prior to their discovery and detention in January 1992. Following the commencement of Division 4B, such non-citizens were designated and their custody was arranged in accordance with Division 4B rather than section 92.

3.99 Section 92 is the only Migration Act detention provision which provides for court scrutiny of the detention of all non-citizens who come within the terms of the section. A person detained under section 92 must be brought before a prescribed authority (for example, a magistrate) within 48 hours after the detention, or as soon as practicable after that period. The prescribed authority may authorise the continued detention of that person if the court is satisfied that there are reasonable grounds for supposing that the person is an illegal entrant. Otherwise, the prescribed authority shall order the person's release. The term of custody can be until the person is ready, willing and able to leave Australia, or such reasonable period to allow DIEA to process an application for the person to remain. In any case, the period of detention is not to exceed seven days from the date of authorisation, unless the detainee consents. A prescribed authority may from time to time extend the seven day term of detention. In practice, unless the illegal entrant consents to a longer term of detention, he/she is brought back before a magistrate every seven days for authorisation of extensions of detention.[43]

3.100 While section 92 confers a discretion on a prescribed authority to order the release of a person from custody, DIEA stated that the Migration Act does not provide for a prescribed authority to impose conditions on the release.[44] Only an authorised officer is allowed to impose conditions of release. Despite this fact, bail conditions have been imposed in a handful of cases. For example, in November 1991, the Hobart Magistrates Court released an illegal entrant on bail on the conditions that the person report to DIEA, lodge a bank guarantee of $5,000, reside at a certain address and reappear before the Court on a set date. The bail conditions were complied with in this case.[45]

3.101 DIEA noted that approximately one third of illegal entrants detained either depart under supervision or are otherwise released from custody within two days of being detained. This obviates the need for them to appear before a prescribed authority. DIEA also advised that in New South Wales and Victoria, where the bulk of compliance work is directed, hard data generally is not available

42 Migration Act, s 4(5)

43 Evidence, p. 490.

44 Evidence, p. S1054.

45 Evidence, p. S1054.

on cases where the Magistrates Court has ordered the release of persons held in immigration custody. However, anecdotal information suggests that the incidence of release by the Magistrates Courts in those States is very low with about 12 persons (six in each State) released by those Courts over the last three years. The detainees were released because the magistrates were satisfied that the detainees were the holders of a valid entry permit, or the magistrates were of the view that continued detention was inappropriate. No conditions of release were imposed in any of these cases, and in the cases where the person released was an illegal entrant, the person subsequently was available to DIEA as required.[46]

3.102 Section 93 relates to the detention of persons subject to a deportation order. There is no requirement for court scrutiny of the detention of deportees, unless the person who is arrested makes a statutory declaration within 48 hours of arrest that he or she is not the person subject to the deportation order. Where such a declaration is made, the person must be brought before a prescribed authority within 48 hours of making the declaration. If the prescribed authority finds that there are reasonable grounds for supposing that the person is subject to a deportation order, then the person may be held in custody until deported, or until released by order of the Minister or the Secretary of DIEA. Otherwise, the person must be released.

3.103 Over the years, there have been a number of cases concerned with the meaning and application of the section 92 and section 93 provisions. Just as in the *Lim* case, the courts have taken a purposive approach to the substantive question of whether for deportees the immigration detention is justified. If the detention is to effect a legitimate purpose, it can be justified. In the High Court case of *Park Oh Ho v The Minister for Immigration, Local Government and Ethnic Affairs* (1989) 88 ALR 517, the appellants, who were involved in a migration scam, were detained as deportees. The deportation order was made not for the purpose of deporting them, but for a purpose which the High Court found was impermissible, namely detaining them in custody in Australia so that their evidence would be available in criminal proceedings. The High Court held that the deportation order was 'intrinsically flawed' and the detention was unlawful. The power to detain pending deportation permitted detention during such time as was required for the execution of the deportation order and not for some ulterior motive.

Summary of detention provisions

3.104 As the law now stands, the effect of all the above detention provisions is that unauthorised border arrivals taken into detention under section 88, section 89, Division 4A or Division 4B must be detained until granted an entry permit or removed from Australia, while illegal entrants and deportees can be but are not required to be detained.

46 Evidence, p. S1054.

3.105 As is evident from the above outline, the existing detention provisions are extremely complicated. In its report on Australia's refugee and humanitarian system, the Joint Standing Committee on Migration Regulations, this Committee's predecessor, stated:

> There are a confusing array of provisions focused not so much on the status of the person as their mode of arrival in Australia. There also is a variety of terms now used to describe border claimants. These terms often carry little if any legal significance. A border claimant can be a prohibited entrant and an unprocessed person and a designated person. The effect of all these terms is simply to permit the Government to order and control the detention of border claimants.[47]

3.106 The Migration Regulations Committee recommended that the provisions be rewritten in a simplified and comprehensible manner, using, as far as possible, a single descriptive term for all border applicants.[48] The Committee notes that the Migration Reform Act, which is scheduled to commence operation on 1 September 1994, is aimed at simplifying and clarifying Australia's immigration detention provisions (see also paragraph 3.127).

Litigation by unauthorised border arrivals

3.107 In recent years, there has been an increasing trend to litigate decisions taken under the Migration Act, including decisions refusing applicants refugee status. Migration Act decisions comprise by far the largest single case load of applications filed in the Federal Court over the past four years, as can be evidenced from the figures in Table 3.2.

3.108 In particular, a large number of unauthorised boat arrivals who have been detained and/or refused refugee status at the primary stage and review stage have challenged the decisions in the Federal Court. While some of these cases have been determined, others are still awaiting judgement. The Minister has undertaken that persons involved in the cases will not be removed from Australia while decisions are pending.

3.109 Certain of the cases already have been mentioned in this chapter. Nevertheless, in the section below, the Committee has detailed the recent litigation involving unauthorised border arrivals, so as to show the extent to which litigation has become a significant and complicating factor in the refugee determination process in Australia.

47 Joint Standing Committee on Migration Regulations, op cit, p. 159.

48 ibid, p. 160.

TABLE 3.2

Review applications lodged in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*

Year	Review applications relating to the Migration Act	Total review applications	Migration Act applications as a percentage of total
1988/89	107	283	38%
1989/90	126	251	50%
1990/91	132	230	57%
1991/92	167	276	61%
1992/93	207	331	63%

* Source: Federal Court of Australia, *Annual Report 1992-1993*, Table 2c, pp. 48-51.

High Court cases

3.110 Two cases involving boat people were appealed to the High Court:

- *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 97, 176 CLR 1; and
- *Ly Sok Pheng v The Commonwealth and the Minister for Immigration, Local Government and Ethnic Affairs* (the *Sok* case).

3.111 The *Lim* case challenged the constitutional validity of the Division 4 amendments to the Migration Act which came into effect from 6 May 1992. The facts, background and conclusions to this case have been set out previously at paragraphs 3.11 and 3.94 to 3.96.

3.112 The *Sok* case challenged the validity of amendments to the Migration Act which limit the compensation which a designated person may be awarded in an action against the Commonwealth in respect of unlawful detention to one dollar a day. The case is pending.

Federal Court cases

3.113 In its submission dated 13 August 1993, DIEA advised of 13 cases involving unauthorised boat arrivals which had been launched in the Federal Court.[49] In supplementary submissions dated 3 September 1993, 12 October 1993 and 21 December 1993, DIEA provided an update on progress in these cases.[50] Some of these cases were launched by individuals appealing their refusal decisions for refugee status. Other cases were representative actions. Some of the boat people were involved in a number of challenges.

3.114 In *Chu Kheng Lim and Others v The Minister for Immigration, Local Government and Ethnic Affairs*, an interlocutory application for stay of deportation was brought in the Federal Court in Darwin by various members of the Pender Bay boat. Stay was granted on 6 April 1992. Following advice from senior counsel that the decisions were potentially defective, the Minister agreed to reconsider the refugee decisions in relation to these persons. The majority of applicants in this action are now included as group members in the representative action *Lim Chinh Po v The Minister for Immigration, Local Government and Ethnic Affairs.*

3.115 In *Li Shi Ping and Liu Xiu Ling v The Minister for Immigration, Local Government and Ethnic Affairs* (application dated 10 November 1992), Mr Li and Ms Liu, who are the two remaining members of the Jeremiah group, contended that they were not given the opportunity to put their true claims for refugee status because of warnings given to them by an interpreter and the inappropriate conduct of Departmental interviews. The action was concluded on 13 August 1993 and the decision was reserved. Mr Li and Ms Liu also are group members in the representative proceedings of *Zhang De Yong v The Minister for Immigration, Local Government and Ethnic Affairs.*

3.116 *Wu Shan Liang v The Minister for Immigration, Local Government and Ethnic Affairs* (application dated 13 November 1993) was an application for review of primary decisions refusing grants of refugee status to members of the Labrador boat. It was a representative action. As the group had already availed themselves of internal merits review via the RSRC, the Minister filed a Notice of Motion to dismiss proceedings. The hearing was set for 7 to 9 February 1994. The persons involved in this action also were group members in the *Zhang* representative action.

3.117 *Mok Gek Buoy v The Minister for Immigration, Local Government and Ethnic Affairs* (application dated 24 November 1992) was an application for review of decisions refusing to grant refugee status to Ms Mok. The grounds for challenge included failure to take into account relevant considerations, applying a policy regardless of the merits of the case, and adopting irrelevant considerations, in

49 Evidence, p. S745.

50 Evidence, pp. S1127-S1133, S1165-S1171, S1265-S1269.

particular institutional bias. On 12 November 1993, Keely J set aside the refugee status refusal and remitted Ms Mok's application for refugee status for reconsideration (*Mok v The Minister for Immigration and Ethnic Affairs* (1993) ACL Rep (Iss 25) 77 FC 63). An appeal to the Full Federal Court was filed on behalf of the Minister on 2 December 1993 and was scheduled for hearing in March 1994.

3.118 *Ly Muy Heng v The Minister for Immigration, Local Government and Ethnic Affairs* (application dated 24 November 1992) was an application for review of decisions refusing to grant refugee status to Ms Ly. The grounds of challenge were similar to those of Ms Mok. The matter was to be heard at the conclusion of the *Mok* case.

3.119 *Ung Bun Nat v The Minister for Immigration, Local Government and Ethnic Affairs* (application dated 24 November 1992) was an application for review of decisions refusing to grant refugee status to Ms Ung. The grounds of challenge were similar to those of Ms Mok. DIEA noted that there was a good chance that the case would be discontinued, as Ms Ung had an Austrian visa and was expected to depart Australia to meet up with her new husband.

3.120 *Lek Kim Sroun v The Minister for Immigration, Local Government and Ethnic Affairs* (application dated 17 December 1992) was a representative action covering 48 people who travelled to Australia on the Beagle. It was an application for review of decisions refusing to grant refugee status to the members of the Beagle boat. The grounds for challenge included failure to provide natural justice, failure to take into account relevant considerations (eg safety of non-voluntary returnees), applying a policy regardless of the merits of the case, and adopting irrelevant considerations. On 22 June 1993, Wilcox J ruled on Parts A and B of the application, and held that the refusal by the Department of Dr Lek's claim for refugee status was lawful and involved no reviewable error. The Court also ruled on claims common to all group members and found that there were no errors of law in each of the determinations refusing refugee status. However, Wilcox J found that there was a technical legal error in the visa/entry permit decisions, in that the decision makers had acted on the basis that the applicants had not technically 'entered' for the purposes of the Act. The fact that they had 'entered' meant that, in these cases, they had access to the Minister's public interest discretion in section 115. The Minister, however, announced that he did not propose to consider whether or not to exercise the discretion. On 8 October 1993, in relation to Part C of the application, Wilcox J allowed the application for review in respect of three applicants and set aside the Minister's decision refusing them refugee status. Wilcox J dismissed the applications for review of the other applicants. The three successful review applications were remitted to the Minister for reconsideration (*Lek Kim Sroun v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455). In respect of the unsuccessful review applications, a representative appeal to the Full Federal Court was filed by Mr Ly, and appeals also were filed by 38 individuals. The appeals

were listed for hearing on 14 to 16 February 1994. In this matter, the named applicant, Dr Lek was ordered to pay two thirds of the Minister's costs in relation to the action. [51]

3.121 *Lim Chinh Po v The Minister for Immigration, Local Government and Ethnic Affairs and Noel Barnsley* (application dated 21 December 1992) was a representative action covering 11 adults and their dependants who entered Australia on the Pender Bay on 28 November 1989. It was an application for review of decisions refusing to grant them refugee status. The grounds for challenge included the failure to take into account relevant considerations (eg safety of non-voluntary returnees), applying a policy regardless of the merits of the case, and adopting irrelevant considerations. On 16 December 1993, the hearing scheduled for 21 February 1994 to 4 March 1994 was vacated pending the appeals in the *Mok* case and the *Ly* case.

3.122 *Zhang De Yong v The Minister for Immigration, Local Government and Ethnic Affairs* (application dated 23 December 1992) involved an application by a citizen of the People's Republic of China, who was not an unauthorised boat arrival. Nevertheless, the case impacted on all refugee cases. Mr Zhang was a stowaway on board a ship which arrived in Western Australia in June 1990. His application for refugee status, lodged on 17 July 1990, was refused on 11 December 1992. In his application to the Federal Court, Mr Zhang claimed to represent all those persons whose refugee applications remained to be considered by the Department as well as those who had been refused in the past and who had not received the opportunity of an oral hearing before the decision maker. The applicant claimed that there was a Departmental policy prohibiting an oral hearing before the decision maker. DIEA noted that it had received over 200 requests from refugee applicants, some of whom are boat persons, seeking undertakings that they not be removed from Australia because they were group members of the *Zhang* representative proceeding.[52] The *Zhang* action was dismissed by French J on 6 October 1993 (*Zhang De Yong v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 118 ALR 165). A representative appeal was heard on 13 December 1993 and judgement was reserved.

3.123 *Kim Lay Heak v The Minister for Immigration, Local Government and Ethnic Affairs* (application dated 5 January 1993) was a representative action covering 42 people who travelled to Australia on the Collie. It was an application for review of decisions refusing to grant refugee status to the members of the Collie boat. The grounds for challenge included the failure to take into account relevant considerations (eg safety of non-voluntary returnees), applying a policy regardless

51 One effect of this order may be that Dr Lek may be unable to qualify for the proposed Cambodian Assistance Scheme permit because he may not satisfy the public interest criteria for visas and entry permits, which require that if a person owes money to the Commonwealth, he must satisfy the Minister that he has made appropriate arrangements to pay the debt (Migration Regulations, Schedule 4, para 4004).

52 Evidence, p. S748.

of the merits of the case, and adopting irrelevant considerations. On 15 November 1993, the hearing scheduled for 22 November 1993 was vacated at the request of the applicant. The case was not scheduled to be heard earlier than March 1994.

3.124 *Chheng Phea Rith v The Minister for Immigration, Local Government and Ethnic Affairs* (application dated 2 February 1993) was a representative action covering 46 people who travelled to Australia on the George and Echo boats. It was an application for review of decisions refusing to grant refugee status to the members of the George and Echo boats. The grounds for challenge included the failure to take into account relevant considerations (eg safety of non-voluntary returnees), applying a policy regardless of the merits of the case, and adopting irrelevant considerations. On 25 November 1993, the hearing scheduled for 6 December 1993 was vacated on application of the applicant. The case was not scheduled to be heard earlier than April 1994.

3.125 *Tang Jia Xin v The Minister for Immigration and Ethnic Affairs and Joanne McRae* (application dated 9 July 1993) was an application seeking an order compelling the respondent to release Mr Tang from custody. Mr Tang was one of 26 designated persons who arrived in Australia on the boat Isabella and who were held in detention at Port Hedland. Mr Tang's refugee status application was refused on 28 June 1993. The primary issue before the Court was whether Mr Tang had been held in application custody under Division 4B of the Migration Act for more than the authorised period of 273 days. Neaves J held that the authorised period of detention had been exceeded and ordered the release of Mr Tang (*Tang Jia Xin v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 116 ALR 329). Subsequent to the ruling by Neaves J, the Minister for Immigration and Ethnic Affairs decided to release a further 36 persons from detention pending the determination of their status. As noted previously, the decision by Neaves J was upheld on appeal by the Full Federal Court (*The Minister for Immigration, Local Government and Ethnic Affairs v Tang Jia Xin* (1994) ACL Rep (Iss 1) 77 FC 11). An application for special leave to appeal to the High Court was lodged on 23 December 1993 and was pending.

3.126 *Wu Shan Liang v The Minister for Immigration and Ethnic Affairs* (application dated 16 July 1993) was a representative action filed under Mr Wu's name. It was an application for review of decisions refusing to grant refugee status to members of the Labrador boat. The case was set for hearing on 7 to 9 February 1994.

Supreme Court case

3.127 *Truong Buu Dien v The Manager, Immigration Detention Centre Port Hedland* (Full Court, Supreme Court WA, No. 1606 of 1993, 24 June 1993, unreported) was an application for a writ of habeas corpus by three Vietnamese claimants who had arrived on 26 April 1991 in a boat codenamed George, and three Chinese applicants who had arrived on March 1991 on a boat codenamed Dalmatian. The applicant claimed that their continuing detention under Division 4B of the Migration Act was unlawful, as they had been in application custody for a period in

excess of 273 days as at the respective dates of refusal of their entry applications. In this case, as in the case of *Tang Jia Xin*, the Court was required to rule on a computation of application custody days in order to determine whether the 273 days had been exceeded. In these proceedings, the six applicants also were members of the group included in the judicial review application brought by Zhang De Yong. In the *Zhang* proceedings, orders were made by consent, concerning the six applicants, that the Minister's decisions refusing them refugee status be suspended until further order. The Supreme Court held that the effect of those orders was that the applicants reverted to application custody and the relevant period of 273 days recommenced to run. The Supreme Court found that the six applicants remained lawfully in application custody and refused to issue the writ of habeas corpus.

Migration Reform Act

3.128 As noted previously, the existing legislative detention regime is set to change on 1 September 1994. The Migration Reform Act, which effects these changes, introduces major amendments to the Migration Act. The Explanatory Memorandum stated that the major themes behind such changes are 'simplicity, clarity, certainty and fairness'.[53] To achieve these aims, the Migration Reform Act:

- abolishes the distinction between visa and entry permits, replacing them with a single visa document; and
- introduces a simple distinction between lawful and unlawful non-citizens to replace the existing categories of unprocessed, prohibited, designated, illegal and legal non-citizens.

3.129 Included in these changes is a rationalisation of the provisions relating to detention.

3.130 The Migration Reform Act was set to come into operation on 1 November 1993. However, the commencement date has been deferred to 1 September 1994 to allow for the drafting of subordinate legislation, the design and printing of forms, the training of departmental officers, and the development of new information technology systems and programs.[54]

53 *Migration Reform Bill 1992, Migration (Delayed Visa Application) Tax Bill 1992*, Explanatory Memorandum, p. 2.

54 *Migration Laws Amendment Bill 1993*, Explanatory Memorandum, p. 2.

3.131 The existing complicated legal arrangements for immigration detention in the Migration Act will be replaced by a detention regime based on the principle that detention will be mandatory for all persons who have no authority to be in Australia. All such persons are to be known as 'unlawful non-citizens'.[55] The Migration Reform Act defines an unlawful non-citizen as any non-citizen in the migration zone[56] who is not a lawful non-citizen.[57] While all 'unlawful non-citizens' must be detained at first instance, some will be able to qualify for release from detention while their status is being determined. The mechanism for securing release from detention is the bridging visa. The bridging visa will give temporary lawful status to those non-citizens released from detention who are awaiting consideration of their applications to remain in Australia.[58]

3.132 Under the Migration Reform Act, unlawful non-citizens will include undocumented border arrivals, overstayers, non-citizens whose visas have been cancelled, as well as those who at the commencement of the Migration Reform Act are illegal entrants.[59]

3.133 The Migration Reform Act does away with the existing distinctions between passengers arriving by air, ship or boat. It also removes the legal fiction that non-citizens who arrive without a valid visa and are detained at the border have not 'entered' Australia.[60] In law, unauthorised border arrivals, illegal entrants and deportees will be subject to mandatory detention at first instance.

3.134 Under the Migration Reform Act, if an officer knows or reasonably suspects that a non-citizen in the migration zone is an unlawful non-citizen, or that a non-citizen in Australia but outside the migration zone is seeking to enter the migration zone and upon entry would be an unlawful non-citizen, then the officer must detain that person.[61]

55 Migration Reform Act, s 54W.

56 Migration Reform Act, s 4. The definition of migration zone carries with it some attendant ambiguity, but in the Migration Reform Act includes land at low mean water mark that is part of the States or Territory, the sea within the limits of a State or Territory and a port, and Australian resource and sea installations.

57 Migration Reform Act, s 15.

58 Migration Reform Act, Subdivision AF.

59 Migration Reform Act, s 15.

60 Migration Reform Act, ss 4, 4AA.

61 Migration Reform Act, s 54W.

3.135 As stated, the Migration Reform Act establishes a principle of mandatory detention. The Act sets down different detention arrangements as follows:

- immigration clearance detention;
- the detention arrangements for unlawful non-citizens; and
- detention for questioning.

3.136 Immigration detention is defined in the Migration Reform Act to mean:

(a) being in the company of, and restrained by:

(i) an officer; or

(ii) in relation to a particular detainee - another person directed by the Secretary to accompany and restrain the detainee; or

(b) being held by, or on behalf of, an officer in:

(i) a detention centre established under the Migration Reform Act; or

(ii) a prison or remand centre of the Commonwealth, a State or a Territory; or

(iii) a police station or watch house; or

(iv) another place approved by the Minister in writing.[62]

Immigration clearance

3.137 Although the Migration Reform Act removes the legal complexities associated with the concept of entry, the Act necessarily subscribes to the principle that entry to Australia must be authorised, and sets down arrangements dealing with the process of border immigration clearance.[63] Whereas in the existing Migration Act a person's immigration status depends in part on whether the person has entered Australia, the Migration Reform Act distinguishes arrivals according to whether they have been cleared through immigration control.[64]

62 Migration Reform Act, s 4.

63 Migration Reform Act, Part 2, Division 4.

64 Migration Reform Act, s 54HS.

3.138 The Migration Reform Act states that a person is in immigration clearance if the person is with an officer to whom the person has gone to show evidence of their passport or identity, Australian citizenship, or visa, has not been refused immigration clearance, and remains with that officer.[65] A person is immigration cleared if he/she presents at an authorised entry point, is the holder of a valid visa and is cleared for entry to Australia.[66] If the person has no visa, is refused an entry visa, has their visa cancelled, or makes an application for a visa that is impossible or impracticable to decide immediately, the person is refused clearance.[67] If the person avoids immigration clearance by clandestine entry, including by jumping ship, he/she is taken to have bypassed immigration clearance.[68]

3.139 For the vast majority of arrivals, the process of immigration clearance will take less than one minute. DIEA noted that the desired current passenger processing time is in the region of 45 seconds per passenger.[69] However, if a person arriving in Australia has no visa, or arrives with a fraudulent, defective or inappropriate visa, he/she may be in immigration clearance for a length of time. In the Migration Reform Act, the officer's powers to restrain the person and the person's rights during processing are not clear. The Migration Reform Act provisions for questioning detention do not extend to those held up in the process of border clearance. The Committee addresses this matter in its conclusions at paragraph 3.167.

3.140 The Committee notes that, as presently drafted, the provisions relating to immigration clearance (section 54 HS(2)) appear to require that the person in immigration clearance must remain with the officer whom they first approached for clearance. This narrow definition is set to produce practical problems if the person is in immigration clearance for any length of time. On the present definition, if the officer should leave the person, say for a meal break, then the person no longer can be considered to be in immigration clearance. The person would not have bypassed immigration clearance or been refused immigration clearance. The person's status is unclear. This problem could be resolved simply by deleting the requirement that the person in immigration clearance be with a counter or specific clearance officer. The Committee addresses this matter in its conclusions at paragraph 3.167.

65 Migration Reform Act, s 54HS(2).

66 Migration Reform Act, s 54HS(1).

67 Migration reform Act, s 54HS(3).

68 Migration Reform Act, s 54HS(4).

69 Evidence, p. S1066.

3.141 A person can be detained in the clearance process if an officer suspects on reasonable grounds that the person evaded, attempted to evade, appeared to attempt to evade, or was not able to show or did not show a clearance officer the evidence required for clearance, namely their passport or identity, Australian citizenship, or visa.[70] The persons detained might be Australian citizens or non-citizens. A person detained in this regard must be released if he/she gives evidence of identity and Australian citizenship, evidence of identity and his/her visa, or shows an officer evidence of being a lawful non-citizen, or is granted a visa.[71]

Detention of unlawful non-citizens

3.142 Section 54W of the Migration Reform Act states:

> (1) If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.
>
> (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
>
> (a) is seeking to enter the migration zone;
>
> (b) would, if in the migration zone, be an unlawful non-citizen;
>
> the officer must detain the non-citizen.

3.143 An unlawful non-citizen must be detained when an officer knows or reasonably suspects that the person is an unlawful non-citizen, or if in Australia would be an unlawful non-citizen. The officer will know the person is an overstayer from DIEA's database or the person's passport, which will show that he/she is an overstayer, or that the person's visa has been cancelled, or will indicate that the person has not been cleared for entry. Such unlawful non-citizens must be kept in immigration detention until removed or deported from Australia, or granted a visa.[72] The Migration Reform Act states that unlawful non-citizens so detained cannot be released, even by a court, otherwise than for removal or deportation, unless the unlawful non-citizen has made a valid application for a visa and has satisfied all the criteria for the visa.[73]

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70 Migration Reform Act, s 54X.

71 Migration Reform Act, s 54Y.

72 Migration Reform Act, s 54ZD.

73 Migration Reform Act, s 54ZD(3).

Detention for questioning

3.144 Detention also is provided to allow questioning of certain persons who may be liable to have their visa cancelled. Section 54Z states:

> (1) Subject to subsection (2), if an officer knows or reasonably suspects that a non-citizen holds a visa that may be cancelled under Subdivision C, D, or G of Division 2, the officer may detain the non-citizen.
>
> (2) An officer must not detain an immigration cleared non-citizen under subsection (1) unless the officer reasonably suspects that if the non-citizen is not detained, the non-citizen would:
>
> (a) attempt to evade the officer or other officers; or
>
> (b) otherwise not cooperate with officers in their inquiries about the non-citizen's visa and matters relating to the visa.

3.145 Thus, where an officer knows or reasonably suspects that a non-citizen's visa may be cancelled under the particular provisions of the Migration Reform Act, namely subdivisions C, D or G of Division 2, the officer may detain the non-citizen for questioning. The non-citizens who can be detained for questioning are those whose visas appear to be based on incorrect information, whose circumstances have changed permitting visa cancellation, or whose business visas are liable for cancellation. This form of detention comprises a term of limited detention to allow an officer to question the non-citizen about his/her visa and matters relevant to the visa. Such non-citizens must be released from questioning detention within four hours after being detained. In computing the four hours, the following times are disregarded:

- if the detainee is detained at a place that is inappropriate for questioning the person, the time that is reasonably required to take the detainee from that place to the nearest place that is appropriate;
- any time during which the questioning is suspended or delayed to allow the detainee, or someone else on the detainee's behalf, to communicate with a legal practitioner, friend, relative, guardian, interpreter or consular representative of the country of which the person is a citizen;

- any time during which the questioning is suspended or delayed to allow a person so communicated with or an interpreter required by an officer to arrive at the place where the questioning is to take place;

- any time during which the questioning is suspended or delayed to allow the detainee to receive medical attention;

- any time during which the questioning is suspended or delayed because of the detainee's intoxication; and

- any reasonable time during which the questioning is suspended or delayed to allow the detainee to rest or recuperate.[74]

The bridging visa

3.146 The Migration Reform Act provides for non-citizens to be released from detention by way of a bridging visa. The bridging visa gives temporary lawful status to those who are granted such a visa. The Migration Reform Act limits eligibility for a bridging visa to persons who come within the definition of a 'detention non-citizen'. A 'detention non-citizen' is defined in section 26ZN as a non-citizen who is detained, is liable to be detained or will become so liable within a prescribed period, and who has been immigration cleared or is in a prescribed class. Under the Migration Reform Act, the Minister or the Minister's delegate may grant a bridging visa to a detention non-citizen who satisfies the criteria for a bridging visa.[75]

3.147 DIEA noted that unauthorised arrivals, who may be detained at the border or who bypassed immigration clearance by, for example, entering Australia clandestinely, will not come within the definition of 'detention non-citizen'. Accordingly, unauthorised arrivals will not be eligible for a bridging visa, unless they are included within a prescribed class of detention non-citizens.[76]

3.148 DIEA intimated that the regulatory criteria for the grant of a bridging visa will reflect those considerations which are taken into account under the existing detention arrangements in deciding whether or not to detain or release an illegal entrant.[77] DIEA suggested that the matters to be taken into account in determining whether or not to grant a bridging visa could include:

- whether the applicant has been identified to the satisfaction of the officer;

74 Migration Reform Act, s 54Z(7).

75 Migration Reform Act, s 26ZO.

76 Evidence, p. S1065.

77 Evidence, p. S1064.

- whether the applicant is likely to comply with the conditions of the bridging visa if granted, including:

  - whether the applicant is a previous deportee/removee;

  - whether a previous application for a bridging visa has been refused;

  - whether the applicant has committed any breaches of the Migration Act or Regulations;

  - whether the applicant has breached the conditions of any previous bridging visa;

  - whether the applicant previously has absconded, or is likely to abscond;

  - the applicant's conduct during detention; and

  - the strength of the applicant's ties to the Australian community;

- whether the applicant had a visa cancelled or a visa application refused in Australia;

- whether the applicant has lodged, or indicates an intention to lodge, any application for a visa in another class which can be granted in Australia;

- whether the applicant is ready, willing and able to depart Australia, including:

  - whether the applicant is in possession of a travel document;

  - whether the applicant has a ticket and booking/reservation to depart Australia; and

  - the applicant's capacity to travel from Australia;

- whether the applicant has lodged, or is capable of lodging, a bond amount determined by the officer; and

- whether the grant of the bridging visa to the applicant is in the best interests of the community.[78]

78 Evidence, p. S1064.

3.149 DIEA noted that provision is being made for a bridging visa to be considered and decided immediately upon application.[79] The Committee notes that not all of the criteria suggested by DIEA could be decided immediately. Some of the criteria, such as likelihood of absconding and ability to post a bond, may take some time to determine. Nevertheless, DIEA commented that it is not anticipated that any more persons than in the past will be kept in detention.[80]

3.150 Under section 26ZP of the Migration Reform Act, a detained non-citizen can make repeated applications for a bridging visa. However, unless the application is made in prescribed circumstances, a further application cannot be made until:

- 30 days after a refusal to grant a bridging visa, unless a review of the refusal is sought; or
- where a review of a refusal to grant a bridging visa is sought, 30 days after the application finally is determined.

As to this provision, the Committee notes that, in practice, there may be difficulties in fixing the time when an application finally is determined. The Committee addresses this matter in its conclusions at paragraph 3.167.

3.151 The Committee also notes that the Migration Reform Act gives certain detained non-citizens the right of review to the Immigration Review Tribunal (IRT) against decisions refusing them a bridging visa. A decision refusing a bridging visa is reviewable unless such a decision was made at the time the non-citizen was in immigration clearance, or unless the non-citizen has been refused immigration clearance.[81] The Committee notes that decisions refusing visa applications to non-citizens who have bypassed immigration clearance by entering clandestinely, in this definition, appear to be reviewable decisions. Non-citizens who have bypassed immigration clearance are not eligible to qualify for a bridging visa. Even so, the above provision permits them to apply for the review of the decision refusing them a bridging visa. Such a right of review is not available to those detained at the border. The Committee considers that there is no reason to give a review right in respect of a visa to a person who by law is ineligible to qualify for that visa. Removal of that review right would bring the practice applying to those who evade immigration clearance into line with the practice applying to unlawful non-citizens detained at the border. The Committee further notes that the provision allowing repeated applications for bridging visas may produce a multiplicity of meritless reviews in respect of those refusals. The Committee addresses this matter in its conclusions at paragraph 3.167.

79 Evidence, p. S1065.

80 Evidence, p. S1064.

81 Migration Reform Act, Division 1A, s 115, definition of reviewable decision.

Judicial review provisions

3.152 The Migration Reform Act includes a number of provisions which seek to control and stem the flow of litigation to the Federal Court. The recent history of immigration detention in Australia coincides with a proliferation of challenges in the Federal Court and the High Court (as detailed at paragraphs 3.111 to 3.126) in relation to adverse migration decisions, including on refugee and detention matters. The Migration Reform Act seeks to reduce the volume of litigation in the higher courts by extending review rights before immigration tribunals. The jurisdiction of the IRT is to be expanded. The RRT was given jurisdiction under the Migration Reform Act to review decisions refusing refugee status. The Administrative Appeals Tribunal has been given additional jurisdiction, including merits review of criminal deportation cases and review of the cancellation of business visas.

3.153 Alongside the above, the Migration Reform Act restricts judicial review by replacing the review arrangements under the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act) and section 39B of the *Judiciary Act 1903* with a new judicial review regime.[82] Under the new judicial review arrangements in the Migration Reform Act, Federal Court review is sought to be limited to those decisions which the Migration Act defines as judicially reviewable decisions. Judicially reviewable decisions essentially are review decisions by the IRT and the RRT and other decisions under the Act or Regulations relating to visas.[83] The Migration Reform Act also seeks to limit the review jurisdiction of the Federal Court by limiting the grounds for review of Migration Act decisions.[84] The new grounds for Migration Act review are defined narrowly and are expressed to be exclusive and exhaustive. They can be enumerated simply as a failure to observe procedures that were required to be observed, two grounds relating to jurisdiction, improper exercise of power, error of law, fraud, bias and no evidence. Improper exercise of power is confined to improper purpose, exercising a discretionary power under dictation, and inflexible application of a policy. Error of law is defined exhaustively as incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found. Bias is confined to actual bias.[85]

3.154 The tightly defined framework for judicial review under the Migration Reform Act is intended to provide a guard against de facto merits review by the courts, and to remove the fluidity or uncertainty which has characterised the grounds for review under the common law and AD(JR). For example, error of law will no longer embrace such grounds as natural justice, agenda errors, or no evidence. Other grounds available under AD(JR), such as natural justice,

82 Migration Reform Act, Part 4B, s 166LK.

83 Migration reform Act, s 166LA.

84 Migration Reform Act, s 166LB.

85 Migration Reform Act, s 166LB.

unreasonableness, relevant and irrelevant considerations, bad faith and 'other', are expressly excluded.

3.155 At this stage, it is difficult to assess whether or not the proposed measures outlined above will be effective. It is not clear, for example, how effectively the AD(JR) Act and Judiciary Act jurisdiction has been excluded. There also is uncertainty about the scope of the surviving grounds of review, in particular whether they will be interpreted so as to accommodate the grounds which the legislation has sought to exclude. The Committee addresses this matter in its conclusions at paragraph 3.167. The grounds which the Migration Reform Act expressly has excluded are those which represent the basis of most of the recent litigation initiated by or on behalf of refugee claimants. If the efforts to limit and codify the grounds for judicial review under the Migration Reform Act are successful, the litigation levels which have been experienced in the recent past and at present should be lessened considerably.

Concerns regarding the Migration Reform Act

3.156 During the inquiry , the Committee received limited evidence on the specific provisions of the Migration Reform Act and their intended operation. In particular, it is important to note that the regulations which will govern the operation of the Migration Reform Act, including such matters as the mechanism to establish the prescribed class of detention non-citizens and the criteria for grant of a bridging visa, were not available for scrutiny by the Committee. DIEA is currently in the process of formulating those regulations and reviewing the text of the legislation. Nevertheless, as is clear from the above recitation of the Migration Reform Act provisions, the Committee identified potential problems arising out of those provisions which need to be addressed. In the above text, at paragraphs 3.139, 3.140, 3.150, 3.151 and 3.155, the Committee has identified anomalies which appear evident in the wording of the Migration Reform Act. The Committee addresses these matters in its conclusions at paragraph 3.167.

Conclusions on eligibility to qualify for a bridging visa

3.157 Notwithstanding the lack of advice from DIEA, the Committee gave particular consideration to the important control device in the Migration Reform Act, whereby eligibility for bridging visas is limited to those who are detention non-citizens. Detention non-citizens have threshold eligibility for a bridging visa. This mechanism is particularly important for border refugee claimants refused entry, and for clandestine entrants who have bypassed immigration control. These applicants are not detention non-citizens. If they are not included in a prescribed class of detention non-citizens, they remain ineligible for bridging visas and for release from detention. DIEA provided no information to the Committee concerning proposed regulations which might prescribe otherwise ineligible persons as detention non-citizens.

3.158 In Chapter Four, the Committee has considered whether and in what circumstances detained border claimants otherwise ineligible for a bridging visa might be included in a prescribed class and made eligible for release. In this chapter, the Committee has focused on the mechanism for conferring that threshold eligibility.

3.159 Due to the importance of such issues, the Committee gave careful consideration to the best method of structuring such a regulation. As stated, the Committee's deliberations in this regard were handicapped by the lack of information from DIEA as to the mechanism for identifying and the format for establishing the prescribed class.

3.160 The issues concerning whether any undocumented border arrival ought to be released are dealt with in Chapter Four. In the Committee's view the question of whether or not to release particular undocumented border arrivals or clandestine entrants, in principle, ought to be a decision of the Minister personally, which should not be delegated. The Minister can give careful consideration to the circumstances of the applicant, and the facts and merits of the applicant's claim for entry, and can evaluate the control implications which attend the release into the community of those who are not authorised to enter Australia.

3.161 The Minister's discretion to include non-citizens in a prescribed class of detained non-citizens is a benevolent one. The Committee anticipates that the Minister will be called upon to exercise such discretion (see Chapter Four). In the Committee's view, the Minister requires full scope to exercise this discretion, including the freedom to decide whether or not to exercise this discretion. Individual applicants ought not to be able to compel the Minister to exercise this discretion in their favour.

3.162 In particular, the Committee is concerned to ensure that while the Minister has the discretion to confer eligibility for release on such persons, the failure to exercise this discretion, or a negative exercise of this discretion, should not be a pretext for lodging meritless applications for review. The Committee notes that migration legislation has experimented with the exercise of Ministerial discretion in a way which does not invite judicial review.

3.163 Depending on how any regulation prescribing classes of detained non-citizens might be drafted, the Committee notes that if there is to be a threshold decision on eligibility for the grant of a bridging visa, the first question is whether and how such a decision is to be reviewable and/or judicially reviewable. Under the Migration Reform Act, it would be possible to prevent border and clandestine entrants from applying for a bridging visa. If they cannot apply, the Minister is not required to consider their application and there is no decision refusing them a bridging visa. If such non-citizens are permitted to apply for a bridging visa, then unless they are in a prescribed class of detention non-citizens and meet the

prescribed criteria for a bridging visa, they must be refused.[86] As noted at paragraph 3.151, border applicants refused immigration clearance have no right of review to the IRT against this refusal.[87] Clandestine entrants appear to have such a domestic review right. Even if there is no IRT review, the question arises whether these applicants can seek judicial review of the decisions refusing them bridging visas and/or challenge their failure to be included in the prescribed class of detention non-citizens. If decisions refusing a bridging visa, including decisions concerning threshold eligibility for a bridging visa, have been removed from AD(JR) Act or Judiciary Act review, then such decisions will be accessible to judicial review only under the new Migration Act review arrangements. If the AD(JR) Act and Judiciary Act jurisdiction over such decisions remains, then applicants seeking review can continue to apply under the AD(JR) Act and Judiciary Act provisions. Assuming that the decision concerning a bridging visa, including the decision as to whether the non-citizen is a detention non-citizen, comes within the new review arrangements, the decision on eligibility would appear to be a judicially reviewable decision, as it is a decision relating to visas.[88] As noted, the grounds for such judicial review under the Migration Act are limited.

3.164 The Committee anticipates that the regulation prescribing the class of detention non-citizens will contain general criteria which must be satisfied if the non-citizen is to be included within the prescribed class of detention non-citizens. Such general criteria almost certainly should include as criteria certain of the matters outlined by this Committee in Chapter Four, paragraph 4.173, concerning the eligibility of unauthorised border arrivals for release. As stated, the Committee considers that the decision whether to include a border or clandestine entrant as a detention non-citizen ought to be one for the Minister. In the Committee's view, the regulation prescribing detention non-citizens should include, in addition to such general criteria, a particular criteria which can be operated only by decision of the Minister. This particular criteria could be structured in a number of different ways. The Committee notes that various provisions in the Migration Act and Regulations can allow for the appropriate, benevolent[89] exercise of Ministerial discretion, but do not invite judicial review. These include in particular:

- the Minister's residual non-compellable discretion, in the public interest, to substitute for a negative review decision a decision favoured by or more favourable to the applicant (Migration Act, sections 115, 137, 166BE and 166HK);

86 Migration Act, s 34.

87 Migration Reform Act, s 115.

88 Migration Reform Act, s 116LA.

89 The term benevolent is used because if the Minister is disposed to exercise the discretion, it will be to the applicant's benefit.

- the requirement for a notice to be published in the gazette of particular criteria as originally included in regulation 141 of the 1989 regulations, whereby the Minister could gazette the particular compassionate or humanitarian circumstances which made persons eligible for a permanent entry permit on humanitarian grounds. This regulation was deleted without any gazettal being effected. Nevertheless, the requirement for gazettal of particular criteria could be adapted as a means of including certain detained non-citizens in the prescribed class; and

- the Minister's directions power (Migration Act, section 179), whereby the Minister can make directions which are binding on decision makers, providing the directions are not inconsistent with the Migration Act. Again, this mechanism could be adapted to direct that certain non-citizens be included in the prescribed class. Further, to protect the processes of decision making in such matters, the Migration Act could be amended to provide that all evidence on the making of a particular direction is to be inadmissible in litigation relating to the release of detained non-citizens.

3.165 Without information on the text of the proposed regulations to accompany the Migration Reform Act, the Committee canvassed and included the above simply as indicators of the mechanisms by which threshold eligibility for release could be conferred appropriately on detained non-citizens without the risk of it providing another fruitful area for litigation.

General conclusions

3.166 The law on immigration detention is in the process of change. The Migration Reform Act has the explicit aim of simplifying and clarifying the legal arrangements for detention. The Committee supports the general thrust of the Migration Reform Act. In particular, the Committee endorses the simplification of the arrangements for detention, including the abolition of the complicated array of detention provisions which vary according to whether the person is taken in law to have entered Australia, and which depend on the mode of transport which the person utilised to travel to Australia.

3.167 However, the Committee notes that there are certain difficulties with the text of the Migration Reform Act as it presently stands. These issues, as discussed in this chapter, were canvassed with DIEA, which acknowledged the existence of certain anomalies and inconsistencies in the text of the Migration Reform Act. The Committee notes that DIEA has obtained counsel's advice on these matters, and that an interdepartmental working group comprising representatives from DIEA and the Attorney-General's Department is working to identify and

eradicate these problems prior to the commencement of the Migration Reform Act on 1 September 1994. The Committee is of the view that, as part of these deliberations, DIEA must consider and rectify the anomalies identified by the Committee at paragraphs 3.139, 3.140, 3.150, 3.151 and 3.155 of this report.

3.168 Despite the attempts to rectify problems with the Migration Reform Act before its commencement, there are certain matters which the Committee was not in a position to ascertain. These matters pertain in particular to the logistics of the proposed mandatory detention arrangement, the process of immigration clearance, and the criteria and procedures for issuing of bridging visas. The Committee was not given sight of the drafting instructions or operational procedures which will govern the new detention arrangements.

3.169 It is the Committee's intention to continue monitoring developments in relation to the Migration Reform Act. This is in accordance with the terms of reference for the Committee, as distinct from the terms of reference for this inquiry. Under the Committee's terms of reference, the Committee is charged with the responsibility of inquiring into and reporting on regulations made or proposed to be made under the Migration Act, and all proposed changes to the Migration Act and any related Acts. Given the Committee's responsibilities in this regard, the Committee expects that, as soon as possible, the Government will make available for scrutiny by the Committee the legislative drafting instructions and operational procedures relevant to the Migration Reform Act.

3.170 One issue to which the Committee directed its attention was the arrangements for judicial review of refugee determinations, which has the potential to delay considerably the time taken to arrive at a final decision, and therefore the possible time which persons are held in detention. As noted at paragraph 3.152, the Migration Reform Act seeks to restrict judicial review, but there is uncertainty as to whether the proposed measures will be effective. In the Committee's view, the limitation on judicial review should be put beyond doubt by amending the AD(JR) Act and the Judiciary Act to specify that the Migration Reform Act and its predecessors are enactments to which the AD(JR) Act and the Judiciary Act do not apply.

3.171 Notwithstanding the Migration Reform Act amendments and the Committee's further proposals outlined above, the Committee is concerned that the high level of migration litigation in the Federal Court and the High Court might continue unabated. The increasing trend of legal firms and barristers to undertake migration/refugee law and litigation work on a pro bono basis facilitates legal action. In the Committee's view, past experience demonstrates that those seeking refugee status will pursue all avenues of appeal open to them, even where the case is unlikely to succeed.

3.172 Appeal systems are important to rectify errors which can occur in refugee determinations. Errors in refugee matters carry with them the prospect of very serious consequences for the aggrieved applicant. The Committee is hopeful that the RRT will act as an appropriate and effective body to ascertain and resolve

such errors. However, the Committee notes that litigation can be and is undertaken in the migration field not just where an error in decision making has occurred, but also because applicants nurse and pursue scintillas of hope of staying in Australia, or regard litigation as a mechanism to buy further time in Australia.

3.173 Increased litigation leads to increased delays and costs within the refugee determination process, and, for those who are held in detention pending a final decision on their status, a significantly longer period of detention. The Committee is of the view that the Government cannot be held responsible for prolonged detention where persons seek to utilise all avenues of legal appeal available to them.

3.174 The Government, through DIEA, is able to control the length of the primary decision making process and ensure that it is expeditious. The Committee considers that the Government must continue to scrutinise the primary determination process to ensure that there are no delays. In the Committee's view, the delays in primary processing of boat arrivals prior to 1992 were entirely unacceptable and never ought to be repeated. In addition, the Parliament has legislated to ensure that the RRT process also must not be delayed. The RRT is required to consider all cases expeditiously and to give priority to cases involving persons held in detention. Neither the Government nor the Parliament, however, can control the time taken for a legal challenge in the Federal Court or the High Court to be finalised. In many instances, such legal challenges involve complex argument and the need to obtain and consider much detailed evidence. This can lead to substantial delays, even where there is a genuine effort to expedite the process. The procedures in the Federal Court and the High Court are not well adapted for hearing a large number of cases. In this regard, it is worth noting that Justices Wilcox and Keely, in the cases of *Lek* and *Mok*, went to some lengths to explain how the delays in their review determinations occurred.

3.175 In many instances, the proliferation of legal challenges can begin to distract from the real issues of the case. The interests of asylum seekers are best served if those who need protection are given that protection as soon as possible, and if those who are determined not be refugees are advised of that fact as expeditiously as possible. Although some claimants have legitimate grounds for seeking review, such review should be undertaken only where the case has merit. If the person is not eligible to remain in Australia, in fairness, they need to be made aware of this fact at the earliest opportunity, in order that they can make alternative plans for their future. The pursuit of litigation on technical points, particularly where the case has little substantive merit, merely serves to build up false and hurtful hopes. In its discussions with persons detained at Port Hedland and Westbridge/Villawood, the Committee was concerned about the high and unrealistic expectations which those persons entertained regarding the likelihood of success in particular cases.

3.176 The Committee is of the view that, notwithstanding the Migration Reform Act amendments, consideration should be given to the degree of access to the courts which is available to refugee applicants who have been refused refugee

status. In this regard, the Committee deliberated on whether migration decisions, including refugee determinations, ought to be removed from Federal Court review. The Committee notes that while the removal of migration decisions from Federal Court review would limit the opportunities for judicial review, such applications could still be pursued to the High Court. This may have the effect of reducing the volume of migration litigation. It is impossible to predict. What concerns the Committee is that if review applications in migration cases must proceed at first instance to the High Court, there is a possibility of further lengthy delays in the resolution of those applications. As noted above, the Committee is mindful that, in the migration jurisdiction, persons can and do litigate simply to buy further time in Australia. In such circumstances, the desired result of accelerating the decision making process, particularly with regard to refugee determinations, may not be achieved.

3.177 The Committee also considered whether a requirement ought to be imposed that in migration matters, including refugee determinations, persons must seek leave from the Court in order to obtain judicial review in the Federal Court. The Committee notes that the draft report[90] on Canada's refugee determination system by the Canadian Law Reform Commission, dated 5 March 1992, canvassed the reasonableness of a Federal Court leave requirement in appeal cases and in judicial review applications arising out of the refugee determination process. In that draft report, it was recommended that the leave requirement be tightened to allow the judge to refuse leave if the judge is of the opinion that no substantial wrong or miscarriage of justice has occurred as a result of the alleged errors in respect of which leave is being sought.

3.178 The Committee considers that there is merit in establishing a provision requiring leave to be sought where Migration Act decisions are sought to be appealed to or reviewed by the Federal Court. The procedures for granting or refusing leave applications should ensure that the applications are dealt with expeditiously, and that unmeritorious claims are disposed of by screening as soon as they are filed. While a leave provision may cause some delays in the hearing of cases which have merit, ultimately it should lead to faster decision making overall, by ensuring that unmeritorious cases are not pursued through the court system. Canada's experience with a leave provision in refugee matters, as noted above, gives the Committee some confidence that it should prove a workable and useful practice in Australia.

90 The Canadian Law Reform Commission's draft report largely was approved, although certain sections, including the provision for recourse to the Federal Court, were still under active review by the Commission when the Commission was abolished in 1992. The Commission published the draft report and noted those sections which had not received final approval. The unapproved sections reflected debate within the Commission but not necessarily the Commission's final views. Note also the discussion on the imposition of a 'leave' requirement for judicial review in Administrative Review Council, 'Report to the Attorney-General: Review of the *Administrative Decisions (Judicial Review) Act 1977* - Stage 1', Report No. 26, AGPS, 1986, pp. 16-21.

3.179 In proposing these reforms, the Committee notes that there is no obligation in international law for a country to have both an administrative and judicial process for determining refugee claims. The Committee also notes that Australia has a generous and exhaustive refugee determination process, offering refugee claimants a two tier administrative system for refugee determinations, coupled with access on appeal or review to the Federal Court.

3.180 In the Committee's view, if the amendments in the Migration Reform Act and the proposals in this report aimed at curtailing the recent trend to litigate migration decisions in the higher courts are not successful, then serious consideration should be given to implementing a new refugee determination process which would provide refugee claimants with access only to the two tier administrative process. This would close off access to review and appeal in the higher courts, save for the right of access to the High Court, which is guaranteed in the Australian Constitution.

3.181 One other related matter to which the Committee gave consideration was the role of legal advisers in the refugee determination process, particularly in relation to detained asylum seekers. The Committee notes that its predecessor, the Joint Standing Committee on Migration Regulations, recommended in its report on Australia's refugee and humanitarian system that:

> public funding be available through the Department of Immigration, Local Government and Ethnic Affairs for the provision of legal advice and assistance to border claimants in relation to the preparation of primary applications for refugee status. Thereafter, publicly funded legal assistance to refugee claimants seeking review of a refusal decision, whether to the Refugee Review Tribunal or the Federal Court, be provided via the Legal Aid Commission, based on the merits of the particular case.[91]

3.182 After careful consideration, the Committee is of the view that there is merit in funding legal advisers for all border refugee claimants to the end of the review stage. In this regard, the Committee is swayed by evidence that a significant percentage of applicants who are unsuccessful at the primary stage in fact are determined to be refugees at the review stage. At the same time, the Committee endorses the view of its predecessor that beyond the review stage, government funded legal assistance should be based on a merits test.

91 Joint Standing Committee on Migration Regulations, op cit, p. 180.

Recommendations

3.183 The Committee recommends that:

1. the Department of Immigration and Ethnic Affairs consider certain anomalies in the text of the *Migration Reform Act 1992*, as identified by the Committee and outlined at paragraphs 3.139, 3.140, 3.150 and 3.151 and 3.155 of this report, and overcome these anomalies before the commencement of the *Migration Reform Act 1992* on 1 September 1994;

2. as soon as possible, the Government provide to the Committee for examination the draft regulations which will accompany the *Migration Reform Act 1992*;

3. the decision on whether to include unauthorised border arrivals and clandestine entrants within the prescribed class of detention non-citizens, conferring on them eligibility to be released from detention with a bridging visa, be a decision of the Minister for Immigration and Ethnic Affairs personally which is not to be delegated. In addition, the mechanism for including such non-citizens within the prescribed class of detention non-citizens be structured carefully so as to allow for appropriate exercise of Ministerial discretion without inviting challenges for judicial review of such discretion;

4. the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903* be amended to specify that the *Migration Reform Act 1992* and its predecessors are enactments to which the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903* do not apply;

5. a leave provision be introduced such that applicants challenging decisions under the *Migration Act 1958* be required to obtain leave in order to apply for a review of Migration Act decisions to the Federal Court;

6. if the amendments in the *Migration Reform Act 1992* and the proposals in this report aimed at curtailing the recent trend to litigate migration decisions in the higher courts are not successful, consideration be given to implementing a new refugee determination process which would provide refugee claimants with access only to the two tier administrative process, and which would close off access to review and appeal in the higher courts, save for the right of access to the High Court which is guaranteed in the Australian Constitution; and

7. public funding be available through the Department of Immigration and Ethnic Affairs for the provision of legal advice and assistance to border refugee claimants in relation to the preparation of primary applications for refugee status and review applications to the Refugee Review Tribunal. Thereafter, publicly funded legal assistance to refugee claimants seeking review of a refusal decision to the Federal Court be provided only on the basis of a merits test.

Chapter Four

DETENTION OF UNAUTHORISED BORDER ARRIVALS

Introduction

4.1 Most of the evidence to the inquiry was focused on the detention arrangements for unauthorised border arrivals who apply for refugee status. In a majority of submissions, criticism was directed at the existing immigration detention system applying to such persons.

4.2 As noted in Chapter Three, there are a variety of provisions in the Migration Act relating to the detention of persons who arrive at Australia's border without a valid entry permit. In general terms, unauthorised arrivals by boat must be held in detention until granted an entry permit or removed from Australia. Unauthorised arrivals by ship may be held in detention until the departure of the ship from Australia. Unauthorised arrivals by air may be detained until granted an entry permit or removed from Australia.

4.3 The existing provisions in the Migration Act draw a further distinction between unauthorised boat arrivals, who must be detained, and illegal entrants, who may be detained. In practice, while all unauthorised boat arrivals must be and are detained, subject to a 273 day time limit, almost all illegal entrants in fact are released conditionally or unconditionally into the community.

4.4 As indicated in Chapter Three, the Migration Reform Act is set to remove the legal distinction between unauthorised arrivals and illegal entrants when it comes into force on 1 September 1994. From that date, all persons who do not have authority to be in Australia will be known as unlawful non-citizens and will be required to be detained. Under the Migration Reform Act, most unlawful non-citizens will be eligible to apply for a bridging visa, which is the mechanism to secure release from detention. However, unauthorised border arrivals will not be eligible for the grant of a bridging visa, unless the Minister prescribes particular unauthorised arrivals as a class eligible to qualify for the bridging visa.

4.5 Much of the criticism of the existing detention regime in Australia has arisen as a result of the lengthy detention endured by unauthorised border arrivals who have come to Australia since November 1989. During the inquiry, the Committee investigated the criticisms which have been made, and considered the proposed alternatives to detention.

4.6 As indicated in Chapter Two, as at 27 January 1994, the number of unauthorised arrivals detained for more than one week has included 735 persons by boat since November 1989, along with their 32 Australian born children, 238 by air since 1990, and five by ship since 1990.[1]

4.7 During the inquiry, the Committee received little evidence regarding the problems encountered by unauthorised air and ship arrivals. Minimal reference was made to such persons during public hearings. In general, the community concerns and proposals put to the Committee and summarised in this report relate to unauthorised boat arrivals. nevertheless, it is evident that the comments and suggestions which have been made are pertinent to all unauthorised border arrivals, not just boat arrivals.

The rationale for detention of border arrivals

4.8 In its submission and subsequent oral evidence to the inquiry, DIEA defended Australia's existing border detention policy, indicating that it formed an integral part of the system for control of entry into the country. DIEA stated:

> ... consideration of the question of detention cannot be seen in isolation from related matters of entry processing, entry controls and the whole cycle of processing of people seeking entry and stay in Australia which, of course, includes the removal or deportation of those who cannot sustain claims. Our approach to each of these impacts needs to be carefully balanced, including the way in which each element impacts on the other if an effective and efficient approach is to be pursued.[2]

4.9 According to DIEA, the difference between Australia and many other countries is that Australia operates a universal visa system, has an offshore migration program, and has no land borders.[3] The detention policy is a control mechanism to ensure that every non-citizen entering or staying on in Australia is authorised to do so, and to ensure that the integrity of the migration program is upheld.[4]

1 Evidence, pp. S1291-S1337.

2 Evidence, p. 966.

3 Evidence, pp. S641, 986.

4 Evidence, pp. 964, 984, 986.

4.10 DIEA argued that there is a sound basis for the distinction in treatment between unauthorised arrivals and illegal entrants. It noted that while illegal entrants have submitted themselves to a proper application and entry process offshore, unauthorised arrivals, by their mode of arrival in Australia, have avoided the relevant offshore processing.[5] DIEA stated:

> If you build a system which requires individuals to present to the Australian Government in advance of arrival - through one form or another - to seek approval for entry and if the system says that not following that requirement will be ignored on arrival, that undermines our universal visa system.[6]

4.11 DIEA also submitted that if the Government wishes to maintain an orderly migration program to Australia, it is important that Australia's broad entry programs are not undermined by persons who believe that they can arrive in the country and enter the community.[7] DIEA commented:

> ... detention ... is an instrument to achieve administrative ends. It is not punitive. There is no sense in which it is seeking to deter people by saying, 'You will be punished if you come into Australia'. It is simply making the point that, if people are coming here because they believe Australia operates an entry system similar to many other countries in the world where people can front up at borders, obtain entry fairly freely and then enter the labour market and the social security system of the country they want to move into, that is simply not the case in Australia. It is not possible for people to do that. There are controls that work, are well managed, have integrity and will be followed through, including removal at the end stage.[8]

4.12 As noted at paragraph 2.31, DIEA argued that deterrence is incidental to a number of Australia's control policies, including the universal visa system. DIEA commented:

> It is probably true to say that incidental to that universal visa system is deterrence; incidental to airlines checking passports before people hop on a plane is deterrence; and

5 Evidence, pp. S654, 993-994.

6 Evidence, p. 985.

7 Evidence, p. 986.

8 Evidence, p. 999.

> incidental to border controls is deterrence. What we are saying is that the rationale behind detention is not cemented on deterrence.[9]

4.13 Another reason for detention of unauthorised border arrivals, in DIEA's view, is that it ensures the availability of applicants for processing and, if necessary, removal from the country. DIEA advised that, from its experience with applicants in the community, there usually is no problem in maintaining contact with an applicant while the application is being assessed. However, if the decision is negative, problems in locating and removing applicants can and do arise.[10]

4.14 According to DIEA, any alternatives to detention of unauthorised border arrivals would need to offer the Department a level of access to persons, for processing of the refugee application and for removal where refugee claims are not sustained, which is similar to the access which is available when border arrivals are held in detention. In this regard, DIEA expressed significant doubt that an alternative to detention could be relied upon to satisfy this requirement. DIEA stated:

> The Department's experience in the past in locating and removing failed asylum seekers does not lead us to a sanguine view of the level of compliance we can expect with the requirement to depart once decision making processes have been exhausted, nor for that matter does the experience of other countries. For these reasons I am not satisfied that an alternative approach to that now applied would work.[11]

4.15 Specific evidence about difficulties with absconding by unauthorised border arrivals was provided by DIEA when it outlined the initial arrangements under which the early boat arrivals were held. DIEA indicated that those unauthorised arrivals who landed in 1990 and early 1991 were held in unfenced migrant accommodation hostels with a reporting requirement. In relation to these arrangements, DIEA commented:

> Our experience of that process, that is of the absconding that took place and the difficulty in obtaining follow up community support in recovering the people that had

9 Evidence, p. 994.

10 Evidence, p. 1008.

11 Evidence, p. 966.

> breached the conditions that they were asked to abide by, meant that the security arrangements had to be upgraded. That was how we landed in the current situation.[12]

4.16 As noted at paragraph 2.57, DIEA advised that 57 unauthorised boat arrivals escaped from detention between 1991 and October 1993.[13] DIEA also advised that, as at 27 January 1994, 18 unauthorised boat arrivals remained at large.[14]

4.17 Also relevant, as noted at paragraph 2.59, are the statistics provided by DIEA with regard to persons residing in the community who had applied for but been refused refugee status. DIEA noted that, from a group of 8,000 persons who had applied for but been refused refugee status either at the primary or review stages, as at November 1993, 2,171 persons (27 percent) did not have a valid entry permit and remained unlawfully in the country.[15]

4.18 While advocating the continuation of Australia's immigration detention policy,[16] DIEA, nevertheless, acknowledged that concerns had been raised by the Attorney-General's Department (as noted at paragraphs 4.36 and 4.37) regarding long term detention and detention of children. DIEA advised that these matters were under further consideration.[17]

4.19 DIEA also acknowledged that an essential adjunct to the detention regime is a fair and speedy process for determination of claims to refugee status. In this regard, it was noted that primary decisions have been made within a month on all applications lodged by unauthorised boat arrivals since early 1992.[18] In DIEA's view, 'the refugee determination process is operating expeditiously and fairly'.[19]

12 Evidence, p. 1095.

13 Evidence, p. S1287.

14 Evidence, p. S1336.

15 Evidence, p. S1279.

16 Evidence, p. 1091.

17 Evidence, pp. 965, 1094.

18 Evidence, p. S655.

19 Evidence, p. 965.

Submissions on Australia's international obligations

4.20 In many submissions, it was argued that Australia's existing detention regime for unauthorised border arrivals places Australia in breach of the international obligations which it agreed to undertake when it became signatory to a range of international instruments, which are outlined in Chapter Three.[20] It also was suggested that Australia's existing detention regime does not conform to appropriate international standards, such as UNHCR Executive Committee Conclusion No. 44.[21]

4.21 In most submissions, the criticisms were made in general terms. In some submissions, it was argued that there have been and continue to be specific breaches of international agreements and standards.

4.22 The Human Rights Commissioner submitted that as there currently is no provision which allows the individual circumstances of the detention of border claimants to be taken into consideration in determining the reasonableness or appropriateness of detaining them, then Australia is in breach of Article 9 of the ICCPR.[22]

4.23 It was argued further in evidence that because all asylum seekers in breach of immigration law are not detained, the decision to detain certain unauthorised persons is arbitrary in its application.[23]

4.24 Concerns also were expressed that the existing detention arrangements for unauthorised arrivals do not satisfy the requirements of the Refugee Convention and Refugee Protocol, or of UNHCR Executive Committee Conclusion No. 44. It was submitted that there is a clear presumption in international standards that detention of asylum seekers normally should be avoided and should be resorted to only where necessary. UNHCR stated:

> The repeated thrust of the 1951 Convention and the Conclusions of the Executive Committee is that only restrictions that are necessary ought to be applied to the freedom of movement of refugees and asylum seekers.[24]

20 Evidence, pp. S144, S154-S155, S245, S278, S428, S600, S613.

21 Evidence, pp. S154, S166, S278-S279, S401-S402, S445.

22 Evidence, p. S599.

23 Evidence, pp. S449, S579, S810.

24 Evidence, p. S927.

4.25 One view put to the Committee was that the detention of asylum seekers in Australia goes beyond that which is necessary to protect national security, verify identity or determine the elements upon which the claim to refugee status is based.[25]

4.26 UNHCR noted that it is possible that detention pending determination is in fact envisaged by UNHCR Executive Committee Conclusion No. 44.[26] However, UNHCR commented that while initial restrictions on the freedom of movement may be justified for administrative reasons, for example, to verify identity and to establish the basis of a claim to asylum, thereafter restrictions on movement require further justification.[27]

4.27 UNHCR expressed particular concern about prolonged detention and its implications in terms of the Refugee Convention. Article 31 of the Refugee Convention provides that asylum seekers should not be punished for their manner of entry or illegal presence in a signatory country. According to UNHCR, 'lengthy detention during processing may constitute a penalty on account of 'illegal entry or presence' contrary to sub-Article (1)'.[28]

4.28 Many community based organisations expressed a similar view. For example, the South Brisbane Immigration and Community Legal Service Incorporated stated:

> ... detention of asylum seekers operates as a punishment against people who seek only to exercise a basic human right - namely the right to seek refuge from persecution.[29]

4.29 Amnesty International Australia (Amnesty) indicated that current detention practices do not take into account the special circumstances of asylum seekers as opposed to those of illegal entrants. Amnesty commented that asylum seekers may have no choice but to enter a country without authorisation. It noted that this is recognised within Article 31 of the Refugee Convention.[30]

25 Evidence, p. S237.

26 Evidence, p. S929.

27 Evidence, p. S921.

28 Evidence, p. S935.

29 Evidence, p. S279.

30 Evidence, p. S404.

4.30 A further concern expressed in submissions was that Australia is in breach of the Convention on the Rights of the Child, particularly Article 37, which stipulates that the detention of children shall be used only as a measure of last resort and for the shortest appropriate time. The Human Rights Commissioner and the New South Wales (NSW) Child Protection Council, among others, argued that the treatment of a number of children currently held in detention violated the specific provisions of Article 37.[31]

4.31 In response, DIEA indicated that it is conscious of the need to ensure that Australia's detention practices and procedures conform with its international obligations. DIEA noted that the Attorney-General's Department has been involved closely in the development of the legislation which provides for the immigration detention regime, to ensure that international obligations have been taken into account.[32]

4.32 In this regard, the Committee received a submission from the Attorney-General's Department which focused on the extent to which Australia's detention regime satisfies the requirements of the various international instruments to which Australia is a signatory. The Committee also received copies of advice which the Attorney-General's Department had provided to DIEA on Australia's international obligations.

4.33 The overall conclusion of the Attorney-General's Department was that the existing immigration detention arrangements comply with the international obligations Australia has assumed.[33] The Attorney-General's Department stated:

> ... detention for the purposes of exclusion from Australia, investigation of claims for protection, satisfactorily identifying the detainee, processing refugee or entry permit applications within a reasonable time and protecting public security is unobjectionable.[34]

31 Evidence, pp. S600 S616-S618.

32 Evidence, p. S662.

33 Evidence, pp. S862 and 769.

34 Evidence, p. S850.

4.34 In coming to this conclusion, the Attorney-General's Department noted that administrative detention, of itself, is not prohibited under international law.[35] The Attorney-General's Department stated:

> ... the detention of individuals who enter Australia without authorisation - including asylum seekers - is permissible both under international law and those non-binding international authorities and instruments which are morally and politically persuasive.[36]

4.35 The Attorney-General's Department indicated that virtually all countries provide in their legislation for detention where the power to detain lies with an administrative authority alone. It also submitted that, in a legal sense, detention of non-citizens under the Migration Act does not constitute a punishment, as the purpose is to achieve a legitimate non-punitive object.[37]

4.36 However, the Attorney-General's Department indicated that while the overall detention regime may not be objectionable, the circumstances of particular cases may lead to breaches of international law. In this regard, the Attorney-General's Department expressed concern about the lack of discretion to release persons subject to long term detention, and the detention of children.[38]

4.37 In its submission and subsequent advice, the Attorney-Generals' Department devoted considerable attention to whether Australia's detention regime could be seen as being arbitrary, and therefore potentially in breach of Article 9 of the ICCPR. The Attorney-General's Department indicated that potential violations of Article 9(1) might occur not because of the use of detention, but because individuals may be held in detention in circumstances which are 'unreasonable' or 'unnecessary'.[39] Article 9 of the ICCPR requires that at all times detention must be reasonable in the circumstances. According to the Attorney-General's Department, detention for an indeterminate or unduly prolonged period of time 'may become

35 Evidence, p. S846.

36 Evidence, p. S1008.

37 Evidence, p. S846.

38 Evidence, p. S862.

39 Evidence, p. S850.

unreasonable in the circumstances'.[40] Using the situation of persons currently held in detention as an example, the Attorney-General's Department stated:

> The length of the detention which has, in fact, been experienced by a number of asylum seekers may give grounds on which their detention could be characterised as arbitrary and thus unlawful under Article 9 of the ICCPR. While the detention may indeed be attributable to discrete periods relating to the processing of their complaints and appeal rights, this justification may not suffice where the total period of detention constitutes an abusive period of time.[41]

4.38 The Attorney-General's Department indicated that it is not possible to define precisely what constitutes an abusive period of time. It considered that the relevant test was whether the detention is reasonable and necessary in all the circumstances.[42]

4.39 The Attorney-General's Department advised that where detention continues because a detained person is pursuing administrative or judicial remedies in an effort to prevent their removal, then such detention would not be contrary to Article 9 of the ICCPR, even if it was for extended periods. The Attorney-General's Department stated:

> The fact that a detainee brings several court cases and every appeal opportunity is taken cannot ... have the effect of making the detention arbitrary. If it could be shown, however, that the processing of applications in relation to a person was designed to delay any decision as long as possible that could be seen as arbitrary.[43]

4.40 The Attorney-General's Department suggested that any potential difficulties arising in relation to Article 9 of the ICCPR could be dealt with by providing a power to grant a visa in circumstances where excessive delay has occurred through actions of the Government rather than the applicant.[44]

40 Evidence, p. S850.

41 Evidence, p. S1000.

42 Evidence, pp. S850-S851, S1000.

43 Evidence, p. S1040.

44 Evidence, pp. S1043-S1044.

4.41 As for the Convention on the Rights of the Child, the Attorney-General's Department noted that the detention of children with or separately from their parents raises particular difficulties. The Attorney-General's Department indicated that under that Convention any actions must always be in the best interests of the child and, bearing in mind the child's right to live with his or her parents, detention only may be used as a measure of last resort. In the opinion of the Attorney-General's Department, the power to release children from detention, if that was in the best interests of the child, would ensure that any criticism relating to the Convention on the Rights of the Child could be overcome (see also paragraphs 4.107 to 4.109).

4.42 In a similar vein, the Department of Foreign Affairs and Trade concluded that, while Australian law and practice generally comply with its international obligations, the introduction of greater discretion into relevant regulations could avoid instances arising where Australia was found not to meet those obligations. The Department of Foreign Affairs stated:

> ... there would be less likelihood that our compliance with our international obligations could be challenged before, for example, the United Nations Human Rights Committee, if there were more discretion under regulation relating, in particular, ... to cases in which detention has been prolonged for whatever reason and in cases which involve children.[45]

4.43 Compliance with Australia's international obligations was raised in the High Court's consideration of the *Lim* case. In that case, the High Court declined to offer an opinion on whether Australia was in breach of the Refugee Convention or the ICCPR. The Conventions had no legal force in a context where the legislation explicitly held itself to override any other law in force in Australia, whether written or unwritten, other than the Constitution (see also paragraph 3.13). The Court stated that because Division 4B expressly provided that it was to prevail over any other law in force in Australia, it evinced a clear legislative intent to prevail over international treaties to the extent, if at all, that they are operative in the Commonwealth. It was accepted in that case that where legislation is ambiguous, it would be appropriate for a court to favour a construction of a statute to accord with Commonwealth obligations under an international treaty.

Submissions on detention and entry control

4.44 There was general agreement in submissions that governments appropriately have the right to decide who should enter a country and, in support of that right, have the power to detain those who are not authorised to enter or

45 Evidence, p. 845.

stay. This view was reflected by the Refugee Council of Western Australia, which stated:

> There is no disagreement at all with the concept of government in this country being able to detain people for a reasonable length of time to ascertain whether they are who they say they are and whether they are here for the reasons they say they are here.[46]

4.45 In a similar vein, the Human Rights Commissioner stated:

> Clearly, the Australian Government has both the right and responsibility to determine which non-citizens should be permitted to enter Australia. Equally clearly, in the discharge of this responsibility the detention of non-citizens can be justified in certain circumstances.[47]

4.46 The major points of contention were how and when the power to detain should be exercised, and for how long. In particular, there were criticisms regarding the distinction in treatment between unauthorised boat arrivals and illegal entrants. Concerns also were expressed about the lack of flexibility within the existing system, the length of detention which unauthorised arrivals have endured, and the detention and treatment of vulnerable persons, such as children, the elderly and the infirm.

Arguments against mandatory detention

4.47 In contrast to DIEA, community and refugee advocacy groups submitted that the existing detention policy discriminates against a particular group of arrivals simply on the basis of their method of arrival. In many submissions, it was argued that the distinction between the treatment of unauthorised arrivals and illegal entrants is inconsistent and unfair. The Australian Red Cross stated:

> From a humanitarian perspective there is concern that an inconsistent position is being taken by the Australian Government regarding refugee status applications. Currently living freely in the Australian community are in excess of 20,000 asylum seekers who arrived by means other than by boat, with valid entry papers, but whose papers have expired and thus have no legal right to remain in the country. Each of them is going through the same determination of refugee status process, yet compared to the 500 or so boat arrivals they have the benefit of their freedom whilst their applications are heard.[48]

4.48 In a similar vein, a representative of the Law Institute of Victoria stated:

> I do not see any fundamental distinction between a person who has breached Australia's migration laws as an overstayer by deliberately flouting the very last day of the entry permit or his visa and someone who has arrived here, albeit ignorantly or even voluntarily, without an appropriate passport and entry visa. Each of those applicants is breaching Australia's migration regime, yet in the former we find it expeditious to be able to release him on conditions, in most cases, and in the latter we keep him behind barbed wire for up to three years.[49]

4.49 One view put to the Committee was that persons who enter Australia with a visa and then overstay that visa in order to change their status in Australia are being less honest than those persons who arrive by boat in a more obvious and direct fashion.[50]

4.50 It also was submitted that a policy of mandatory detention does not account for the fact that asylum seekers may not be able to access appropriate documentation or legitimate migration channels. It was suggested that the very nature of asylum seekers will often necessitate an individual leaving their country of origin without correct documentation or without accessing the correct processes. UNHCR indicated that, for precisely these reasons, a clear distinction should be drawn between the situation of an asylum seeker and that of an ordinary alien. Amnesty argued that those who do not and often cannot seek asylum other than by doing so at Australia's border should not be subject to restrictive measures. The Australian Council of Churches commented:

> This policy is inequitable and arguably disadvantages those potentially most in need of protection (ie those not able to use regular modes of transport).[51]

46 Evidence, p. 451.

47 Evidence, p. S594.

48 Evidence, p. S569.

49 Evidence, p. 532.

50 Evidence, p. S796.

51 Evidence, p. S233.

4.51 The Victorian Immigration Advice and Rights Centre Incorporated suggested that 'it is seen as unjust that unlawful non-citizens, under the present system, are treated in a harsher way than most major criminals'.[52] Other groups indicated that unauthorised arrivals are denied certain rights which the justice system extends to criminals, such as recourse to external review of their detention and access to parole.[53]

4.52 Overseas practice also was drawn upon to suggest that Australia has adopted a far stricter approach to detention than comparable overseas countries. It was argued that while most Western countries which are signatories to the Refugee Convention have some form of detention for asylum seekers, in most cases such detention is brief and there are laws which require that it be periodically reviewed. It was noted that most comparable countries have developed a range of alternatives to lengthy detention.[54] UNHCR commented:

> The problem in Australia seems to be that ... there is not sufficient nuance in the way the legislation is presented. It is too uniform in so far as this business of detention is concerned, this mandatory detention. In all the other Western countries it is modulated, there are a lot of exceptions, there are a lot of limits. What differentiates Australia from other Western countries is the lack of modulation, the lack of flexibility in the system, the lack of limits to ... detention ... .[55]

4.53 The South Brisbane Immigration and Community Legal Service Incorporated argued that the existing detention policy is based upon 'an administrative distinction, namely the method of arrival, that ignores factors such as the person's health, age, bona fides, previous experience of trauma or persecution, or other compassionate circumstances'.[56] It submitted:

> A more appropriate policy would be one which allows the merits and needs of the undocumented arrivals case to be considered before detention is enforced.[57]

52 Evidence, p. S625.

53 Evidence, pp. S32, S428, S625.

54 Evidence, pp. S167, S304, S622.

55 Evidence, p. 816.

56 Evidence, p. S276.

57 Evidence, p. S276.

4.54 The view put in many submissions was that there should be consistency in treatment between unauthorised arrivals who seek asylum and illegal entrants who seek asylum. It was suggested in many submissions that border asylum seekers should be eligible for release into the community, just as illegal entrants who apply for refugee status presently are eligible to be released.[58]

Submissions on duration of detention

4.55 As a result of the long term detention endured by many unauthorised arrivals who have landed in Australia since November 1989, much attention was directed to the duration of detention and the limits which should apply.

4.56 Community and advocacy groups generally agreed that unauthorised arrivals should be detained upon arrival in Australia, in order that identity and reasons for arrival can be established, and to allow security and health checks to be conducted. At the same time, it was argued that once a person has lodged an application for refugee status and has satisfied the relevant identity, security and health checks, then that person should be released from detention pending the outcome of his or her application for refugee status, unless that person is a risk to the community or is likely to abscond.[59]

4.57 Many individuals and organisations felt that detention beyond an initial period of identification and checking would be unreasonable. The Catholic Archbishop of Perth, Archbishop Hickey, commented that if an application is made for refugee status 'there seems to be little reason to continue to hold such a person in custody'.[60] In a similar vein, a representative of the Refugee Council of Western Australia commented:

> There is no dissension of view that people should be held for a period of time ... while some estimation is made as to whether these people are a threat to national security, whether they are who they say they are and so on. Providing these questions can be answered in such a way that it is perceived from a security point of view, or even a health view, that these people are not a 'threat to the Australian situation' what is the value of continuing to retain these people in custody? ... once the basic

58 Evidence, pp. S113, S157, S207, S276, S526, S569, S613.

59 Evidence, pp. S129, S151, S167-S168, S613.

60 Evidence, p. S129.

> questions that would be asked of anybody who has illegally entered the country, for whatever reasons, have been answered, the need to retain them in a prison environment, in our view, does not wash.[61]

4.58 Many groups proposed a specific time limit for detention. While various maximum time frames were canvassed, ranging from two to six months, a majority of groups advocated a maximum two month detention limit for those who are not a risk to the community or who are not likely to abscond.[62]

4.59 The Law Institute of Victoria suggested that a relevant factor in establishing a maximum time frame for detention is that there now is a relatively expeditious process in place for determination of refugee status. It commented:

> Given that the Australian Immigration Department has now, through its DORS section, refined processing to a fine art; given that it can now make a decision one way or the other within three months, and in six weeks in some cases in my experience; and given that the RRT has now almost from day one got its act together and is able to make a decision within a further two months, we question why people have to be detained for that long and longer.[63]

4.60 A common view was that beyond a two month time frame, the onus should be placed on DIEA to demonstrate to an independent authority why detention is necessary.[64] One suggestion was that if DIEA is having difficulty in establishing the identity of a detainee, then it should be able to apply for an extension of 30 days beyond the initial two months. Thereafter, DIEA would have to establish before the IRT that there was a demonstrable threat of absconding, or risk to public order or health, otherwise the detainee should be released conditionally.[65]

4.61 The Legal Aid Commission of NSW proposed a more detailed scheme which would allow a detained asylum seeker to apply to DIEA's Compliance Section for release any time after the lodgment of an application for refugee status. Under this proposal, the application for release is to be determined within seven days. A decision not to release would be reviewable by the IRT, which also could reconsider

61 Evidence, p. 440.

62 Evidence, pp. S168, S437, S635, S794, S804.

63 Evidence, p. 543.

64 Evidence, pp. S169, S635.

65 Evidence, p. 582.

an application for release if the refugee determination process had not been completed within three months. The Legal Aid Commission of NSW also proposed that, in cases where the review of a refugee determination is not made within three months, the RRT would be given the same powers and obligations as the IRT to consider an applicant's release. In addition, it submitted that decisions of the IRT and RRT refusing release should be appealable to the Federal Court in accordance with the AD(JR) Act.[66]

Submissions on mechanisms and conditions for release

The bridging visa

4.62 Among those organisations advocating release into the community of unauthorised border arrivals who have lodged applications for refugee status and who have satisfied initial identity, security and health checks, it was agreed generally that the bridging visa system, as proposed in the Migration Reform Act, should be extended to apply to unauthorised arrivals. This view was consistent with the general consensus among community and advocacy groups that, in law and in practice, unauthorised arrivals should be treated in the same manner as illegal entrants. The Australian Catholic Refugee Office, for example, stated:

> Consistent with the view ... that detention is not an acceptable option for non-citizens who arrive here without an entry visa and make claim to stay ... a bridging visa or similar recognition of their actual presence in Australia for the purpose of considering their appeal would appear to be the only realistic alternative.[67]

4.63 The Ethnic Affairs Commission of NSW argued that there seems to be no basis for denying border claimants as a class eligibility for bridging visas when visa overstayers have the right to apply for such visas.[68] In a similar vein, the Immigration Advice and Rights Centre stated:

> The introduction of 'bridging visas' in the [Migration] Reform Act is an opportunity to settle a single scheme for the release from detention of persons unlawfully in Australia, no matter their status on entry.[69]

66 Evidence, pp. S550-S555.

67 Evidence, p. S256.

68 Evidence, p. S430.

69 Evidence, p. S529.

4.64 The Society of St Vincent de Paul pointed to a number of favourable factors supporting the extension of the bridging visa system to border arrivals. It indicated:

- there will be no need for any additional legislative change as provisions already exist which would allow for an extension of the system;
- skilled and experienced staff, and readily useable administrative provisions and resources already would be available;
- similar schemes overseas have proved successful;
- the example of illegal entrants in Australia and asylum seekers involved in similar schemes overseas demonstrates that generally there is co-operation if the incentive is the possibility of a successful application to remain in the country; and
- it is simple, inexpensive and very effective with the majority of illegal entrants who are a low risk population.[70]

4.65 The Legal Aid Commission of NSW, in its proposal for a release scheme, provided an extensive list of criteria which should be taken into consideration when determining whether release from detention is justified. It was not clear whether it was envisaged that any or all of these would serve as criteria for the grant of a bridging visa. The criteria included:

- the person's ability to arrange accommodation, and willingness to undertake to reside at a specified address and notify any change of address;
- the person's or another acceptable person's ability to deposit an amount of money, or security for that amount, or forfeit an amount of money;
- the existence and extent of any family ties;
- any reasonable need to be at liberty, for example to obtain medical treatment or instruct legal advisers;
- the age and state of health of the person and any dependants;
- whether the application for refugee status is manifestly unfounded;

70 Evidence, p. S454.

- whether the person's country of origin has been established, if reasonably capable of being established;
- any previous escape by the person, or attempted escape, from migration custody;
- any previous breach by the person of a condition of a visa, entry permit or release, and the nature of that breach;
- if the person has been convicted of a violent criminal offence, the likelihood, based on evidence, that the person will commit a further violent criminal offence; and
- whether the person is a risk to national security.[71]

Bonds, sureties and conditions of release

4.66 Beyond this broad support for extension of the bridging visa system, there was a range of views about the conditions for release which should attach to the grant of a bridging visa. A variety of possible safeguards to protect against persons absconding were canvassed.

4.67 A number of groups indicated that release should be conditional on the applicant undertaking to:

- reside at a designated address;
- notify DIEA prior to a proposed change of address; and
- report on a regular basis to DIEA or its proxy.[72]

4.68 It was put to the Committee that there would be a real incentive for asylum seekers to adhere to such conditions, as their primary interest is to remain in Australia and they would not wish to prejudice their chances by not fulfilling their release obligations. In this regard, various organisations submitted that a further control measure would be renewed detention if the conditions of release were not satisfied.[73]

71 Evidence, p. S555.

72 Evidence, pp. S133, S168, S635.

73 Evidence, pp. S133, S168, S635.

4.69 Justice the Hon Marcus Einfeld indicated that bonds, recognisances, sureties, reporting arrangements and other forms of control are used quite successfully in other circumstances within Australian society, including other immigration areas and in the regular criminal justice system. Justice Einfeld commented:

> There seems to be no reason why a selection or combination of these systems or similar safeguards would not adequately protect us and our integrity as a nation.[74]

4.70 Considerable further comment was directed to the issue of bonds and sureties. One view put to the Committee in a submission from Ms V Campbell was that those who sponsor an asylum seeker out of detention should be responsible totally for the person who is released. It was submitted that sponsors should be required to pay a large sum of money, in the vicinity of $10,000 to $15,000, which should be retained by the Government if the applicant absconds. It was suggested that 'this would make the sponsors ensure that the refugee does not disappear while his application is being processed'.[75]

4.71 In contrast to this view, many cautioned against the use of bonds, while others directly opposed a bonding system. It was submitted that it would be highly unlikely that persons arriving at the border in the manner of recent arrivals would have access to the funds necessary for lodgement of a bond or surety. It also was argued that those community organisations who are willing to offer assistance to asylum seekers similarly would have difficulty in affording the funds necessary under a bonding system. The Western Australian Government stated:

> A particular difficulty with bonds may be that illegal migrants frequently have no links or ties with existing members of the community. If they do, then it is often with people who have little way of affording to put up a bond.[76]

4.72 The South Australian Office of Multicultural and Ethnic Affairs indicated that, from its experience, the sorts of community groups which may be interested and expected to provide support for asylum seekers would include groups comprised predominantly of people who are refugees themselves. Such groups invariably do not have the money to pay for bonds or sponsorships. It noted that

74 Evidence, p. S818.

75 Evidence, p. S139.

76 Evidence, p. S631.

when this issue was canvassed with the communities themselves and the major refugee support organisations, the notion of bonding arrangements was received poorly. It commented:

> The plight of refugees is such that bonding systems would place an enormous burden on those most likely to provide moral, financial and welfare support and make it even more difficult to assist people in need.[77]

4.73 UNHCR, while not ruling out the use of bonds as an alternative to detention, noted:

> ... the arbitrary imposition of inordinately burdensome monetary or performance requirements on asylum seekers could render any release program simply illusory, or distort the program in favour of the less deserving.[78]

4.74 Church groups generally opposed the introduction of bonds as a release mechanism for asylum seekers. Archbishop Hickey stated:

> Given the impecunious nature of most asylum seekers in detention, it is recommended that no 'bail' be posted as a condition of release.[79]

Community sponsorship schemes

4.75 Instead of bonding arrangements, many groups advocated a co-operative approach between government and non-government organisations through a community sponsorship mechanism. It was suggested that the Community Refugee Settlement Scheme (CRSS) would provide an appropriate model in this regard. The Federation of Ethnic Communities' Councils of Australia (FECCA) urged the Government to utilise the supportive networks of church and other community groups to assist asylum seekers in a positive manner, as it has done with CRSS. FECCA argued that community support and involvement is an essential component in successful settlement of those who come to Australia under any immigration category, and for those who seek asylum here.[80]

77 Evidence, p. S391.

78 Evidence, p. S938.

79 Evidence, p. S133.

80 Evidence, p. S581.

4.76 The Australian Red Cross also advocated a co-ordinated community release program, which could incorporate the assistance of willing organisations. It stated:

> This approach would ensure the equal treatment of all asylum seekers applying for refugee status and would promote a more positive spirit of co-operation between all parties.[81]

4.77 Many groups argued that community sponsorship would be a more cost-effective way of maintaining border asylum seekers. In some submissions, it was argued that the existing costs of maintaining persons in detention are exorbitant. The Refugee Council of Western Australia, for example, stated:

> The dilemma we have is that the cost to the taxpayers - the amount of dollars consumed to maintain people in that environment - is very great. We would be firmly making the case that the cost to the community, if released into care, would be only a fraction of what it currently costs the government to keep people in formal detention, such as in Port Hedland.[82]

4.78 In making these claims, the Committee notes that little evidence was provided to indicate what the full costs would be of maintaining persons in the community. Estimates were made of some of the costs of maintaining persons in a hostel or boarding environment, and these are detailed at paragraph 2.104.[83] However, these estimates only took into account certain living expenses, such as accommodation, food and clothing, and did not include items such as the capital costs associated with accommodation, ongoing repairs and maintenance of the accommodation, and medical and education expenses.

4.79 In proposing community release, some individuals and organisations outlined the extent to which the community could be expected to support persons released from detention. Archbishop Hickey suggested that a community sponsor could provide the following support:

- personal sponsorship of an individual or a group of individuals, such as a family;
- assistance to find accommodation during the time of processing refugee claims;

81 Evidence, p. S572.

82 Evidence, p. S439.

83 Evidence, p. S1226.

- basic material needs such as furniture, clothing and food;
- assistance in complying with reporting and other DIEA requirements;
- assistance in liaising with DIEA on the processing of claims;
- close liaison with groups which could offer education, medical, or legal assistance, without necessarily being expected to provide such services; and
- close co-operation with DIEA, without seeking to give advice on migration matters unless registered to do so.[84]

4.80 Many groups expressed confidence that there would be sufficient support within the community for asylum seekers to enable a community sponsorship program to succeed. The St Vincent de Paul Society, for example, advised that it had in place a contingency plan to deal with any asylum seekers released from detention. Included in that contingency plan were arrangements for the provision of accommodation, transport, education and health. The Society of St Vincent de Paul stated:

> In health, we have looked through the Catholic hospital system and we have made arrangements for the provision of health, including dental health. In education, through the Catholic education system we have arranged for the provision of education. Housing we can arrange through church properties nationally. We have made some investigations as to what surplus church property there is available nationally. As an organisation we allocated initially $50,000 for transport costs to transport the people to various places in the country. We have had some discussions with Qantas about the arrangement of taking up the option of using vacant seats on domestic flights to transport people around the country. We have looked at putting administrative systems in place so that we could keep track of where people were, and we were looking at our local members providing transport and support services - transport services to transport people to whatever reporting procedures were put in place. So we have a contingency plan in place, and if we were told that we had 200 people we would do our best to rise to the challenge.[85]

84 Evidence, p. S134.

85 Evidence, p. 137.

4.81 Many groups emphasised that a community release scheme needed to be a partnership between the government and the community. To this end, it was submitted that government funding assistance should be offered to community sponsors to help cover some of the costs of maintaining persons in the community. It was suggested that some of the resources currently devoted to detention could be reallocated to programs for transition from detention to the community.[86]

4.82 In a number of submissions, it was argued that release should not be conditional on obtaining community support. It was suggested that this would discriminate against those who are unable to obtain such support, and could be divisive within the community if only certain ethnic groups were able to generate support.[87]

4.83 It also was argued that community sponsors would not wish to take on the responsibility of policing any conditions of release. For example, Archbishop Hickey stated:

> A Community Sponsor would not wish to enter any legal contract with the Immigration Department, nor would it wish to be legally responsible for any breach of release conditions by the person sponsored. The relationship between the Community Sponsor and the Immigration Department would be one of 'good will'. Any suggestion that the Community Sponsor should act as a 'parole officer' is not supported ...[88]

4.84 In a similar vein, the Waverley Refugee Support Group commented:

> We wish to make the point very clearly that this CRSS group does not see itself as having a punitive or policing role. Our raison d'etre is to offer support to refugees in Australia; to assist, in whatever way we can, the settlement process of those who come to us under the program, or who find their way to us from a variety of other means.[89]

4.85 The Committee questioned witnesses on whether community sponsors would be able to guarantee that those who were sponsored into the community would be available for deportation if their asylum cases were rejected. The NSW

86 Evidence, pp. S208, S436, S449, S1208.

87 Evidence, pp. S135, S776.

88 Evidence, p. S135.

89 Evidence, p. S776.

Ethnic Affairs Commission suggested that community organisations would be responsive to ensuring that undertakings made at the time of release were met. The Chairman of the Commission stated:

> I am confident, from my interaction with the community, that if they do enter into an agreement or a partnership with the government on this issue, and that partnership is between government and leadership of the community and community infrastructure, then they will adhere to those undertakings and they will deliver.[90]

4.86 The Australian Council of Churches, however, indicated that while churches would encourage and counsel persons to present themselves for deportation on a voluntary basis, they would not physically deliver such persons to DIEA for deportation.[91]

4.87 To alleviate some of the uncertainty regarding the potential role of community sponsors within a release scheme, the Society of St Vincent de Paul suggested that there should be clear agreements on the role, purpose and objectives of community sponsors. It proposed a system of accreditation for community sponsors.[92]

4.88 A further suggestion made to the Committee was that placement of unauthorised arrivals in a hostel arrangement would be a suitable alternative to detention. In one submission, it was noted that off-shore refugees are housed initially in migrant hostels. It was suggested that a similar arrangement could apply to on-shore asylum seekers. The reduced costs of maintaining people in hostels rather than detention centres was cited as one benefit of such an arrangement.[93]

4.89 Some groups also proposed that those released into the community should be given permission to work, and either access to Medicare or some form of health insurance.[94] One argument put in favour of such measures was that they would reduce the dependency on community sponsors. It also was suggested that employment would assist in regularising the person's life, and would act as a further control to ensure that the release conditions are met.

90 Evidence, p. 179.

91 Evidence, p. 206.

92 Evidence, p. S455.

93 Evidence, p. S314.

94 Evidence, pp. S313-S315, S521, S836-S837, S908-S909.

4.90 Those opposed to the proposition that asylum seekers released into the community should have access to work permits expressed concerns about potential exploitation of persons who have not regularised their status, as well as the existing high levels of unemployment in Australia. In one submission, it was stated:

> It is not envisaged that permission to work should be granted. The reasons for this are at least twofold. First, people who have not legitimised their status are open to exploitation by unscrupulous employers who offer less than adequate wages because of the ignorance of the applicant as to proper payment and the uncertainty that the person they have employed may not be here next week. Secondly, the current level of unemployment in Australia would make it difficult, if not impossible, for a person awaiting determination to gain employment.[95]

United States release program

4.91 In a number of submissions, reference was made to a program introduced in the United States permitting the release of applicants for asylum who were able to show preliminarily that they had substantial claims for refugee protection. The program was introduced in April 1992 by the United States Immigration and Naturalization Service (INS), following an 18 month pilot release project.

4.92 During the inquiry, the Committee met with Dr Arthur Helton (Director, Refugee Project, Lawyers Committee for Human Rights) who was involved in the establishment and implementation of the pilot project. Dr Helton briefed the Committee on the pilot project, and provided the Committee with a paper detailing the project and preliminary outcomes.[96]

4.93 The pilot release project commenced on 1 May 1990 in New York, Miami, San Francisco and Los Angeles. Those districts were chosen for the pilot scheme because it is through their airports that the most excludable aliens arrive.

4.94 Under the pilot project, aliens applying for asylum underwent pre-asylum screening interviews, conducted by the INS to determine their eligibility for release. In order to secure release, an alien was required to meet the following criteria:

- the alien must first have sought parole in the United States on or after 1 May 1990;

95 Evidence, p. S315.

96 Exhibit 1.

- the alien's true identity had to be determined with a reasonable degree of certainty;
- the allegations in the alien's asylum application, if proven true, had to provide a reasonable basis for finding that the alien was eligible for refugee status;
- the applicant must not have been subject to the exclusions from refugee protection nor otherwise have presented a threat to public safety;
- the alien had to be represented by an attorney or an accredited representative;
- the alien had to have a place to live with a specific address at which he or she could be reached;
- the alien had to have an offer of employment or another suitable means of financial support;
- the alien had to post a bond of between $500 and $2,500;
- the alien had to agree in writing to report on a monthly basis to the local INS office, to appear for all immigration hearings, and to appear for deportation if ultimately ordered excluded; and
- the alien had to agree that his/her parole might be terminated if he/she failed to comply with the above requirements or if convicted of any felony or three misdemeanours.

4.95 In his paper on the pilot project, Dr Helton noted that independent legal organisations and community support groups had a vital role to play in the implementation of the project. In relation to the first, Dr Helton stated:

> Independent legal organisations, it was hoped, would serve several purposes, including to disperse information among private and pro bono attorneys concerning the program, and to help insure that aliens who applied had genuine refugee protection claims so as to insure the integrity of the program. Additionally, independent legal organisations would be able to liaise between the INS, the released individuals, their legal representatives, and the voluntary agencies involved in the process.[97]

97 Exhibit 1, p. 9.

4.96 As for community support groups, Dr Helton indicated that such groups were crucial to the project, because asylum seekers required not only legal representation, but also orientation to life in the United States. Dr Helton stated:

> In keeping with the plan for community involvement in assisting persons to be presented before the INS for release consideration, we involved national voluntary agencies and local community groups. Agency participation was viewed as a critical necessity in assisting persons, many of whom are without family, in not only meeting the INS eligibility criteria of living arrangements and employment or other financial support, but also in complying with their monthly reporting requirements and settling into society in a contributing fashion.[98]

4.97 Dr Helton indicated that community support agencies could not provide assistance in all cases referred to them. As such, the voluntary agency process of selecting cases for support, coupled with the INS process of screening to determine strong asylum claims, resulted in the selection of persons for release 'for the most part well prepared from the outset to comply with reporting requirements'.[99]

4.98 In November 1990, an interim report on the pilot project, based on the first six months experience, was issued by the Lawyers Committee for Human Rights. The report noted 'high rates of compliance by represented asylum applicants in terms of meeting monthly requirements and appearing in the immigration court, particularly for those released with the benefit of assistance and support by local community and religious groups'.[100] However, according to Dr Helton, INS records did not necessarily reflect the findings of the Lawyers Committee. As a result, the INS decided to review the files of the 127 persons released in New York, and the 52 persons released in Miami. Dr Helton indicated that the INS review found, inter alia, that 'those cases released with the assistance of community groups in New York achieved high rates on reporting compliance and immigration court appearances'.[101] Dr Helton provided statistics collected during August 1991 in relation to the 127 persons released in New York, 24 of whom had unadjudicated refugee claims. Those statistics showed a reporting compliance rate of 93 percent, with 503 written reports to the INS and 35 non-reports, as well as a court

98 Exhibit 1, p. 9.

99 Exhibit 1, p. 10.

100 Exhibit 1, p. 10.

101 Exhibit 1, p. 11.

appearance compliance rate of 95 percent, with 42 appearances in the immigration court and 2 non-appearances.[102]

4.99 On the basis of his analysis, Dr Helton concluded:

> The findings of the Lawyers Committee and those of the INS demonstrated that a well-conceived and carefully administered release program that works closely with the community can address the government's interests in preventing absconding and targeting for detention those who pose dangers to the community, as well as avoiding the unnecessary detention of refugees.[103]

4.100 In April 1992, following its assessment of the pilot project, the INS decided to establish a permanent release authority. Announcing the decision, the INS Commissioner stated:

> The Service has limited detention space. By adopting the Parole Project, the Service will be able to detain those persons most likely to abscond or to pose a threat to public safety rather than base the detention decision solely or primarily on the availability of detention space.[104]

4.101 During the first year of the program, 2,016 asylum seekers were interviewed for release. Of those interviewed, 647 persons were recommended for release by INS lawyers. Dr Helton advised that 88 percent of release recommendations were accepted by the detaining authorities, and the individuals were paroled.[105] No details, however, were provided as to this group's compliance with the conditions of release.

4.102 In its submission, DIEA noted that although it was intended that the parole program would be implemented both at detention centres, for persons subject to deportation proceedings, and at ports of entry, for persons subject to exclusion proceedings, namely unauthorised arrivals, in practice it has been implemented only at detention centres, that is, for deportees only and not border arrivals. DIEA, nevertheless, acknowledged that unauthorised arrivals are paroled into the United States on the basis of factors such as availability of detention space.[106]

102 Exhibit 1, p. 11.

103 Exhibit 1, p. 12.

104 Exhibit 1, p. 12.

105 Exhibit 1, p. 13.

106 Evidence, p. S760.

4.103 DIEA also provided the Committee with some statistics relevant to asylum seekers admitted entry into the United States. Those statistics were obtained from the New York INS office, which covers the eastern region of the United States. DIEA noted that for the period 1 October 1992 to end May 1993, some 33 percent of unauthorised arrivals admitted to the United States who claimed asylum did not appear for scheduled interviews at asylum offices. In addition, of the 1,078 deportation notices issued by the New York office in the period 1 October 1992 to mid-July 1993, 934 (87 percent) failed to respond.[107]

4.104 During the inquiry, a number of community groups suggested that the United States program should be implemented or at the very least trialled in Australia.[108] However, when questioned on the program, it became evident to the Committee that a number of those advocating an American style release scheme were unaware of the full details of the program. In particular, they were not fully aware of the comprehensive requirements which need to be satisfied before release can be secured, as detailed in paragraph 4.94. In general, they also were unaware that the program is presently provided for undocumented or illegal aliens who have been residing in the United States, rather than for unauthorised border arrivals. The United States parole scheme represents a formal arrangement for those persons who in Australia are termed illegal entrants. As such, it corresponds with the current working practice in Australia of releasing into the community most illegal entrant refugee claimants pending the determination of their claims.

Submissions on hardship cases

4.105 While the submissions proposing community release of asylum seekers were framed with all asylum seekers in mind, particular attention was directed to the situation of children, the elderly, the infirm, and victims of torture and trauma.

4.106 As noted at paragraph 4.30, it was submitted that the existing detention regime breaches the Convention on the Rights of the Child. It was argued that Australia's detention system, and the conditions of detention, do not comply with the requirements of the Convention that:

- detention of children shall be used only as a measure of last resort and for the shortest appropriate period of time;
- every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person; and

107 Evidence, p. S760.

108 Evidence, pp. S130, S272, S288, S430-S431, S561-S562.

- every child deprived of liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent or impartial authority, and to a prompt decision on any such action.[109]

4.107 The Attorney-General's Department noted that these requirements need to be balanced against a child's right to live with his or her parents, unless that is incompatible with the child's best interests. It indicated that the child's need to live with his or her parents is usually given as the reason for keeping children together with their families in detention. However, it questioned whether this practice is always in the best interests of the child. The Attorney-General's Department stated:

> ... on occasions this might best be met by the family being located with the child outside of detention.[110]

4.108 Nevertheless, the Attorney-General's Department also noted that if it is determined that it is in the best interests of the child to be released from detention, it does not automatically follow that the parents should be released. The Attorney-General's Department stated:

> In weighing up what is in the best interests of the child, there would be two things that need to be taken into account. The first is whether the child should be out of detention, and the other is whether the child should remain with the parent. ... it is a matter of balance as to whether that flows through to what you do about the parent, but it does not follow automatically that the parent should be released.[111]

4.109 According to the Attorney-General's Department, if a decision to release a child from detention was made, then consideration would need to have been given as to whether it was in the best interests of the child to be kept together with the parent. If such consideration was given, then there would be no breach of the obligations under the Convention on the Rights of the Child.[112]

109 Evidence, pp. S428, S600, S616.

110 Evidence, p. S858.

111 Evidence, p. 762.

112 Evidence, p. 763.

4.110 In other submissions, it was suggested that the existing detention regime places children in a situation which normally would be considered unacceptable in Australian society. The Ethnic Affairs Commission of NSW stated:

> Children, in particular, are blameless and their detention most clearly deviates from our national expectations regarding the treatment of children.[113]

4.111 A number of organisations expressed significant concerns about the effects of detention on children. It was submitted that prolonged incarceration, combined with the general environment of the detention centres, can lead to long term psychological consequences for children. The Mercy Refugee Service stated:

> ... the effects of being restrained behind wire fences and locked gates; of knowing that one's parents are suffering depression and uncertainty, will have long term psychological and psychosocial consequences that could be avoided by allowing for release of families into the community.[114]

4.112 It was argued that children living in the detention centres are leading abnormal lives in conditions which are 'stunting their intellectual and emotional development'. The NSW Child Protection Council stated:

> The combination of minimal education, a lack of stimulus, living with parents in a pressure cooker environment, the total lack of privacy, and the company of adults filled with despair is an unhealthy situation for anybody but particularly damaging to children's well-being.[115]

4.113 The Australian Red Cross noted that it has previously reported to the Government that there were grounds for extreme concern for the health and welfare of children in detention. According to the Red Cross:

> It was reported, and independently collaborated by an employee of the Department of Immigration 'that within the Port Hedland facility children from 2 to 6 years of age displayed retarded fine motor skills and an outlook which can only be described as apathetic'.[116]

113 Evidence, p. S428.

114 Evidence, p. S120.

115 Evidence, p. S620.

116 Evidence, p. S570.

4.114 In response, DIEA advised that the issue was identified in early 1992 in discussions between the Port Hedland Centre's welfare and nursing staff, and that programs had been put in place to address this well before the first Australian Red Cross visit to Port Hedland. DIEA stated:

> Qualified teaching and nursing staff at the Centre confirm there is no longer any concern over either physical or intellectual development of children.[117]

4.115 Concerns also were expressed that children are placed at risk within the detention centres. The NSW Child Protection Council commented:

> A closed community of men, women and children, living in cramped conditions raises serious concerns about the possibility of child abuse going undetected.[118]

4.116 In this regard, the Committee notes that no specific allegations of child abuse within the detention centres were raised during the inquiry, or indeed throughout the detention period.

4.117 The view put in many submissions from community organisations was that certain categories of persons should not be detained other than in exceptional circumstances.[119] The Refugee Council of Australia, for example, stated:

> other than in the most exceptional circumstances, ... certain groups of people should not be detained beyond the time required to establish identity and intent. These groups include:
>
> - children under 16 years of age and their guardians;
> - the aged;
> - the infirm;
> - survivors of torture and trauma.[120]

117 Evidence, p. S1161.

118 Evidence, p. S620.

119 Evidence, pp. S167, S290, S613, S794.

120 Evidence, p. S167.

Community release: an example in operation

4.118 During the inquiry, 37 unauthorised border arrivals who had been refused refugee status and were pursuing appeals against these decisions to the Federal Court were released into the community. The release of the 37 persons who had been detained at the Port Hedland Immigration Reception and Processing Centre and the Perth Immigration Detention Centre followed the decision by Justice Neaves in the case of *Tang Jia Xin v the Minister for Immigration, Local Government and Ethnic Affairs* (1993) 116 ALR 329 (the *Tang* case).

4.119 Justice Neaves ordered the release of Tang Jia Xin, a Chinese asylum seeker from the boat codenamed Isabella, on the grounds that the 273 day detention time limit prescribed in the Migration Act had expired. Justice Neaves held that there was no legislative provision whereby Tang Jia Xin could continue to be held in custody. At the conclusion of the hearing, Justice Neaves also expressed the view that if the Government had no power to detain Tang Jia Xin for any further period, he had no power to prescribe conditions attaching to the release of Tang Jia Xin into the community.

4.120 Nevertheless, conditions for release were agreed by the parties and sanctioned by Justice Neaves. These conditions required the applicant to:

- notify a nominated person of the address at which he may be found;
- notify any intended change of address no later than 48 hours before moving to that address;
- notify the fact that he has moved to a new address no later than 48 hours after having moved to that address; and
- report personally once every 14 days to a nominated person at a nominated place and time.[121]

4.121 Further conditions were agreed between the applicant's solicitor and the Australian Government Solicitor, including that:

- the applicant be released into the care of an officer of the Indo-China Refugee Association;
- the applicant be provided with a letter of identification with a photograph attached;
- the applicant be conveyed to Perth by bus;

121 Evidence, p. 1065.

- upon release from Port Hedland, DIEA have no further responsibility for the applicant's care; and
- prior to the applicant's release, he sign a completed form signifying that he will observe the release conditions.[122]

4.122 As a result of the Neaves ruling, the Minister decided to release the remaining 25 people from the Isabella who were still in detention and whose circumstances were the same as those of Tang Jia Xin. All 26 persons, including Tang Jia Xin, were released on 13 August 1993 into the care of the Indo-China Refugee Association (ACT) Incorporated, which launched the court action on behalf of Tang Jia Xin. A subsequent review of detention cases resulted in the Minister agreeing to release a further 11 persons, bringing to 37 the total number of persons released as at 21 December 1993. The additional 11 persons included:

- 3 persons from the boat codenamed Dalmatian who were released on 26 August 1993;
- 3 persons from the boat codenamed George who were released on 26 August 1993;
- 1 person from the boat codenamed Beagle who was released on 27 August 1993;
- 2 persons from the boat codenamed George who were released on 17 September 1993; and
- 2 persons from the boat codenamed George who were released on 3 October 1993.[123]

4.123 The full range of conditions relating to Tang Jia Xin were extended, by agreement, to cover the other 36 persons who subsequently were released.[124]

4.124 The release of 37 unauthorised border arrivals provided an opportunity for the Committee to consider in further detail the appropriateness and viability of a community release scheme for such border arrivals. The Committee sought specific information on the release arrangements from DIEA and those individuals and organisations providing support to the persons concerned.

122 Evidence, p. 1065.

123 Evidence, pp. S1265-S1269.

124 Evidence, pp. 1066, 1073.

4.125 As at 1 November 1993, the persons released were residing in the following locations:

- 22 persons in Perth;
- 9 persons in Canberra;
- 2 persons in Melbourne;
- 2 persons in Sydney;
- 1 person in Brisbane; and
- 1 person in the United States, after having been accepted for migration there.[125]

4.126 The persons resident in Perth were being cared for by the Society of St Vincent de Paul at one of the Society's boarding houses. The Society was providing much of the support, although a range of community organisations were assisting with contributions of clothing, food and other basic needs. The support arrangements were being co-ordinated by the Conference of Churches of Western Australia (WA), who had appointed a co-ordinator on a part-time basis.[126]

4.127 The persons resident in other capital cities were being supported by private families, with assistance from the Catholic Refugee Office and members of the Isabella group who had been granted refugee status.[127]

4.128 Each of these persons was reporting fortnightly to DIEA at the nominated office in their State of residence. To date, the relevant release conditions have been complied with in all expect one case. DIEA noted that in one instance a person changed address without notification. The matter was brought to the attention of the applicant's solicitor, who was reminded of the release conditions. No further action was taken by DIEA.[128]

4.129 While, in general, the conditions of release have not been breached, it would appear from the submissions received from Ms Marion Le (President of the Indo-China Refugee Association ACT) and the Conference of Churches of WA that both appear to be having reservations about the terms of the agreement, made

125 Evidence, p. S1209.

126 Evidence, pp. S1201-S1208.

127 Evidence, p. S1210.

128 Evidence, p. 1066.

between the parties at the time of the release, that DIEA would have no further responsibility for the care of those persons released.[129]

4.130 In terms of the situation of those released, Ms Le advised that all the people are happier outside of detention, particularly as they can move around freely and contact whomever they wish. Ms Le commented that most are severely stressed over their future, but noted that, in general, they are happier and less depressed on a daily basis than they were whilst in detention. Ms Le stated:

> None would choose detention as an option to what they are experiencing now.[130]

4.131 At the same time, a number of problems were identified by Ms Le and the Conference of Churches of WA, including:

- the lack of assistance from the Government for those released;
- the lack of any provision for health care;
- continuing psychological difficulties; and
- the difficulty of sustaining community based support beyond a short time frame.[131]

4.132 On the first point, Ms Le and the Conference of Churches of WA were critical of the lack of support available from the Government once the persons had been released into the community.[132] This was despite the fact that one of the conditions for release agreed between the parties was that DIEA would have no further responsibility for the care of those persons released.

4.133 The Conference of Churches of WA highlighted the difficulties it had faced in trying to co-ordinate a response with just 48 hours notice before the release took place, and without any government assistance upon which to call. It commented:

> Many of the local service providers saw this as a vindictive move by the Government, who appeared more than happy to 'wash their hands' of the situation ... .[133]

129 Evidence, pp. S1207, S1210, S1212, S1215.

130 Evidence, p. S1214.

131 Evidence, pp. S1205-S1208, S1210-S1215.

132 Evidence, pp. S1207-S1208, S1213-S1215.

133 Evidence, p. S1207.

4.134 In terms of the overall support arrangements, the Conference of Churches of WA stated:

> Unfortunately, this is an enormously costly exercise for the Church and community groups to consider without Government support and back-up.[134]

4.135 The lack of provision for medical services was cited as one of the most pressing problems, with the persons released not eligible for Medicare or any other health care assistance. The Conference of Churches of WA indicated that, without the assistance of some individual doctors who had sympathy with the plight of the persons released, it would have been unable to respond financially to the range of medical problems experienced by these persons since their release. It noted that provision of pharmaceuticals is a particular problem, as some money from the Society of St Vincent de Paul has been available for filling of prescriptions to date, but that the Society is unable to respond in such a way in the longer term.[135]

4.136 Related to this health issue were the concerns expressed by Ms Le that some behaviour problems have begun to emerge among certain persons released, but that the problems have not been diagnosed properly, and that adequate assistance is not available. In particular, Ms Le expressed concern about one person admitted to the psychiatric ward of a hospital.[136]

4.137 The Conference of Churches of WA suggested that the state of well-being of those released has not been assisted by the prohibition on their working. It indicated that their inability to work has resulted in long idle days with little sense of purpose or hope for the future. It stated:

> The longer they see themselves as recipients of a 'Church handout' without the opportunity to make a contribution to their livelihood and without the opportunity to the basic rights accorded to a range of groups in our society, the harder it will be for them to feel they have some control over their destiny.[137]

134 Evidence, p. S1207.

135 Evidence, p. S1206.

136 Evidence, pp. S1210-S1211.

137 Evidence, p. S1207.

4.138 The Conference of Churches of WA also submitted that there is an urgent need to move these persons released beyond the existing hostel type accommodation arrangements which has overtones of their previous accommodation arrangements in the detention centres.[138]

4.139 In addition, it indicated that the support available from community organisations could not be sustained in the longer term if government assistance was not forthcoming. The Conference of Churches of WA noted that church groups, specifically the Society of St Vincent de Paul, are not in a position to provide long term assistance to those released. It stated:

> The initial Church and community response was only envisaged as a short-term measure (until the end of the year) and was offered in the spirit of a proposed partnership with Government. In other words, the nature and scope of the help offered ... should not be seen to exonerate any Government responsibility, but complement and add to a Government provision for asylum seekers in this specific situation.[139]

4.140 The Committee did not test the above assertion with the Society of St Vincent de Paul, but notes that it differs from the evidence given by the Society at public hearings in Sydney regarding their ability to care for persons released into the community (see paragraph 4.80).

4.141 The Conference of Churches of WA was concerned that it may be setting a dangerous precedent of supporting asylum seekers released into the community without any assistance from DIEA. It argued that the Government should have an obligation towards these people, and suggested that in future there would be a need for:

- more notice, planning and preparation in relation to community release;
- the provision of health care benefits and a basic living allowance for asylum seekers released into the community;
- greater emphasis on the needs of the individual, rather than treating those released as an homogenous group; and

138 Evidence, p. S1207.

139 Evidence, p. S1208.

> a partnership between community groups and DIEA for the provision of the basic needs of persons released into the community, with support being provided through schemes such as the Asylum Seekers' Assistance Scheme.[140]

4.142 In its evidence, DIEA argued that the release of the 37 persons and their adherence to the release conditions should not be regarded as setting any sort of precedent. The Secretary of DIEA stated:

> ... a fair bit of honour is caught up in this particular aspect of people that have been released into the care of individuals and groups in the community as a result of the *Tang* case. This is a very atypical group. ... Even if the individuals put in a hundred per cent performance under the conditions that have been determined by the court and presented at the end of the process, provided there are no appeals, and in due course were removed, we would not see that as being any kind of prototype that could be applied generally in the context of any release scheme.[141]

4.143 DIEA noted that once Justice Neaves ordered the release of Mr Tang, it was not in a position to determine the conditions of release. As noted previously, those conditions were achieved through negotiation between the legal representatives of the parties. DIEA stated:

> In effect, we did not have any choice. Justice Neaves ordered the release of Mr Tang. He did not say that we must release him into the care of so and so.[142]

4.144 DIEA argued that the order to release Mr Tang was a one-off situation which arose out of a combination of the operation of the law and the operation of administrative procedure relevant to the provisions of Division 4B of the Migration Act. The Secretary of DIEA stated:

> ... I strongly urge that this particular episode not be regarded as an arena in which conditions, model or otherwise, were being established - or precedents, model or otherwise, were being established. It is a pretty exceptional situation in all respects.[143]

140 Evidence, p. S1208.

141 Evidence, p. 1081.

142 Evidence, p. 1083.

143 Evidence, p. 1086.

Conclusions

4.145 The Committee's inquiry into detention practices was conducted in response to a controversial and unfortunate episode in the history of Australian immigration policy. The long term detention of certain unauthorised border arrivals has generated widespread community concern.

4.146 While the Committee recognises that various factors have contributed to the length of detention which has been endured by those unauthorised arrivals who have landed in Australia since November 1989, there is broad agreement that the long term detention of asylum seekers is inappropriate and unacceptable.

4.147 In this regard, the Committee reasserts the view of its predecessor, the Joint Standing Committee on Migration Regulations, which in its report on Australia's refugee and humanitarian system stated:

> ... the detention of the Cambodians in particular has lasted far too long. It is imperative that the procedures which are in place do not allow a repetition of such lengthy detention.[144]

4.148 In considering the issues of this inquiry, the Committee is mindful that past experience should not be the sole determinant of the future direction of immigration policy. It is important to note that the lengthy detention endured by unauthorised border arrivals over the past four years has occurred because of a number of circumstances which have impacted on the processing of refugee claims, and which ultimately have led to significant changes in Australia's refugee determination procedures. In 1989, a code of regulations was introduced which has required constant amendment since that time. Concurrently, there was a massive increase in the number of on-shore refugee applications, coinciding also with the unexpected arrival of over 600 persons by boat. To cope with this substantial case load of refugee applications, legislative amendments were introduced, the Determination of Refugee Status Section was restructured, and the Determination of Refugee Status Committee was disbanded and replaced by the RSRC, which in turn was replaced by the RRT. There also were significant delays in the lodgement of applications for refugee status from the early boat arrivals. Finally, and of equal significance, there has been a substantial increase in litigation of refugee cases, involving lengthy and expensive legal processes. All of these factors go some way towards explaining why, over the past four years, there has been an unusually and unacceptably long period of processing and detention of unauthorised border arrivals.

144 Joint Standing Committee on Migration Regulations, op cit, p. 177.

4.149 The Committee, in particular, notes that Australia offers a generous process of refugee determination, including primary and merits review stages, as well as the option of appeals to the Federal Court and the High Court. Each of these stages in the determination process involves time delays. It is important to recognise that the unauthorised boat arrivals who currently are detained, except for those who arrived in November and December 1993, have been rejected for refugee status at the primary and review stages, but have opted to mount legal challenges against those decisions. By exercising this option, the period of their detention has been extended. At the litigation stage, DIEA has limited control over when a decision is made.

4.150 In raising these matters, the Committee is not seeking to apportion blame for the problems which have occurred. Rather, the Committee wishes to point out that previous lengthy detention should not serve as an indication of what will happen in the future if further unauthorised boat arrivals land in Australia. Indeed, the Committee acknowledges that important changes have been implemented with the aim of minimising delays in the determination process.

4.151 For the Committee, the relevant matters to consider in determining the most appropriate border detention regime for the future are:

- the existing processing and review arrangements, which recently have resulted in an average determination time frame of 26 days for decisions on primary applications and 61 days for decisions on review applications;

- the limited experience regarding community release schemes for unauthorised arrivals, with only a small number of such persons having been released recently into the community;

- the evidence from DIEA regarding the difficulties and expense associated with locating and removing unsuccessful applicants for refugee status, which mirrors the problems experienced in comparable overseas countries; and

- Australia's international obligations, in particular, the requirements under the Refugee Convention and Refugee Protocol, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.

4.152 As a basic principle, the Committee asserts that Australia must retain its sovereign right to determine who may enter, the conditions under which a non-citizen's entry may be permitted, and the circumstances under which a non-citizen may be permitted to stay or may be removed from Australia. The current

detention regime was established to support this principle, and on the rationale that detention provides appropriate access for the purposes of processing refugee applications and ensuring that unsuccessful claimants can and will be removed.

4.153 In this regard, the Committee is of the view that those who arrive in Australia without authorisation or with invalid authorisation should be detained upon arrival. To do otherwise would compromise Australia's system of immigration control. In addition, detention of unauthorised arrivals ensures that the community is not exposed to unknown or undetected health or security risks. In the Committee's view, Australia's immigration control system must be upheld. It is important to ensure that immigration to Australia cannot be achieved simply by arrival.

4.154 During the inquiry, there was general agreement with the principle of detaining unauthorised arrivals while their identity and background are determined, and to allow for lodgement of their claims to enter and remain in Australia. The consensus in submissions was that detention in such circumstances is appropriate, with two to six months being the suggested time frames. It was the need to extend detention beyond a relatively short time frame which was challenged by community and advocacy groups.

4.155 It is evident that, under the existing system, the length of detention depends to a large extent on the speed and fairness of the process for determining a person's claim to remain in Australia as a refugee. A fair and expeditious determination process will ensure that those who have a legitimate claim to remain in Australia as refugees are able to enter the community within a reasonable time frame after arrival, while those who do not have a legitimate claim are removed.

4.156 The Committee is encouraged by the latest statistics from DIEA which indicate that primary decisions on the grant of refugee status are being provided on average within 26 days of lodgement of an application, and review decisions within 61 days of the lodgement of a review application. These time frames indicate that earlier problems with delays in determining refugee status are not being encountered at this time. The Committee expects the RRT to operate as least as efficiently as the RSRC in keeping to such time frames. The Committee emphasises that every effort should be directed by DIEA and the RRT to ensure that the administrative decision making processes, both at the primary and review stages, result in fair and expeditious decisions on refugee status. In particular, precedence should continue to be given to the processing of refugee applications from unauthorised border arrivals and persons held in detention.

4.157 In addition, whenever possible, all parties to litigation relevant to a refugee determination, including the legal advisers to the applicant and to the Commonwealth, should do all within their powers to expedite any such legal action.

4.158 In its deliberations, the Committee gave consideration to the proposals made in various submissions regarding community release of border asylum seekers. One frequently mentioned proposal was that Australia should adopt a release scheme for unauthorised border refugee claimants modelled on a program operating in the United States. The Committee does not support this proposal. It was evident to the Committee, from its questioning during public hearings, that many of the community groups suggesting the United States scheme did not have detailed knowledge of that scheme. The evidence available to the Committee on the United States program suggests that it simply would add an additional layer to the decision making process. The American experience shows that only those persons who established a reasonable basis for their claims were considered for release. This would require a separate decision before determination of a person's refugee claim. Such a decision may well be reviewable administratively and also appealable at a judicial level. Potentially this could delay consideration of the primary application. With a fast primary decision making process already operating in Australia, there appears to be no need for a program which in some instances has taken two months to determine eligibility for release instead of eligibility for refugee status.

4.159 It also is apparent that other aspects of the United States release scheme were not considered in detail by those who sought its implementation in Australia. The Committee notes that the United States program includes strict requirements that, before they can be released, persons must post a bond and have an offer of employment or other financial support. While those advocating community release on the one hand supported the United States model, on the other hand they expressed opposition to an important element of the United States scheme, namely that an unauthorised border arrival should be required to post a bond and guarantee financial support as a condition of release. In addition, on DIEA's evidence, the United States program presently appears to cater not for those who seek asylum at the border, but for those who have entered the United States and have sought asylum after entry. In Australia, non-citizens who claim asylum after entry usually are released into the community pending a determination of their claims. As such, adoption of the United States model would formalise but not substantially alter existing practice for illegal entrant refugee claimants in Australia.

4.160 The Committee also gave consideration to the view put in various submissions that, in terms of eligibility for release into the community, unauthorised border arrivals who apply for refugee status should be treated no differently to illegal entrants. The Committee acknowledges that in terms of breaching Australia's immigration laws, unauthorised arrivals are often no more culpable than illegal entrants. The Committee accepts that the existing legal arrangements for immigration detention draw an artificial and unnecessary distinction between persons depending on their method of arrival in Australia. For these reasons, the Committee agrees with most of the submissions from community and advocacy groups that the distinction in principle between unauthorised arrivals and illegal entrants should be removed. In this regard, the Committee notes that the Migration Reform Act in fact does remove this distinction. The Committee supports this development.

4.161 Following the commencement of the Migration Reform Act, which has been postponed to 1 September 1994, both unauthorised arrivals and illegal entrants will become liable to mandatory detention. In a world of increasing mobility across international borders, Australia must not compromise the principle that non-citizens who wish to travel to Australia and enter and stay in Australia must be authorised to do so.

4.162 While detention will become mandatory for all non-citizens who are not authorised to enter or stay in Australia, appropriately there will be a mechanism, namely the bridging visa, which will enable release from detention if certain criteria are met. The bridging visa will provide a degree of flexibility in controlling who should be detained during the determination of their claims to remain in Australia and who should be released into the community.

4.163 In deciding whether unauthorised border arrivals should be eligible for release from detention during the determination of their status, the Committee considered a number of issues pertaining to release. Some of these matters were of particular significance because of the general circumstances and profile of border asylum seekers.

4.164 One issue considered by the Committee concerned the difficulties which are evident in supporting unauthorised border arrivals within the community. By definition, unauthorised border arrivals, particularly boat arrivals, are a vulnerable group. They can include persons who have endured a long and difficult voyage, who are ill upon arrival, and who claim to be victims of torture and trauma in their own countries. As such, they often require significant and ongoing care. In many instances, they speak little or no English. While in detention, DIEA is responsible for the care of such persons. This includes provision of accommodation, clothing and food, as well as payment of expenses, including living, medical and education expenses. A range of services is provided at the government's expense.

4.165 If detained unauthorised border arrivals were to be released into the community, DIEA would no longer be responsible for their care or support, just as DIEA is not responsible for the care and support of illegal entrants released into the community, except for those who qualify for limited emergency assistance. The support which would be necessary to maintain these people in the community may be required over a lengthy time frame, particularly if those persons who are rejected for refugee status seek to utilise all avenues of appeal. Release into the community would require significant co-ordination between a range of service providers, including various Commonwealth and State Government departments and community support and welfare organisations. In addition, unlike illegal entrants, many of whom have established links to the community during their stay in Australia, unauthorised border arrivals tend not to have any direct personal links to the community, and therefore would be entirely dependant on community support or charitable groups.

4.166 While a number of community organisations have expressed a willingness to assist detainees released into the community, it is the Committee's view that such assistance would generally be of a short term nature. Practical evidence from the Conference of Churches of WA, which has played a major role in coordinating assistance to many of the 37 persons released following the decision in the *Tang* case, indicates that the confidence expressed by some community organisations about their ability to respond to the long term needs of asylum seekers does not necessarily match the reality of the situation.

4.167 A related issue considered by the Committee was the cost of maintaining unauthorised border arrivals in the community. A number of organisations have argued that it would be less costly to accommodate persons in the community, and that some of the funds currently expended by DIEA on detention could be reallocated to community organisations, to enable them to support persons released into the community. Some estimates of maintaining persons in a hostel and a boarding situation were provided to the Committee in support of this proposition. In the Committee's view, sufficient consideration has not been given by community groups to the varied and significant costs which would be associated with supporting persons in the community, particularly if that support was required over a long term. Such costs not only would comprise the basic costs of food, clothing and accommodation, but also would include capital and maintenance costs in relation to any accommodation which is provided, medical costs, the costs of counselling services, education costs, the costs of recreational activities, and other various living expenses. As noted above, within the detention environment, such costs are covered in their entirety by DIEA. It is impractical and unrealistic to expect that a similar level of support could be achieved and maintained at a lesser cost if a large number of asylum seekers were released to live individually or even as small groups in the community, and if the support was required over a longer term.

4.168 Another important issue for the Committee was the likelihood of absconding among those applicants who are released into the community and who fail in their attempts to gain refugee status in Australia. While many community organisations expressed confidence that persons would not abscond, no substantial evidence was provided to indicate that absconding would not occur. Some evidence was provided by DIEA to show a level of absconding among boat arrivals over the past four years, with 57 unauthorised boat arrivals having escaped from detention between November 1989 and October 1993. As noted at paragraph 4.16, as at 27 January 1994, 18 unauthorised boat arrivals who had escaped from detention remained at large in the community. While this is only limited evidence to indicate that the problem of absconding has arisen among boat arrivals, DIEA's experience with illegal entrants is more compelling evidence of the difficulties which could be encountered if border arrivals who are awaiting refugee determinations are released into the community. Particularly relevant is the statistical information provided by DIEA and noted at paragraph 4.17. This information shows that, as at November 1993, out of a group of 8,000 non-citizens who after entry had applied for

but had been refused refugee status, 2,171 non-citizens (or 27 percent) had not sought a review of the decision, had not appealed the decision, had not departed Australia or presented for removal, did not have a valid entry permit, and therefore remained unlawfully in the community.

4.169 In some submissions, it was suggested that parole and bonding arrangements should be considered in relation to unauthorised arrivals because such arrangements operate effectively in other areas of the justice system. In the Committee's view, this comparison is flawed. In other areas of the justice system, the person released on bail, or on another form of parole, has some direct link to the community which unauthorised arrivals generally do not have. In the criminal justice system, before a person is released on bail or parole, consideration is given to issues such as whether the person has relatives in the community, or whether the person has any property which can be offered as surety. It is unlikely that an unauthorised arrival would be able to satisfy any such criteria for release. It also is important to note that many community groups argued against the imposition of bonds as a mechanism for release of unauthorised arrivals, precisely because of the difficulty of raising the required funds.

4.170 In this regard, the Committee also took into consideration the evidence from some community organisations indicating that they were prepared to offer support to those released from detention, but that it would not be their role or responsibility to ensure that asylum seekers released into the community presented themselves for removal from Australia if they were unsuccessful in their applications to remain. The view often put to the Committee was that a community sponsor would not be prepared to take on the role of policing the conditions of release. This simply reinforced the impression within the Committee that there would be few safeguards to deter absconding if unauthorised border arrivals were released into the community.

4.171 Indeed, much of the evidence on the current unauthorised arrivals suggests to the Committee that most of them are determined to remain in Australia. Clearly, the continuing appeals launched by these persons, almost all of which have been unsuccessful, are an indication of this. The Committee considers it unlikely that persons who appear to be so determined not to be removed from Australia would voluntarily present for removal if released into the community.

4.172 In the Committee's view, a high rate of absconding among unauthorised border arrivals would result in unauthorised arrival being perceived as providing ready access to long term entry. Such a perception would undermine Australia's system of immigration control. Without any significant evidence to suggest that absconding would not be a problem, and indeed current evidence to suggest that Australia already has a substantial problem with persons who are in the community and who do not depart Australia after being refused refugee status, the Committee is not convinced by reassurances that absconding is unlikely to arise or that, if it did arise, it could be overcome through the use of community support networks.

4.173 After considering the above issues and examining all the evidence presented to it, the Committee has come to the view that those who arrive unauthorised at Australia's borders and seek asylum should be detained while their claims to asylum are determined. However, the Committee is of the view that where asylum seekers are detained for a period which exceeds six months, and the continued detention has been brought about by a lack of action or administrative error on DIEA's part, the Minister for Immigration and Ethnic Affairs should give consideration to including such detainees in a prescribed class of detention non-citizens. This would enable the asylum seeker/s in question to become eligible for the grant of a bridging visa, which is the mechanism for securing release from detention. This would be in accordance with the Minister's powers under the Migration Reform Act to prescribe certain classes of non-citizens as being eligible to apply for the grant of a bridging visa. In considering whether to include in the prescribed class any unprocessed border detainees who have been held in detention for more than six months, the Minister should take the following matters into consideration:

- whether the applicant has a special need on the basis of age, health, or previous experiences of torture or trauma;
- whether the applicant has satisfied appropriate health, character and security checks;
- the likelihood that the applicant would abscond if granted a bridging visa;
- whether there is a reasonable basis for the applicant's claim to refugee status;
- the timeliness of the lodgement of the application for refugee status;
- the extent to which the applicant co-operated with the DIEA in the provision of information relevant to the applicant's claims;
- whether there will be adequate support arrangements if the applicant is released into the community; and
- Australia's international obligations.

4.174 As discussed in Chapter Three, the Committee considers that the Minister personally should exercise the power to determine whether a particular class of non-citizens should become eligible for the grant of a bridging visa. This power should not be delegated. The Minister will be accountable to the Parliament in situations where this power is exercised. However, the Minister should not be compelled to exercise this discretion. In addition, the failure to exercise this discretion should not invite applications for judicial review.

4.175 The Committee is mindful that the RRT is an independent body charged with making deliberative decisions in its own right and, accordingly, is not subject to Government direction in the management of its case load. For this reason, the Committee has not included reference to the RRT in the above conclusion. The Committee emphasises that its conclusion is based on the expectation that an efficient RRT review process will provide fair and expeditious decision making. If the RRT review process fails to meet this expectation, this would need to be addressed by the Government.

4.176 The Committee emphasises that persons with a special need should be given particular consideration for release from detention after six months. The Committee is concerned especially about the detention of children.

4.177 The Committee is well aware of the requirements under the Convention on the Rights of the Child. In particular, the Committee acknowledges the obligation under that Convention that detention of children be used only as a measure of last resort. At the same time, the Committee notes that there is an overriding obligation which requires that any action taken should be in the best interests of the child.

4.178 In this regard, evidence from the Attorney-General's Department indicates that a judgement as to what is in the best interests of the child needs to be made on a case by case basis, and must focus on the specific interests of the child. While in some submissions it was argued that the release of children and their parents or guardians from detention is necessary to satisfy the requirements of the Convention on the Rights of the Child, advice from the Attorney-General's Department indicates that a number of factors need to be considered in determining what is in the best interests of the child. For example, if the circumstances are such that the parents or guardians of the child would not be considered eligible for release, careful consideration would need to be given as to whether it is in the best interests of the child to be released from detention into a foster care situation, or whether it is preferable for the child to remain with the parents or guardians in detention. Under the Committee's proposals, the best interests of the child would be taken into consideration by the Minister in determining whether the child should be prescribed within a class of non-citizens eligible for grant of a bridging visa.

4.179 The Committee also emphasises that appropriate support arrangements need to be established before persons are released into the community. It is evident that both government and community support would be necessary to sustain unauthorised border arrivals in the community. A range of options may wish to be considered for accommodating those who become eligible for release, including placement in a hostel, a boarding situation, a private family, or even in their own living quarters. The best option will depend on the circumstances of the particular person, and the extent of community support which can be generated. In the Committee's view, DIEA should liaise with accredited community support and charitable organisations, such as the Australian Red Cross and the Society of St Vincent de Paul, and relevant ethnic community groups to determine the most appropriate mechanism for ensuring that border asylum seekers released into the

community are provided with appropriate levels of support. Any monetary support which may be provided by the government to assist in this regard should be channelled through accredited community organisations, just as existing emergency assistance, such as the ASA Scheme, is coordinated by the Australian Red Cross.

4.180 In proposing that release from detention be available for certain unauthorised arrivals if the refugee determination process exceeds six months, the Committee considers that appropriate conditions for release should be agreed by the relevant persons before they are released. These should include the following requirements:

- report to a nominated DIEA office on a regular basis, at least once a fortnight;
- reside at a nominated address;
- notify any change of address at least one week prior to any such change; and
- depart Australia or present for removal if refugee status is refused.

Recommendations

4.181 The Committee recommends that:

8. as an absolute priority, the Department of Immigration and Ethnic Affairs and the Refugee Review Tribunal ensure that applications for refugee status are processed in a fair and expeditious manner, and that the processing of applications for refugee status from unauthorised border arrivals and persons held in detention continues to be given precedence;

9. all parties to litigation concerning and relating to refugee determinations make every effort to expedite the hearing of that litigation;

10. unauthorised border arrivals who claim refugee status be held in detention during the determination of their status, including during administrative processing, administrative review and any legal appeals, but that there be a capacity to consider release where the period of detention exceeds six months;

11. in cases where unauthorised border arrivals who claim refugee status have been held in detention for more than six months, and the continued detention has been brought about by a lack of action or administrative error by the Department of Immigration and Ethnic Affairs, the Minister for Immigration and Ethnic Affairs, in accordance with the Minister's powers under the *Migration Reform Act 1992*, give consideration to including such detained asylum seekers in a prescribed class of detention non-citizens eligible for the grant of a bridging visa, which secures release from detention. In considering whether to include in the prescribed class all or any such detainees, the Minister have regard to the following matters:

    - whether the applicant has a special need based on age, health, or previous experiences of torture and trauma;
    - whether the applicant has satisfied appropriate health, character and security checks;
    - the likelihood that the applicant would abscond if granted a bridging visa;
    - whether there is a reasonable basis for the applicant's claim to refugee status;
    - the timeliness of the lodgement of the application for refugee status;
    - the extent to which the applicant co-operated with the Department of Immigration and Ethnic Affairs in the provision of information relevant to the applicant's claims;
    - whether there will be adequate support arrangements if the applicant is released into the community; and
    - Australia's international obligations;

12. in determining whether to prescribe any unauthorised border arrivals as a class of detention non-citizens eligible for the grant of a bridging visa, the Minister for Immigration and Ethnic Affairs give particular consideration to the release of those persons who particularly are vulnerable to any effects of long term detention, namely those persons with a special need based on age, health, or previous experiences of torture and trauma;

13. in order to be granted a bridging visa, an unauthorised border arrival deemed eligible for release from detention should be required to agree that he/she will:

- report regularly, at least once a fortnight, to a nominated office of the Department of Immigration and Ethnic Affairs;
- reside at a nominated address notified in advance to the Department of Immigration and Ethnic Affairs;
- notify the Department of Immigration and Ethnic Affairs at least one week in advance of any change of address; and
- depart Australia or present for removal if he/she is refused refugee status; and

14. before unauthorised border arrivals who become eligible for the grant of a bridging visa in fact are released into the community, the Department of Immigration and Ethnic Affairs liaise with accredited community support or charitable organisations and relevant ethnic community groups to ensure that appropriate support arrangements are established to maintain such persons in the community. In addition, any government funding which may be provided to assist with such support arrangements be directed through accredited community support or charitable organisations.

Chapter Five

IMMIGRATION DETENTION CENTRES

Introduction

5.1 In general, persons detained under the Migration Act are accommodated in specialised facilities for immigration detention. Section 113 of the Migration Act provides for the establishment and maintenance of immigration detention centres.

5.2 On occasions, immigration detainees have been held in State prisons. This has occurred where a particular difficulty has arisen in relation to the conduct of the detainee.

5.3 While the major focus of the inquiry was the system of detention, a variety of issues were raised regarding the facilities in which immigration detainees are held. In particular, a number of concerns were expressed about the conditions and services within immigration detention centres. The concerns related mainly to unauthorised boat arrivals.

5.4 Many of these concerns have arisen because of the longer term detention which many current unauthorised arrivals have endured. When those currently held in detention first arrived in Australia, it was not envisaged that they would be held in the detention facilities for any great length of time. As the length of detention has increased, adjustments have had to be made to cater for the longer term needs of detainees within the detention environment.

5.5 It is evident that whatever detention system is in place, there will be a need for specialised facilities to accommodate those who offend against immigration law. As such, it was important for the Committee to consider in detail the operation of such centres. As part of its investigations, the Committee inspected the Port Hedland Immigration Reception and Processing Centre, the immigration detention centres at Perth and Villawood/Westbridge, and Roebourne State Prison, where certain detainees from Port Hedland were held for a period of time. Those inspections provided the Committee with the opportunity to discuss with persons working in the immigration detention centres, and with some of the detainees, the various issues and concerns raised in submissions to the inquiry. As a result of these discussions, the Committee came to a better understanding of the matters to which it needed to direct its consideration.

Description of the immigration detention centres

5.6 Australia's first immigration detention centre was opened in 1966, in the Melbourne suburb of Maribyrnong. Since that time, five other immigration detention centres have opened across Australia, including:

- Villawood (Sydney) in 1976;
- Perth (at Perth Airport) in 1981;
- Westbridge Stage 2 (an annexe to Villawood) in 1991;
- the Port Hedland Immigration Reception and Processing Centre (north west Western Australia) in 1991; and
- Wacol (a dedicated wing in the remand area of the Arthur Gorrie Correctional Centre, Brisbane) in 1992.[1]

5.7 The Maribyrnong Immigration Detention Centre is a purpose built low to medium security detention facility with dormitory style accommodation for up to 84 detainees. It has separate dormitories and recreation areas for males and females, and four motel style units for families. In its submission dated 13 August 1993, DIEA noted that, as at 19 July 1993, 25 persons were detained at Maribyrnong, none of which were unauthorised boat arrivals.[2] As at 1 February 1994, no unauthorised boat arrivals were detained at Maribyrnong.[3]

5.8 The Villawood Immigration Detention Centre is a purpose built low to medium security detention facility with accommodation for up to 72 detainees. It has separate dormitories for males and females, but detainees may mix freely in the recreation areas during the day. Detainees in New South Wales generally are held in the Westbridge Stage 2 facility. They are moved to Villawood, which is adjacent to Westbridge, if they become unmanageable, for example following unsuccessful escape attempts, episodes of violence or threatened violence, and during periods of sustained and serious protest such as hunger strikes. Villawood is not used for the detention of children. In its submission dated 13 August 1993, DIEA noted that, as at 19 July 1993, 40 persons were detained at Villawood, none of which were unauthorised boat arrivals.[4] As at 1 February 1994, there no unauthorised boat arrivals were detained at Villawood.[5]

1 Evidence, p. S640.

2 Evidence, p. S680.

3 Evidence, p. S1336.

4 Evidence, p. S680.

5 Evidence, p. S1336.

5.9 Westbridge Stage 2 is an annexe to the Villawood Immigration Detention Centre. It was created by enclosing 12 accommodation units and some support buildings within the former Westbridge Migrant Centre. Each accommodation unit contains 12 to 15 flatettes, which include two to three bedrooms, a bathroom with a toilet, and an entry hall. Westbridge contains 200 useable bedrooms. Families are assigned individual flatettes in blocks with other families. Unaccompanied males and females are assigned to separate units. In most accommodation units, a room has been set aside for recreational purposes. A transportable building also is used as an indoor recreation area, and outdoor recreational equipment is provided. In its submission dated 13 August 1993, DIEA noted that, as at 19 July 1993, 98 unauthorised Cambodian boat arrivals and 78 prohibited and illegal entrants were detained at Westbridge.[6] As at 1 February 1994, 49 unauthorised boat arrivals were detained at Westbridge.[7]

5.10 The Perth Immigration Detention Centre is a purpose built low to medium security detention facility with dormitory style accommodation for up to 22 detainees. Extensions under way will allow for up to 30 detainees to be held there. It has separate dormitories for males and females, but detainees may mix freely in recreation areas during the day. In its submission dated 13 August 1993, DIEA noted that, as at 19 July 1993, 17 persons were detained at Perth, four of whom were unauthorised boat arrivals.[8] As at 1 February 1994, two unauthorised boat arrivals were detained at Perth.[9]

5.11 The Port Hedland Immigration Reception and Processing Centre is a part of the former Broken Hill Proprietary Company Limited (BHP) single men's quarters. It consists of 11 air-conditioned accommodation units, a large air-conditioned kitchen/dining block and several smaller buildings, including a workshop, storerooms and laundries. One accommodation unit has been set aside as administration offices, one as a school, and one as office space for visiting DIEA staff processing refugee applications and legal advisers. Each accommodation unit originally contained 38 bedrooms, two sets of toilets and bathrooms, and a common room. The partitions between some bedrooms have been removed to create larger rooms for family groups. One unit is used for accommodation for unaccompanied females and another for unaccompanied males. In its submission dated

6 Evidence, p. S670.

7 Evidence, p. S1336.

8 Evidence, p. S682.

9 Evidence, p. S1336.

13 August 1993, DIEA noted that, as at 19 July 1993, 183 unauthorised boat arrivals were detained at Port Hedland.[10] As at 1 February 1994, 165 unauthorised boat arrivals were detained at Port Hedland.[11]

5.12 The Wacol Immigration Detention Facility consists of 20 cells in the Wacol Remand Centre leased from the Queensland Corrective Services Commission. It is used for the detention of males only. Detainees are subject to normal Remand Centre programs. In its submission dated 13 August 1993, DIEA noted that, as at 19 July 1993, no immigration detainees were held at Wacol.[12] As at 1 February 1994, no unauthorised boat arrivals were detained at Wacol.[13]

5.13 DIEA noted that, within the immigration detention centres, the principal restriction placed on detainees is that they cannot move unsupervised or at will beyond the confines of the detention facility. According to DIEA, in other respects restrictions on detainees are kept to a minimum. Visitors are permitted to attend the immigration detention centres.[14]

5.14 Commenting on the situation at Westbridge and Port Hedland, which are the two facilities developed to detain unauthorised arrivals, DIEA stated:

> Both facilities have reasonable open areas, and people live as family groups, may receive visitors for 12 hours daily, hold special celebrations within the centres and undertake various vocational and recreational activities during the day. Health, education and welfare services are provided, as are some excursions beyond the centres.[15]

Administration of the immigration detention centres

5.15 DIEA is responsible for the administration of the immigration detention centres. The Manager of each detention centre is a DIEA officer and is responsible for the day to day operations within the detention centre.

10 Evidence, p. S676.

11 Evidence, p. S1336.

12 Evidence, p. S683.

13 Evidence, p. S1336.

14 Evidence, p. S656.

15 Evidence, p. S 656.

5.16 DIEA staff responsible for administering the immigration detention centres have no role in the administrative processes for determining a detainee's claims to remain in Australia. The processing of applications for refugee status is undertaken by officers from the Determination of Refugee Status Section, who are not based at the detention centres. During the Committee's inspections of the Port Hedland and Villawood\Westbridge Centres, it was emphasised to the Committee that the separation of the roles between those who administer the detention centres and those who administer the refugee decision making processes was crucial to the effective functioning of the detention centres.

5.17 A number of staff are employed on a contract basis to provide various services within the immigration detention centres, including education, interpreting and welfare services. The services provided are discussed at paragraph 5.21.

5.18 The Australian Protective Service (APS) provides the custodial services at the immigration detention centres. In addition, in recent years it has taken on an increased contract management function within certain of the detention centres. At Port Hedland, APS manages the education program for school age children and the ground maintenance contract. At Villawood/Westbridge, APS manages all contract work, including the contracts for cleaning, maintenance, catering and education. In this regard, APS noted that it has put a proposal to DIEA for APS to manage, as a sub-contractor, the detention centres at Maribyrnong, Perth, Port Hedland, and Villawood/Westbridge.[16]

5.19 Explaining the rationale for expanding the role of APS into contract management for the immigration detention centres, the Director of APS stated:

> ... in days gone by we did provide just the protective security service and nothing else. We and the Department found that that was a very expensive and inefficient way to operate, because we did have people who had the capacity to do other things while they were there. We were able to offer the Department very substantial savings by taking over some of the things that it previously did without, in any way, detracting from what we did. It made the job more interesting for my troops and it made it substantially more cost effective for the Department of Immigration.[17]

5.20 While APS has responsibility for contracting out particular services, DIEA retains responsibility for determining and assessing the level and standard of the services which are provided. For example, in relation to the security

16 Evidence, pp. S99-S100.

17 Evidence, p. 936.

arrangements at the immigration detention centres, even though APS is contracted to provide the custodial services, DIEA retains authority for increasing the defensive capability of APS officers working within the detention centres.[18]

DIEA evidence on services provided in immigration detention centres

5.21 As noted above, various services are provided to immigration detainees within the immigration detention centres, including health, education and welfare services. DIEA noted that as almost all long term detainees, namely unauthorised border arrivals, are detained either in the Westbridge or Port Hedland facilities, the services provided at those detention centres are at a much higher level than in the other immigration detention centres, which are used mainly for short term detention.[19]

Health

5.22 In general, detainees are examined by a doctor usually within 24 hours of arrival at an immigration detention centre. DIEA indicated that any persons assessed as suffering from mental trauma are 'immediately referred for further assessment and treatment'.[20] Medical and pharmaceutical costs are met by DIEA.[21]

5.23 At Perth and Maribyrnong, general medical and dental treatment is provided on a needs basis, with doctors, who are on call, attending as required. Referral to specialists and to hospital also is on a needs basis. A female doctor visits the Maribyrnong Centre every week.[22]

5.24 At Westbridge, a private doctor attends twice a day, morning and evening, six days a week. The Centre also has a nurse on-site six days a week. A program of routine dental examination and treatment has been established. Since 6 July 1993, a monthly clinic has been conducted by a female medical practitioner, with access to a female medical practitioner available on a needs basis at other times. The services at Westbridge are shared by the Villawood detainees on a needs basis.[23]

5.25 At Port Hedland, a full time general nurse is in attendance, along with

18 Evidence, p. S99.

19 Evidence, p. S662.

20 Evidence, pp. S672, S680, S682.

21 Evidence, pp. S672, S680, S682.

22 Evidence, pp. S680, S682.

23 Evidence, pp. S672, S680.

a full time psychiatric nurse. Referral to specialists or to hospital is on a needs basis. A program of routine dental examination and treatment operates. A monthly clinic conducted by a female medical practitioner commenced in August 1993.[24]

Education

5.26 An education program only operates at Westbridge and Port Hedland, as children and long term detainees generally are not detained at the other immigration detention centres. In its submission dated 13 August 1993, DIEA described the education program operating at that time.

5.27 At Westbridge, education was being provided by one full time teacher and one part time teacher. Pre-primary school age children were attending a one hour primary class and were spending the rest of the morning on other pre-primary activities. Primary and secondary students were attending two and a half hours of formal lessons each day. Subjects covered included English language and grammar, mathematics, geography and science. DIEA noted that three supervised educational excursions for primary students and one for secondary students were conducted between February and August 1993.[25]

5.28 DIEA noted that the school originally was established along the lines of a one teacher country school to provide education for a small group of children, many of whom were expected to be transferred to Port Hedland. As that transfer did not take place, DIEA was reviewing the education program with a view to increasing class contact hours for both primary and secondary students.[26]

5.29 At Westbridge, adults were able to attend up to five hours per week of situational English practice and 24 hours per week of English tuition. Vocational sewing and typing classes also were available. Recreational classes in aerobic exercise and the proper use of exercise equipment were made available, but were abandoned due to lack of interest.[27]

5.30 At Port Hedland, education was being provided by four full time teachers and one part time teacher. Pre-primary students were attending two and a half hours of pre-school activity each morning. Primary and secondary students were attending five hours of formal lessons each day. Subjects covered included

24 Evidence, pp. S677-678.

25 Evidence, p. S670.

26 Evidence, p. S671.

27 Evidence, p. S671.

English language and grammar, mathematics, social studies, geography and art. There was a weekly outing for school children, involving either swimming lessons at a local pool, or other instructive activity.[28]

5.31 Adults were able to attend up to 29 hours per week of English tuition. Vocational typing and personal computer classes were available.[29]

Welfare

5.32 Welfare staff are employed by DIEA only at the longer term detention facilities. In it submission dated 13 August 1993, DIEA noted that at Westbridge, there is one full time welfare worker and two part time Khmer speaking welfare workers funded by DIEA. At Port Hedland, there usually are two full time welfare workers.[30]

Other services

5.33 Other services being provided within the immigration detention centres by DIEA, with some assistance from community groups, include:

- recreational equipment, such as televisions, books, magazines, volleyball equipment, and pool tables;
- an interpreter service on a needs basis, except in Port Hedland where a Khmer and Chinese interpreter are on staff;
- access to religious workers; and
- postal and telephone services.[31]

History of earlier investigations of the detention centres

5.34 Over the last four years, the operation of Australia's immigration detention centres has been examined by various organisations, including the Australian Institute of Criminology (AIC), the Human Rights and Equal Opportunity Commission (HREOC), the Australian Council of Churches (ACC), and UNHCR. The reports of the AIC, HREOC and ACC were available to the Committee.

28 Evidence, p. S676.

29 Evidence, p. S676.

30 Evidence, pp. S671, S677.

31 Evidence, pp. S670-S683.

5.35 In its evidence to this inquiry, DIEA advised the Committee of the many changes which have been implemented at the immigration detention centres in response to the matters raised in these earlier reports. These issues also have been given consideration by the Committee and are dealt with in the conclusions to this chapter.

Australian Institute of Criminology report

5.36 In July 1989, the AIC provided the then Department of Immigration, Local Government and Ethnic Affairs (DILGEA) with a report entitled *The Future of Immigration Detention Centres in Australia*.[32] The purpose of the report was to advise DILGEA on issues relating to the future of immigration detention centres in Australia. In compiling its report, the AIC visited the immigration detention centres in Sydney, Perth and Melbourne, as well as State and Territory prison departments where illegal entrants were detained.

5.37 The fundamental findings of the AIC, upon which the other conclusions in the report were drawn, were that:

- detention for small numbers of illegal entrants will be needed for the foreseeable future; and
- DILGEA was the appropriate agency for providing the detention centre function.[33]

5.38 At the same time, the AIC argued that immigration detention centres were not suitable for long term stay, and that long term stay should not be allowed. In particular, the AIC commented that long term detention was deleterious to detainees.[34] The AIC noted that detainees suffer from boredom, frustration and anxiety.[35] It also commented that the fences and bars gave a prison like appearance to the immigration detention centres.[36]

5.39 The major recommendations of the AIC were that:

- DILGEA retain the immigration detention centre function;

32 Exhibit 14.

33 Exhibit 14, p. 1.

34 Exhibit 14, pp. 101-102.

35 Exhibit 14, p. 99.

36 Exhibit 14, p. 36.

- the three immigration detention centres in Sydney, Melbourne and Perth be retained, the plans to build an immigration detention centre in Queensland proceed, and the immigration needs of the Northern Territory in particular be monitored;

- new detainees be routinely advised by DILGEA officers about the purpose of the immigration detention centre, its facilities, its procedures and what support service are available;

- the existing immigration detention centres be upgraded, including renovations to provide appropriate space for families, women and children, more recreational equipment, cells appropriate for handling violent episodes, increased indoor living and outdoor recreational space, improved access to welfare support and better quality food;

- a memorandum of understanding between DILGEA and APS be given urgent priority;

- DILGEA adopt the principle that only persons charged or convicted of a criminal offence be detained in a penal institution;

- maximum use be made of conditional release (reporting) as the primary alternative to detention for illegal entrants;

- a bail scheme be established and evaluated;

- consideration be given to employing migrant hostels and appropriate motels where illegal entrants who have otherwise no ties in the community will be required to stay;

- for the time being, home detention not be used as an alternative to institutional detention;

- proposals for reducing long term detention be given urgent consideration; and

- the immigration detention centres not be modified to take long term cases on the grounds that legal and administrative changes flowing from amendments to the Migration Act, together with adoption of the AIC proposals, should eliminate the need for long term detention of illegal entrants in immigration detention centres.[37]

37 Exhibit 14, p. vii.

Human Rights and Equal Opportunity Commission report

5.40 In March 1992, HREOC provided DILGEA with a draft report detailing the findings of visits made to the Darwin and Port Hedland Detention Centres/Processing Areas by the Acting Secretary of HREOC in August and December 1991.[38] The visits followed representations made to HREOC regarding the detention centres.

5.41 HREOC's report, which was confidential but was later subpoenaed for litigation in the Federal Court, addressed various issues relating to the detention centres. These included education, medical services, counselling, religion, food, remoteness, recreational facilities, community access and access to interpreters and legal advice. While identifying specific problems arising in relation to each of these areas, and while acknowledging that issues relating to conditions within the detention centres are important, HREOC argued that such issues are fairly readily addressed in most cases.[39]

5.42 HREOC's principal argument was that the most serious problem faced by detainees was the length of time they were likely to be held in detention awaiting determination of their refugee status. HREOC recommended a review of the detention policy and the granting of temporary residence to those who had been detained for two or more years.[40]

5.43 HREOC also expressed concern that, arising from the length of detention endured by the detainees, there was a process of 'inculturation' taking place, whereby detainees were experiencing a loss of their own culture. HREOC considered that this was particularly true of the children, who were receiving an Australia education, whose first language was becoming English, and whose contact with the outside world was primarily with Australians who visited the centre and through Australian television.[41]

Australian Council of Churches report

5.44 On 24 and 25 March 1992, an ACC delegation visited the Port Hedland Immigration Reception and Processing Centre. In its report on that visit, the ACC delegation noted that the purpose of the visit was to gain a first hand understanding

38 HREOC, 'Detention of Asylum Seekers - Darwin and Port Hedland', Report of the Acting Secretary's visits to Darwin and Port Hedland Detention Centres/Processing Areas, August and December 1991.

39 ibid, p. 31.

40 ibid, pp. 31-32.

41 ibid, p. 32.

of the situation of the detainees, assess the living conditions and meet local people, church representatives and government officials.[42]

5.45 The ACC delegation identified various difficulties within the Port Hedland Centre, including:

- a lack of on-site interpreters;
- a lack of professional torture and trauma counsellors;
- a lack of a clear understanding of the role of supervisors;
- no vocational skills training;
- a lack of ethno-specific bi-cultural health workers; and
- a lack of community access.[43]

5.46 The ACC delegation also commented on the psychological state of the detainees, indicating that they were feeling depressed and tense.[44] In addition, the ACC delegation questioned the desirability of having protective security officers dressed in a paramilitary fashion.[45]

5.47 At the same time, the ACC delegation acknowledged the contribution of DILGEA staff and others in improving living conditions. For example, the ACC delegation noted that problems in the kitchen had been overcome and that there were no complaints about the food, as the detainees had input in the day to day planning of the menu, accommodating the different cultural needs of Cambodians, Vietnamese and Chinese groups.[46]

5.48 In its recommendations at the conclusion of its report, the ACC delegation deplored the continued detention of individuals for two years or longer, urged a review of the detention policy, and urged the Minister to grant four year temporary entry permits to those Cambodian asylum seekers not recognised as refugees who were in detention at the time of the ACC delegation's report.[47]

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42 *Report to the Australian Council of Churches on the Present Situation of Asylum Seekers Detained at Port Hedland Reception and Processing Centre*, March 1992, p. 1.

43 ibid, pp. 6-10.

44 ibid, p. 10.

45 ibid, p. 5.

46 ibid, pp. 6-7.

47 ibid, p. 14.

Submissions on immigration detention centres

5.49 A number of concerns raised in previous investigations of the immigration detention centres were reiterated in submissions to this inquiry. In some submissions, the concerns which were raised in the earlier reports were restated. In other submissions, new claims were made regarding the conditions and services at Australia's immigration detention centres. Suggestions also were made for further improvements. The concerns and suggestions raised in submissions are detailed below.

5.50 Those seeking improvements within the immigration detention centres regarded such improvements as a short term solution to the overall problems associated with detention. Their preferred outcome remained community release for asylum seekers who, under the present system, are detained mandatorily.[48]

5.51 From its own inspections of the various immigration detention centres, and from the discussions which were held during those inspections, it was evident to the Committee that DIEA has made various improvements in order to address the concerns raised in earlier reports on the detention centres. In evidence to the inquiry, DIEA and APS responded to the various claims which were made in submissions to this inquiry. Those responses also are detailed below.

Submissions on administration of the immigration detention centres

5.52 Various issues regarding staffing and general administration within the immigration detention centres were raised in submissions from community and advocacy groups. Criticisms included the following:

- there is a lack of understanding of cultural differences on the part of both DIEA and APS staff. The Hedland Reception and Processing Centre Support Group noted that it has received complaints of racial discrimination and intimidation by staff, but stated that these have not been reported formally by detainees, because of a lack of trust and for fear of reprisal;[49]
- staff dealing with detainees are not trained adequately, and are in need of counselling support to more effectively and sensitively handle the difficult task of dealing with people who are traumatised and who attempt suicide and self-harm;[50]

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48 Evidence, pp. S614, S636.

49 Evidence, p. S63.

50 Evidence, p. S569.

- staff at Port Hedland, particularly welfare workers, stay for short periods of time.[51] These frequent changes made it difficult to build relationships of trust and can affect the welfare of detainees.[52]

- there is inconsistent application of rules and regulations by staff,[53] and the rules change frequently without apparent reason.[54] The Australian Red Cross alleged that there are day to day occurrences where DIEA and APS appear not to agree on the rules, and that there are constant accusations by detainees that there are different rules for different people. The Australian Red Cross, nevertheless, conceded that improved lines of communication introduced by the Manager of the Port Hedland Centre have assisted in overcoming such problems at that facility.[55]

5.53 APS responded to each of the criticisms outlined above, providing details of APS operations at the immigration detention centres.

5.54 APS noted that it has a sound working relationship with DIEA at all levels, including at the local, regional and national levels.[56] APS advised that the rules for the administration of the immigration detention centres are well documented.[57] APS provided the Committee with copies of its procedural and training manuals. In response to the broad criticism that these rules are not being applied consistently, APS stated:

> I think that general statement came out of the suggestion that the Chinese were being handled differently by the Department from the Vietnamese because certain people were being released and others were not. I do not think there is a suggestion that those individuals or groups are

51 Evidence, pp. S22, S53.

52 Evidence, p. S60.

53 Evidence, pp. S63, S570.

54 Evidence, pp. S63, S260.

55 Evidence, pp. S570-S571.

56 Evidence, p. 936.

57 Evidence, p. 959.

> being treated any differently in the administration of their security or their health and well-being at the centres.[58]

5.55 APS indicated that there are various avenues for detainees to make complaints.[59] Detainees are able to discuss their concerns with interpreters, lawyers and APS officers. On a more formal basis, they also have the option of taking a complaint to the Ombudsman or the Human Rights and Equal Opportunity Commission. While concerns and complaints are raised by detainees from time to time, according to APS, none of these complaints have revealed any serious deficiencies.[60]

5.56 APS advised that it places great emphasis on the training of staff to ensure that sensitivity was shown towards detainees. APS supervisors and some base level employees receive an initial five weeks of training in Canberra as protective service officers. That training covers issues such as the legal aspects of their duties, and the requirements of relevant international covenants and conventions. When officers are allocated to a detention centre, they receive an initial four to five days of training on their roles and responsibilities. In addition, a minimum of 40 hours extra training per year is provided to all staff. One recent course attended by officers-in-charge and supervisors at the immigration detention centres incorporated, amongst other subjects, cross-cultural awareness, crisis management and an understanding of the problems faced by persons in detention.[61] APS stated:

> We give people a great deal of training. ... The focus of that training is on the protection of dignity and safety. We take a highly unobtrusive approach to our task. We focus on things such as communication skills, preconceptions and stereotypes, cultural differences, counselling skills, conflict management and so on. We also have extensive procedures to guide our staff at these centres to make sure that these things are done ... our total focus is on the protection of dignity and safety. We approach the task with total paranoia about the protection of human rights.[62]

58 Evidence, p. 959.

59 Evidence, p. 958.

60 Evidence, p. 932.

61 Evidence p. S97

62 Evidence, pp. 930-931.

5.57 APS also responded to concerns regarding frequent turnover of staff. Those concerns related mainly to Port Hedland. They were identified and canvassed in submissions and by the Committee when it visited that facility. The Committee found that among the staff at Port Hedland with whom the Committee held discussions, few had been located there for any substantial length of time. While acknowledging that three different persons had been in the APS officer-in-charge position over the past two years, APS advised that, in terms of general APS staff at Port Hedland, half the staff are recruited locally and have been working at Port Hedland for most of the time that it has been operating.[63]

5.58 Evidence from the Hedland Reception and Processing Centre Support Group corroborated the APS evidence that there has been an improvement in terms of administration and staffing matters over time. The Support Group stated:

> ... the APS people who have a lot to do with them, have a lot of really good relationships with the residents, which is good to see. That has come about because there have been more people staying there now, and they have got to know them; there is a lot more mutual respect, rather than just this one-way feeling of a guard having authority over the person.[64]

Submissions on security arrangements

5.59 The Hedland Reception and Processing Centre Support Group reflected a concern identified in previous reports regarding security arrangements at the detention centres. It stated:

> Detention in custody means the need for people, often wearing uniforms, to have authority over others. This situation can only create fear and tension especially for traumatised people who have lived most of their life distrusting authorities.[65]

63 Evidence, p. 946.

64 Evidence, p. 475.

65 Evidence, p. S63.

5.60 The Society of St Vincent de Paul expressed other concerns about the security arrangements. It stated:

> Practices such as finger printing, body and living quarter searches and other extensive interventions in the lives of the people detained have been common, although reports of this received by Society members have decreased in recent months.[66]

5.61 In response, APS advised that within the immigration detention centres it has a philosophy of minimum use of force.[67] In evidence at the public hearings, APS expanded on these comments when it stated:

> A low use of force for us means that we do not issue people with firearms as we do elsewhere, such as in running a prison. They do not walk around with batons and handcuffs, which is exactly what they would be carrying if they were working for us elsewhere, particularly if were running a prison. We do not have anywhere near the resources that we would have in an equivalent sized prison.[68]

5.62 Evidence presented by both DIEA and APS indicated that searches are kept to a minimum.[69] DIEA advised that general searches only have occurred twice at Westbridge and not at all at Port Hedland. Searches of individual rooms generally are undertaken if there are reports of activities which raise concern, for example, if there are reports that weapons have been secreted or foodstuffs and other groceries are being hoarded.[70]

5.63 DIEA also explained the reason for the use of 'finger scan' equipment. DIEA stated:

> Initially, roll calls or headcounts were instituted to confirm that all detainees were present in a Centre. Many detainees found it offensive to have a custodial officer point at them while a head count was being held. Whenever the headcount showed a deficiency in the number of detainees, usually because a detainee had

66 Evidence, p. S443.

67 Evidence, p. S99.

68 Evidence, p. 947.

69 Evidence, pp. S671, S677, 947.

70 Evidence, pp. S671, S677.

decided to remain in bed or had forgotten to present themself, they also found it frustrating to have to wait in a confined area while a check was made of rooms to find the missing people. Those who had remained in their rooms also found it an intrusion of their privacy to have custodial staff checking all the rooms to find them.

To overcome this problem the Centres at Port Hedland and Westbridge were equipped with machines which could identify the detainees by means of a combination of a PIN (Personal Identification Number) and a comparison of a person's finger with an electronic image of that finger. At Port Hedland adult detainees are asked to register their PIN and place a finger on the machine's optical reader at least once per day during a meal time. The machine produces a summary of the detainees who have used it as requested in the previous 24 hours and those, if any, who have not. Custodial officers are then able to check quickly and discreetly to ensure that those who had failed to register in the past 24 hours are still in the Centre.[71]

Submissions on living conditions

5.64 A number of concerns and allegations were raised about the living conditions in the immigration detention centres, including the following:

- the living arrangements constituted an impoverished overall environment, which could have a detrimental effect particularly on children;[72]
- there is inadequate living space within each unit, as in each unit the bedroom and living space is combined;[73]
- there is minimal privacy;[74] and

71 Evidence, p. S679.

72 Evidence, pp. S619, 743.

73 Evidence, p. S620.

74 Evidence, p. 744.

the food is of poor quality, and is repetitive and culturally inappropriate.[75] One allegation made but not substantiated to the Committee, and not raised previously with DIEA or APS, was that maggots had been found in the food at Port Hedland.[76]

5.65 The Committee tested some of these concerns and allegations with certain witnesses who had visited the detention centres. In response, Archbishop Hickey, for example, commented in relation to the Port Hedland Centre:

> I know many criticisms have been levelled. I do not think they are altogether justified. The criticisms that I agree with are those about the security of the detention and the length of the detention. I visited the processing centre myself and found its facilities quite adequate, except for the fences and the inability of people to move beyond them.[77]

5.66 The Committee raised the specific allegations regarding food with DIEA and APS. DIEA indicated that the food service is given thought and care, and is designed primarily to meet the nutritional, dietary and medical needs of those in detention. While DIEA noted that some account could be taken of ethnic and regional differences, DIEA argued that it is impractical to design a menu for a single group which is in a minority at the centre.[78]

5.67 Both DIEA and APS, when questioned about the allegations made to the Committee about maggots in food, advised that they have received no reports about maggots in food.[79] DIEA commented:

> There are screens on doors, there are electronic bug zappers, there are mesh food covers ... I think it is indicative that the only instance that we have had of a serious medical incident related to food was an instance where it became apparent that one of the residents had actually been able to take perishable food from the dining hall to their rooms and several days later was admitted to hospital with food poisoning which was related to pork. There had been no pork in that dining room for

75 Evidence, p. 266.

76 Evidence, p. 883.

77 Evidence, p. 382.

78 Evidence, p. 1053.

79 Evidence, pp. 957, 1053-1054.

several days, and afterwards there was admission that food had been stored in a room. There has not been another incident of a medical problem related to food.[80]

Submissions on services within the immigration detention centres

5.68 A number of community and advocacy groups raised concerns regarding the adequacy of education, recreation and health services provided within the immigration detention centres.

Health

5.69 In some submissions, concerns were raised regarding the adequacy of health services at the detention centres. The Australian Red Cross argued that there is a lack of access to primary health care.[81] The Ethnic Affairs Commission of NSW submitted that there is a lack of gender based health care for women.[82] The NSW Child Protection Council argued that there is a lack of adequate health care.[83]

5.70 To illustrate its argument, the NSW Child Protection Council provided the example of a person who suffered continual ear bleeding problems. The NSW Child Protection Council alleged that the person was referred to a specialist only after intervention by an outside organisation. The NSW Child Protection Council stated:

> It was almost as if the doctor was under the authority of the Department not to spend any more money on the people.[84]

5.71 In this matter, DIEA noted that the person concerned had suffered ear problems since his childhood, well before coming to Australia. DIEA indicated that treatment was given when the person complained of discomfort. DIEA noted that while the person sought an operation, the doctor indicated that there was no discomfort and no bleeding from the ear, and that the condition had existed since the patient's childhood. DIEA indicated that the procedure which the person sought was considered elective surgery and, at the time, elective surgical procedures which did not involve alleviating discomfort, or significantly altering the quality of life, generally were not progressed, given long hospital waiting lists and the cost to public

80 Evidence, p. 1055.

81 Evidence, p. S570.

82 Evidence p. S429.

83 Evidence, p. 741-743.

84 Evidence, p. 742.

outlays. Subsequently, following representations by a member of the Society of St Vincent de Paul, the patient was referred for specialist assessment. The specialist confirmed the doctor's diagnosis and delayed treatment to enable further checks. After surgery was recommended by the specialist, an operation was scheduled.[85]

5.72 On general health care issues, the NSW Child Protection Council argued further that the immigration detention centres do not have sufficient qualified medical staff on site. Commenting on the situation at Westbridge, the Council stated:

> The medical staff – what you would call medical – consists of one nurse and one doctor and the doctor is on call. The nurse can provide a very general referral procedure to the doctor and the doctor, if he is available, comes in, but he is not on site. The doctor also is not equipped with the various languages to assist the patients. The doctor speaks a dialect of Chinese and is not in a position to handle people from different ethnic backgrounds without an interpreter. There is no female doctor; there is no regular psychological counselling.[86]

5.73 In other submissions, it was argued that adequate specialised health care is not available. It was suggested that regular trauma counselling is not of an appropriate standard,[87] and that in Western Australia there is a lack of suitably trained torture and trauma counsellors.[88]

Education and recreation

5.74 In some submissions, community groups were critical of the education services available within those immigration detention centres which accommodate children and longer term detainees, namely Port Hedland and Westbridge. It was suggested that the education program is not of an appropriate standard, particularly

85 Evidence, p. S1285.

86 Evidence, p. 741.

87 Evidence pp. 324, S428-S429.

88 Evidence, p. 335.

as there are inadequate learning contact hours and a limited curriculum.[89] The NSW Child Protection Council, for example, submitted:

> The curriculum consists principally of maths and English grammar with some elementary science and geography ... There are no classes in the children's own language and no provision for art, music, physical education or personal development.[90]

5.75 During public hearings, the NSW Child Protection Council was more vociferous in its criticisms. It stated:

> In terms of the curriculum spread, it is a nonsense to suggest that it is a curriculum. The secondary students are learning English grammar and maths. When we look at documents that the Australian Government is a signatory to, such as the United Nations Convention [on the Rights of the Child], and we look at the commitment we have made there to the full development of a child's personality, talents, mental and physical abilities, it is a nonsense to suggest that what is being provided for those children out there is anything other than a smokescreen in terms of the provision of educational services.[91]

5.76 The Society of the Sacred Heart drew attention to the lack of tuition in the detainees' own language, and the lack of vocational training for the older children. It also argued that there is a lack of educational resources.[92]

5.77 The Human Rights Commissioner submitted that while DIEA engages qualified teaching staff, the extent of educational subjects addressed and the time allocated to classes is restricted and cannot be compared to equivalent State syllabus education.[93] A similar view was put by the Hedland Reception and Processing Centre Support Group. However, the Support Group acknowledged the difficult

89 Evidence, pp. S601, 693, 749.

90 Evidence, pp. S617-S618.

91 Evidence, p. 745.

92 Evidence, p. S493.

93 Evidence, p. S601.

circumstances under which the education program is operating. A representative of the Support Group stated:

> I think the education is probably as good as you can manage under the circumstances. It is not as good as what is provided in Australia for other children. I think that would be impossible under the circumstances, given the fact that there are very small numbers, that the teachers are just one teacher for the whole high school. The curriculum is obviously restricted. There are, from my view, certain gaps in what is provided, and I think that those are probably inevitable under the detention system. I think that they do a pretty good job. I think that they are very limited, but they do provide education and they do provide them with activities.[94]

5.78 Some concerns were expressed about the lack of provision for adult education. For example Father Reitmeyer, representing the Australian Catholic Refugee Office, stated that, up until 1993, the Government had sponsored adult education for detainees. According to Father Reitmeyer, since the beginning of 1993, government support for adult education had ceased. Volunteer support was required to maintain the service.[95] This also was raised with Committee members during informal discussions held with staff during the Committee's inspection of the Port Hedland Centre.

5.79 Alongside formal education, concerns also were expressed about the lack of opportunity for social development, particularly with regard to children. The Ethnic Communities Council of Western Australia, for example, commented:

> The social aspect and the social formation is important in our education. That is completely lacking in a camp environment because of the lack of normal day to day contact with the community that we experience as part of our education.[96]

5.80 The NSW Child Protection Council considered that there is a lack of opportunity for children to engage in activities which help with the development of co-ordination and gross motor skills. It stated:

> In addition to the limitations and restrictions inherent in a custodial environment, these children are further deprived of the normal educational and recreational

94 Evidence, p. 468.

95 Evidence, p. 891.

96 Evidence, p. 337.

> stimuli so essential at critical developmental stages of their lives ... The absence of adequate play and recreational facilities must surely mean that the development of the children's co-ordination and motor skills will be retarded.[97]

5.81 In a number of submissions, it was suggested that there should be greater opportunity for excursions outside of the immigration detention centres.[98] It was argued that such excursions are an important part of social and educational development, and provided a much needed boost to morale.[99]

Responses to submissions on services

5.82 DIEA and APS responded to the various criticisms raised regarding the adequacy of services provided within the detention centres. They also advised of recent developments at Westbridge and Port Hedland.

5.83 DIEA indicated that, in the early days of detention, it was recognised that services such as health care and education needed to be provided. However, it was expected that such services only would be required in the short term, as it was anticipated that detention would be short term.[100]

5.84 In this regard, APS noted that one of the real difficulties in determining the level of services required has been the inability to predict how long people were likely to be held in detention. APS commented:

> If somebody is going to be there for three days, the approach to education will be entirely different from that of somebody who is going to be there for three years. With many of these people, it has not been clear at any point how long they are going to be there. So that is one of the threshold difficulties that the Department faces.[101]

97 Evidence, p. S618.

98 Evidence, pp.

99 Evidence, pp. S54, S64-S65, S514.

100 DIEA Briefing, 22 July 1993, Transcript of Evidence, p. 42.

101 Evidence, p. 941.

5.85 As the length of detention increased, the level of services within the centres also improved. DIEA advised that it has upgraded almost every aspect of care within the detention centres. DIEA stated:

> If you look at the provision across the whole spectrum of activities, from health care and psychological and psychiatric care to education, you will see that we now have immensely upgraded facilities with what we started with ... we now certainly provide a fully integrated system within the centre.[102]

5.86 In terms of education, DIEA advised that the services at Westbridge have been upgraded to allow primary and secondary school children to have five hours of class contact each day. Also, in response to requests from the parents of school age children, the syllabus has been modified to include increased focus on English and mathematics tuition.[103]

5.87 APS noted that the class contact hours include 15 hours per week for each pre-primary child and 27.5 hours per week for each secondary child at Port Hedland, and 30 hours per child per week at Westbridge. APS also advised that the curriculum at Port Hedland has been approved by the Pilbara District Superintendent of Education.[104] As for Westbridge, APS commented that the children receive the same class hours as children in Australian schools 'but better quality as the class sizes are one third those of the State Schools'.[105]

5.88 APS also indicated that it has not received any specific criticisms of the education service. The Director of APS stated:

> We have received quite a deal of praise from those who have come and had a look at the education facilities and the approach that is taken. I am not aware, personally, of having received a great deal of criticism at all; in fact quite the contrary.[106]

102 DIEA Briefing, 22 July 1993, Transcript of Evidence, p. 42.

103 Evidence, p. 1053.

104 Evidence, pp. S1178-S1179.

105 Evidence, p. S1179.

106 Evidence, p. 941.

5.89 When questioned on the option of sending children, particularly at the Port Hedland Centre, to the local school, the Deputy Secretary of DIEA stated:

> We have reviewed education services continuously but I would be honest in saying that we have reviewed education services as a function within the centre rather than reviewing it with a view to what are the options external to the centre.[107]

5.90 With regard to recreation, DIEA indicated that over time it has relaxed its attitude in relation to children's access to outside activities. It noted that regular excursions are organised for the children at Port Hedland, including to the local swimming pool and other attractions in the vicinity of the detention centre.[108] A similar change in approach also has been adopted for children at Westbridge.[109]

5.91 APS advised that each child at Port Hedland is able to go on an excursion fortnightly of at least three to five hours duration. These excursions consist of picnics, fishing, swimming and sightseeing. At Westbridge, each child is able to go on an excursion every one to two weeks. The visits have included the Sydney Museum, Aquarium, Botanical Gardens, a wildlife park, McDonalds and bowling. APS noted that future plans include swimming, tennis lessons and basketball.[110]

5.92 In addition, DIEA advised that programs have been put in place to address previously identified problems of underdeveloped co-ordination among children. DIEA informed the Committee that teaching and nursing staff at Port Hedland consider that there no longer is any problem with either the physical or intellectual development of children.[111]

5.93 During the Committee's inspection of the Port Hedland Centre, mention also was made of increased opportunities for adults to participate in some external activities, such as fishing on the beach and a volleyball game against members of the local Port Hedland community.

107 Evidence, p. 1056.

108 Evidence, p. 1056.

109 Evidence, p. 940.

110 Evidence, p. S1178.

111 Evidence, p. S1161.

5.94 In terms of health services, DIEA indicated that, in its view, such services are being provided at an appropriate level. DIEA stated:

> We emphasise that gender specific medical services are available at both Westbridge and Port Hedland and that an extensive range of on-site services - psychiatric, medical and dental – is also available at both places.[112]

5.95 The most recent development in terms of health services have been to make available, on a trial basis, a female doctor at Westbridge from July 1993 and at Port Hedland from August 1993.[113]

5.96 DIEA also advised that it has adopted a more pro-active role in relation to psychological care. DIEA stated:

> We have put a tremendous amount of effort now into ensuring that there is on-site psychological and psychiatric care afforded and that the residents as a whole are being reviewed regularly. We see ups and downs in their spirit, as opposed to what their psychological state is, as decisions are reached and relayed or as court actions are taken and court decisions are made, and, with the cooperation of the carers contracted to us or assisting in the place, we have attempted to flatten out the ups and downs of life in the centre.[114]

5.97 With regard to trauma and torture counselling, DIEA commented:

> We have had no difficulty in accessing such services and, wherever a person in any of the centres has been referred to such a service, we have taken up the recommendation, and that has at times involved moving the person interstate to access the particular service.[115]

112 Evidence, p. 1053.

113 Evidence, pp. S673, S678.

114 Evidence, p. 1058.

115 Evidence, p. 1057.

Advisory body for the detention centres

5.98 To assist in resolving day to day management issues and detainee concerns, as identified in submissions and by various community groups which have visited the immigration detention centres, the Society of St Vincent de Paul suggested the establishment of an Immigration Detention Centres Advisory Committee. According to St Vincent de Paul, such an advisory committee should include members drawn from DIEA, APS, non-government organisations, centre residents, and community based service providers.[116]

5.99 Both DIEA and APS indicated that they would have no objection to the establishment of an advisory committee for the detention centres. The Deputy Secretary of DIEA stated:

> I do not find any difficulty with that at all. Overall advisory services have improved tremendously over the last 12 months. I think the spirit of cooperation among service providers in the centres is at an all-time high currently.[117]

5.100 In a similar vein, the Director of APS stated:

> I certainly have no objection to such a body. I would have thought that we would have pretty close to an equivalent of that now. We have the UNHCR, the Human Rights and Equal Opportunity Commission, Red Cross, and so on, visiting all of the centres regularly. Obviously we have the lawyers monitoring the places very closely, so we are already under a great deal of scrutiny. The centres are wide open for just about anybody to visit who wants to; they can do so for about 12 hours of every day. If that were a more formal arrangement, I would not object to it.[118]

116 Evidence, p. S444.

117 Evidence, p. 1057.

118 Evidence, p. 945.

Location of the Port Hedland Centre

5.101 Alongside the concerns and criticisms expressed about the immigration detention facilities in general, some specific concerns were raised regarding the location of an immigration reception and processing centre at Port Hedland in north west Western Australia.

5.102 Some groups submitted that Port Hedland is too isolated and therefore unsuitable as a site for an immigration detention centre. It was argued that the remoteness of the detention centre hinders access by detainees to:

- legal advisers with demonstrated experience in assisting with refugee status determination;
- interpreters accredited in the language of the applicants;
- therapists and counsellors with expertise working with people suffering from the effects of trauma and torture;
- medical, dental and welfare personnel experienced in cross-cultural communication;
- culturally appropriate religious leaders; and
- contact with community, such as ethnic community groups or cultural support groups.[119]

5.103 It also was argued that locating a detention centre at Port Hedland increases the costs associated with detention. In particular, it was submitted that the provision of legal services to asylum seekers would be considerably cheaper if the asylum seekers were located in a capital city. The Refugee Council of Australia, for example, compared the actual cost of providing legal assistance to asylum seekers detained at Port Hedland with the estimated cost of providing the same service in a capital city. It concluded that in a capital city the same service could be provided at 52 percent of the cost of the service in Port Hedland.[120]

5.104 From a similar perspective, Australian Lawyers for Refugees Incorporated noted that, of the government funds provided to it to assist refugee applicants at Port Hedland, 'almost 50 percent of those funds covered the cost of

119 Evidence, pp. S56, S64, S429, S444, S579.

120 Evidence, p. S176.

long distance air travel, hotel accommodation at Port Hedland and the living allowance paid to the lawyers as well as the not inconsiderable cost of communications to and from that remote location'.[121]

5.105 In various submissions from community groups, it was argued that the Port Hedland Immigration Reception and Processing Centre should be closed, and that immigration detention centres should only be located near major population centres.[122]

5.106 Not all, however, were critical of the location of an immigration reception and processing centre at Port Hedland. Archbishop Hickey stated:

> I did, I believe, have some influence on the government's decision to accept Port Hedland as a location. At the time I was Bishop of Geraldton and my opinion was sought by government officials about Port Hedland. I knew Port Hedland well and spoke to the mining company that was making the facilities available, and my recommendations may have had some effect in the government accepting Port Hedland. I still think that as a location it is okay. I object to long term detention; I do not necessarily object to Port Hedland as a location.[123]

5.107 When questioned on the criticisms regarding the use of Port Hedland as a location for an immigration reception and processing centre, Archbishop Hickey responded:

> I have been told that it is very difficult to get resources - lawyers, interpreters and so forth. There is something in that, but I think there were more lawyers assisting the people at Port Hedland than there were assisting the people at Westbridge, in Sydney. I do not think that all the criticisms of the location are justified, but I maintain my criticism of the long term detention.[124]

121 Evidence, p. S204.

122 Evidence, pp. S169, S247, S444, S636.

123 Evidence, p. 382.

124 Evidence, p. 382.

5.108 In response to the criticisms about the location of the Port Hedland Centre, DIEA explained the reasons for establishing an immigration reception and processing centre in the north of Western Australia. DIEA stated:

> In May 1990, as it was anticipated that more boats might travel to Australia, various sites in the north west of Australia were examined to identify possible holding areas should the need arise. Facilities close to the point of arrival were pursued both for logistical reasons and because it was felt that transfer to major population centres before entry claims had been determined favourable could prematurely signal acceptance into the community ... The Port Hedland facility was the best equipped of those seen and had the added advantage of being well south of the area where the type of mosquitos carrying the malaria parasite are most common (doctors from the Commonwealth and NT Departments of Health had raised this issue with the Department).[125]

5.109 As noted in Chapter Two, lower detention costs was claimed to be a further advantage of siting an immigration reception and processing centre at Port Hedland. According to DIEA, the overheads of maintaining Port Hedland are much lower, particularly as the costs of perimeter security and custodial services were lower than at traditional immigration detention centres (see paragraph 2.95).[126]

Conclusions

5.110 For many in the community, Australia's immigration detention facilities have become a focal point for the concerns and criticisms regarding Australia's policy of detaining unauthorised arrivals who seek refugee status. The imagery of fences, guards and barbed wire has been evoked at various times to direct attention to the situation of persons who have been held in those detention facilities for periods now in excess of four years. In some instances, community groups seeking to emphasise their arguments have compared the detention centres to Australian prisons and even refugee camps in some South East Asian countries.

5.111 On the basis of the Committee's own visits to the facilities at Port Hedland, Villawood/Westbridge and Perth, as well as its inspection of Roebourne Prison, the Committee is of the view that there can be no valid comparison made between immigration detention centres and prisons. From

125 Evidence, pp. S651-S652.

126 Senate Estimates Committee F, Transcript of Evidence, 11 May 1993, p. 26.

Committee members' own experience of travelling to refugee camps in countries such as Hong Kong, Indonesia, Malaysia, Pakistan and Thailand, any comparisons with such camps are even more invalid.

5.112 The Committee notes that the two immigration detention facilities which currently accommodate longer term detainees, namely Westbridge Stage 2 and Port Hedland, were utilised previously as a migrant hostel and a single men's quarters for BHP. The only difference between the facilities then and now is that fences and unarmed correctional services officers have been placed around the perimeter to restrict the movement of persons in and out of the centres. In the Committee's view, this hardly constitutes a prison or refugee camp environment.

5.113 The Committee, however, recognises that there have been difficulties within the detention centres. Even DIEA would acknowledge this fact. Many of these difficulties have arisen as the immigration detention centres have been transformed from short term detention facilities, where the basic needs of detainees were being met, to facilities which accommodate longer term detainees with longer term needs.

5.114 The evidence given by DIEA during the inquiry indicated to the Committee that DIEA is sensitive to the various concerns and criticisms which have been directed to it regarding the treatment of and services provided to detainees. It is evident that, over time, DIEA has sought to address the various concerns which have been raised. Many in the community, including organisations such as the Australian Red Cross and the Hedland Reception and Processing Centre Support Group, acknowledged the improvements which have been made within the detention centres.

5.115 Despite the range of improvements, evidence from community groups suggests that new problems continue to be identified within the detention centres. During the inquiry, the Committee listened to the concerns expressed by various organisations and requested DIEA and APS to respond to these concerns. In some instances, direct attention to rectify problems has been taken by DIEA in response to community intervention on behalf of detainees.

5.116 Apart from raising relevant matters with DIEA, the Committee was not in a position, nor was it necessarily the Committee's role, to investigate and seek to resolve each and every allegation made regarding the detention centres. In any case, the Committee does not expect that the allegations or problems will cease at the conclusion of this inquiry. As such, the Committee considers that better opportunities for detainees, their families and community groups to communicate problems to DIEA and APS would assist in overcoming many of the difficulties which may continue to arise with respect to immigration detention.

5.117 In this regard, the Committee supports the suggestion by the Society of St Vincent de Paul that an Immigration Detention Centres Advisory Committee be established, involving DIEA, APS, centre residents, community service providers and local community representatives. Such an advisory committee would provide an appropriate forum in which concerns regarding particular services or particular

occurrences could be raised and addressed in a cooperative manner. It would provide an opportunity to identify and rectify any problems before they have a significant impact on the detainees. It also would provide an opportunity to assess the provision of particular services, and to offer suggestions for improving either conditions within the centres or the delivery of services to detainees. However, it should not be, as envisaged in the Society of St Vincent de Paul's submission, an advisory committee to plan and implement a program of renovation and redesign of the detention centres.

5.118 The Committee envisages that an Immigration Detention Centres Advisory Committee also might consider complaints and comments regarding the involvement of community groups and legal representatives within the detention centres. Any concerns in relation to the actions of community groups or legal advisers could be raised, at first instance, with the advisory committee. In certain instances, the advisory committee may be the appropriate body to liaise on behalf of detainees to facilitate changes and improvements in relation to the provision of services by community based organisations.

5.119 As part of its ongoing assessment of the conditions and services within the detention centres, the advisory committee also should be required to consider factors relevant to the refugee determination process which necessarily impact on the level of service which is and should be provided. Those factors include the number of persons detained, the likely length of their stay, and the likelihood of their gaining refugee status in Australia.

5.120 While preferring to leave specific problems arising within the detention centres to a more appropriate body to resolve, the Committee has decided to comment on three particular issues which attracted considerable attention during the inquiry.

5.121 First, the Committee is concerned about the education of children at the detention centres. While the Committee acknowledges that much effort has been devoted in recent times towards improving the level of education services within the detention centres, it is evident that the nature of the detention environment will always place limitations upon the education services which can be delivered. The Committee considers that, in appropriate cases, children who reside in the detention centres could be allowed to attend local schools during the day. This not only would help to ensure that the children are exposed to a full and comprehensive curriculum, but also would provide them with improved opportunities for recreation and interaction with other children, which are vital to their general development. DIEA should liaise with the appropriate State government agencies to secure access to local schools for detainee children. In determining which children should be allowed to attend local schools, consideration should be given to the literacy levels of each child, the likelihood of resettlement in Australia and the standard of the education being provided within the particular detention centre.

5.122 On the issue of education, there was some debate among Committee members as to whether it would be preferable to teach detained children in their native language and to educate them in a style which is compatible with their country of origin. Certainly this would be in accordance with the principles of the Convention on the Rights of the Child, which at Article 29 states that the education of the child shall be directed to the development of respect for the child's own cultural identity, language and values. Some Committee members considered that the advantage of such an approach would be that those who ultimately are required to leave Australia could adjust more easily back into their country of origin. Other Committee members considered that educating detainee children in English would be preferable as it would provide them with the language skills which they would need should they remain in Australia and which would be valued if they were returned to their country of origin. The Committee did not come to any firm conclusion on this point, but considers that DIEA should canvass the issue of education in a child's native language with the appropriate State government agencies when it consults with those agencies regarding access to local schools. In determining whether native language education is feasible, consideration should be given to the costs of providing such education, the multiplicity of languages which might need to be taught, the literacy levels of the children, and the likelihood of the children being allowed to remain in Australia.

5.123 Secondly, the Committee considered the adequacy of medical services at the detention centres. Here too improvements have been made over time. The Committee wishes to emphasise that language must not be a barrier to appropriate diagnosis and treatment of a medical problem. To limit the possibility of difficulties arising in this regard, the Committee is of the view that where a large number of persons from one ethnic group are detained together in one detention centre, DIEA should make every effort to recruit the services of medical personnel who are able to provide regular consultations in the native language of that group of detainees.

5.124 Thirdly, the Committee considered the issue of Port Hedland as a site for an immigration processing and reception centre. Committee members acknowledged the disadvantages of placing detainees in a remote location, including the problems with accessing appropriate services, the additional costs of transport for DIEA staff and legal representatives who are required to travel to Port Hedland as part of the refugee determination process, and the difficulties for detainees in accessing community support. At the same time, Committee members recognised the benefits of placing detainees in a centre which is in reasonable proximity to where most of the boat arrivals first land, and where the remoteness of the location provides a disincentive to abscond from the Centre.

5.125 The Committee notes that it is difficult to predict how many further boat arrivals are likely to arrive in Australia in the near future. In November and December 1993, three boats carrying a total of 81 unauthorised boat arrivals arrived in the north of Australia. One of these boats arrived at Broome, some 600 kilometres from Port Hedland.

5.126 On balance, the Committee is of the view that it would be premature to close the Port Hedland facility at this stage. The original reasons for establishing the centre at Port Hedland do not appear to have diminished to any great extent. In the Committee's view, should the number of detainees at the Port Hedland Centre decrease to the extent that operation of the Centre would not be viable, then the Port Hedland Centre should be decommissioned, but with the capacity to recommission the Centre should it be required in the future.

Recommendations

5.127 **The Committee recommends that:**

15. **an Immigration Detention Centres Advisory Committee be established, comprising representatives of the Department of Immigration and Ethnic Affairs, Australian Protective Service, detention centre residents, community based service providers and local community representatives. The terms of reference for the advisory committee should require it to consider and make recommendations on matters pertaining to the conditions and services provided within immigration detention centres. In considering such matters, the advisory committee should be required to take account of issues relevant to the refugee determination process, including the number of persons detained, the likely length of their stay, and the likelihood of their gaining refugee status in Australia;**

16. **having regard to the literacy levels of detainee children, the number of native languages spoken, the likelihood of the children being allowed to remain in Australia, and the standard of education provided within the centre in which the children are detained, the Department of Immigration and Ethnic Affairs consult with State Government education agencies to determine whether, in appropriate cases, children held at the detention centres might be able to attend local schools, and to consider whether education in a child's native language is viable and can be organised;**

17. **where a large group of detainees belonging to a particular ethnic group are held together in a particular immigration detention centre, the Department of Immigration and Ethnic Affairs make every effort to engage the services of medical personnel who can provide regular consultations in the native language of that ethnic group;**

18. **the Port Hedland Immigration Reception and Processing Centre be retained for the purpose of detaining unauthorised boat arrivals pending the determination of their status; and**

19. **should the number of detainees held at the Port Hedland Immigration Reception and Processing Centre decrease to the extent that it is no longer viable to operate the Centre, the Port Hedland Centre be decommissioned, but with the capacity to recommission the Centre should it be required in the future.**

SENATOR JIM McKIERNAN
CHAIRMAN

February 1994

ADDENDUM BY SENATOR BARNEY COONEY

ADDITIONAL MATTERS

Judicial powers explicitly stated

In my view, the Judiciary should have the power to release people held in custody by the Executive, both on the ground that such detention is unlawful and on the ground that, though lawful, it is appropriate in all the circumstances that the person detained be released on reasonable terms.

This proposition should be stated explicitly in the report. Clearly, it is right and proper to make laws setting out the basis upon which the Executive may release people it holds in custody. However, these should not leave in doubt the Judiciary's power to order such release.

Separation of functions

It is right and proper for the Executive to have the power to release those it detains. However, an authority which holds people in custody should not have the exclusive power to decide whether they should be released or in what circumstances or under what conditions. Detention of any sort or for any length of time is a grave matter and a captor should not be the only person deciding the fate of the captive. Nor should there be any appearance that this is the case.

Usually no crime involved

Most people held in custody under the Migration Act have not been charged with any crime and never will be. Accordingly, their imprisonment is a matter of utmost concern. They must have the opportunity to test the reasonableness of their detention before the courts and not be confined to applying for a remedy to the Government which has taken them into custody.

Position under the Constitution

A law which prevents the Judiciary from examining the lawfulness or otherwise of the Executive's detention of a person, whether citizen or alien, is invalid under the Constitution. See *Chu Kheng Lim v Minister for Immigration* (1992 176 CLR 1).

At page 36 of the report the following passage appears in the joint decision of Justices Brennan, Deane and Dawson:

> A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid.

Trusting the courts

The Constitution, in giving the Judiciary power to examine the validity of the Executive's detention of any person and to order one unlawfully in custody to be released, demonstrates high trust in the ability of judges to examine the circumstances in which people are detained and to allow them freedom in the appropriate circumstances.

That ability is of the sort needed to make a proper decision as to whether it is appropriate for a person lawfully in custody to be released and on what conditions.

Courts decide day after day whether people lawfully in custody pending the hearing of a criminal charge against them should be released in the meantime. That is a function they have performed for generations.

Given all this, if the courts were denied the jurisdiction to release people detained under the Migration Act for other than a criminal offence it would appear, whatever the reality, that the Parliament lacked proper trust in the Judiciary. This would be an unhappy situation.

Judiciary to be trusted

I make three points about trust in the Judiciary.

Firstly, Australia has excellent judges. They are worthy of trust and should be given it. Those who seek to diminish their legitimate jurisdiction seek to take an action consistent with one which would flow from a belief that the Judiciary is to some degree untrustworthy. I would prefer to avoid an action of that nature.

Secondly, were Parliament and the Executive, because they lacked trust in the Judiciary, to move successfully to reduce its proper role, unwarranted strain would be thrown on the constitutional balance of this country.

Thirdly, if in fact the Judiciary is untrustworthy then this country is in a crisis which must be addressed immediately in a dramatic way. If it is not so, then its powers should not be limited on the basis that it is.

In my view, the Judiciary is trustworthy and should have jurisdiction to release people held in detention under the Migration Act.

Trust and release from detention

I have made clear that the courts are to be trusted and will act responsibly in deciding who should and who should not be released from administrative detention under the Migration Act.

That proposition holds good for the Immigration Review Tribunal and the Refugee Review Tribunal. If members of those bodies are not trustworthy enough to be given power to release people from administrative detention, they should not be on those tribunals at all.

Courts and civil rights

The courts are charged by society with the task of restraining arbitrary action, whether public or private, directed by one person against another. They stand between government and those it seeks to detain. People in Australia, whether legally or illegally, are entitled to have this safeguard retained to protect their civil rights. To remove it would diminish the quality of the liberties available in Australia.

What should the power to release be?

The courts should have a power to release people held in administrative detention under the Migration Act which is at least as extensive as the one they have to bail those held in custody after being charged with a criminal offence but before conviction. They should have power to hear applications for such release from the time the applicant is arrested under the Act until the issue in respect of which the arrest is made is finally resolved.

Conditions to be reasonable

People held in custody for a reason other than having been sentenced to imprisonment for committing a criminal offence should, in the proper circumstances, be able to obtain an order from the courts for release on reasonable terms. The

concept behind that proposition is similar to the one reflected in Declaration 10 of the Bill of Rights 1689 which reads:

> That excessive bail ought not to be required nor excessive fines imposed; nor cruel and unusual punishment inflicted.

This declaration contemplates that people remanded in custody should be able in the appropriate cases to obtain their freedom on reasonable terms from the courts pending the final determination of their fate. What such terms are have been laid down by judges over many generations.

Parliament can legislate to add to or amend those terms if it feels it has a responsibility to do so. However, it should not attempt to take away the Judiciary's jurisdiction to grant bail to those imprisoned by the State pending their trial for a criminal offence. Even more so, it should not seek to deny the Judiciary jurisdiction to release people held in custody for reasons other than the administration of the criminal law.

Wide discretion needed

The circumstances which may arise making it proper for a person detained under the Migration Act to be released are wide, varied and in many cases unforeseeable. To define them in too much detail and to make a person's release dependant upon factors too precisely stated is to put many who morally should be set free at too great a risk of being kept in custody. Accordingly the courts should be given a broad discretion as to the basis on which they might release people detained under the Migration Act.

Which courts and tribunals to empower?

In my view, those courts and tribunals handling matters under the Migration Act ought to have power to release people detained under it. Accordingly, the Immigration Review Tribunal, the Refugee Review Tribunal, the Federal Court and the High Court should have a discretion to set free those people held under the provisions of the Migration Act for a reason other than having been sentenced to a term of prison for committing a crime.

RECOMMENDATION

I recommend that a provision be made in the Migration Act giving the courts power in the appropriate circumstances to release people held in administrative custody under the legislation. This power should be available to the courts from the time such people are first detained under the Act. The courts should be defined to include the Immigration Review Tribunal and the Refugee Review Tribunal as well as those courts of record which deal with matters arising under the legislation.

SENATOR BARNEY COONEY

February 1994

DISSENTING REPORT BY SENATOR CHRISTABEL CHAMARETTE

Introduction and overview

When I circulated terms of reference and requested support from the Senate for this inquiry, I was reflecting both a personal concern and a growing community concern over the detention of unauthorised border arrivals. Detention times have increased from several months to two, three and sometimes four years.

I personally believe that lengthy detention is totally unacceptable from a humane point of view, and is costing Australia dearly in terms of financial resources and our self-image as a just and fair society. Furthermore, I believe there are alternatives available which actually achieve the objectives that are claimed for the practice of detention.

The difference between my dissenting report and that of the Committee majority comes down, I believe, to a philosophical position. While the Federal Government has the right to detain (a right which it has only chosen to exercise with unauthorised border arrivals since 1992) it also has the right *not* to detain. In my view detention should in all cases be a measure of last resort, to be used only if individuals pose a threat to the safety of either themselves or the community. It makes no difference if we are dealing with those who are citizens or non-citizens, because in each case detention runs the risk of causing emotional and psychological damage that can never be totally rectified and which results in a net loss to society. All the evidence presented to the Committee only served to reinforce this view.

My different perspective on detention, coupled with the clear injustice of the proposed changes, explains much of my opposition to the *Migration Amendment Act 1992* and the *Migration Reform Act 1992* when they were introduced as Bills into the Federal Parliament.

I regret that, for political reasons, the terms of reference of the inquiry did not explicitly cover current detainees. However it is clear from the majority report and this dissenting report that their situation was uppermost in the minds of all members of the Committee and the witnesses who appeared before the Committee. Similarly, it is regrettable that there was no opportunity to compare present policies and practices with those existing at the time of the influx of Vietnamese boat people in the mid to late 1970s that appeared to offer a more flexible treatment of refugees.

The recommendations in this dissenting report are offered with the intention that, should they be adopted by the Federal Government, future arrivals on our borders seeking refuge would be treated in a more kind and just manner. The course I suggest would satisfy our international obligations and, at the same time, retain control over who is admitted into Australia and under what conditions.

Turning to the recommendations in the majority report, their underlying presumption is that it is acceptable to detain unauthorised border arrivals for a significant period. There are four aspects of the majority report recommendations that clearly illustrate this presumption. First, detention is to remain mandatory. Secondly, the Minister is only requested to consider release where the period of detention exceeds *six* months and the delay is due to lack of action on the part of DIEA. Thirdly, the class of detainees to be considered for release if this stage is reached appears to be additionally restricted to those who fall into specified categories such as age or health related need. Fourthly, it is also reflected in several majority report recommendations that seek to restrict the legal bases on which immigration decisions can be appealed.

However, much of the evidence put before the Committee supports a very different view - that not only is long term detention unacceptable in terms of our international obligations, but that it is also unnecessary in terms of maintaining control over immigration. This conclusion has formed the basis of my recommendations, the main one being that a conditional release should be made available to all unauthorised border arrivals claiming refugee status once preliminary identity, security and health checks have been completed.

More discussion and analysis on the details of the conditional release scheme that I propose would be necessary before implementation by the Federal Government. However, I believe that the evidence supports the view that such a scheme would not only deal with unauthorised border arrivals in a more humane manner, it would also be more effective in a risk management and cost sense than the process currently in existence or proposed in the majority report.

There are two recommendations which I have adopted directly from the majority report - these are my recommendations 3 and 9 (which correspond to recommendations 13 and 8 in the majority report). I have no objection per se to several other recommendations in the majority report but have not discussed these as they would not be relevant should my main recommendation to end mandatory detention be adopted. In general, however, I dissent from the overall thrust of the majority report and accordingly provide the report below and alternative recommendations for the Federal Government to consider.

Immigration detention in Australia

Why mandatory detention? Why for so long? And why only for unauthorised border arrivals?

As the majority report points out, there are basically no objections to the assertion that the Federal Government has the right to detain those who either arrive at our borders without a visa or those who enter with a valid entry permit and then become illegal entrants.

As well as well as ignoring the fact that it also has the right *not* to detain, however, in practice the Federal Government has utilised mandatory detention only for unauthorised border arrivals. The length of many of these detentions has stretched to several years. For example, at 27 July 1993 there were 300 unauthorised border arrivals in detention, of whom 243 (81 percent) had been held for more than two years. At February 1994, the number of detainees held for over two years was 94 (44 percent of the 216 total).

The majority report suggests that the circumstances leading to some of the longer detentions were exceptional and have passed. However, it is a well-accepted principle of legislation that it should endeavour to be fair under even the most exceptional of circumstances. Furthermore, there is no reason why some of the conditions might not re-occur, in which case the Federal Government's practice of mandatory detention would not cope and the over-reactive and unjust nature of current and proposed legislation would be even more apparent.

It should be reiterated that this is the detention, for years, of people whose 'crime' has been to come to Australia without a valid visa. They are being treated in a harsher way than most major criminals, and without court supervision. It should also be noted that lack of appropriate visa arrangements in home countries or difficult individual circumstances often meant that asylum seekers were unable to obtain appropriate documentation or go through 'proper' immigration channels before departing. The fact that they have been prepared to face a hazardous journey across thousands of miles of open sea to come to Australia can be an indication of the lack of choice of some to arrive in other than an unauthorised manner. Equally important, it is often not a choice for detainees to obtain their release from detention in Australia simply by agreeing to leave. Conditions in their home countries and the possibility of persecution should they return can make this an unacceptable option.

It is significant to note that the Government is not intending, with the *Migration Reform Act 1992* (MRA), to alter its existing practice of discriminating against asylum seekers who arrive without documentation (and are detained) vis-a-vis those who apply for asylum after having entered Australia (and are usually allowed to remain in the community). This is despite the fact that the MRA is described in the majority report (paragraphs 4.160-4.161) as eliminating the distinction between the two categories, because technically all illegal entrants will be subject to mandatory detention.

While the MRA is described in the majority report as eliminating any distinction, this conveys a totally false impression since the distinction will be removed in a legal sense but will remain in practice. Under the MRA, those who entered legally but subsequently became illegal will continue to be allowed to reside in the community (via a bridging visa), even though they are just as much illegal entrants as unauthorised border arrivals (who will continue to be detained).

If the Federal Government has decided that documented arrivals who overstay their visas do not pose any threat to the maintenance of Australia's immigration system

by being conditionally released into the community, it is difficult to see why it is not the same with unauthorised border arrivals. This is particularly the case when a conditional release system could be introduced for the latter with certain safeguards and conditions, as will be discussed later.

Finally, to the extent that one of the reasons for the Federal Government's mandatory detention is deterrence, it should be noted that the number of unauthorised border arrivals is likely to vary more with events in overseas countries than with the harshness of Australia's detention policies. In addition, small sums spent in helping refugees at overseas locations may be considerably more effective than the large sums spent on detention in Australia. There appears to be an assumption, but no evidence, in the majority report that the conditional release of border claimants would see the control mechanism unravel.

Consequently, an increase in expenditure on support of refugees overseas would be more useful than the continuation of mandatory detention if the Government believes that additional measures to dissuade refugees from coming to Australia are necessary. Given the apparent cost of detention, providing resources to help refugees overseas would be considerably more cost-effective.

Judicial review

There are indications throughout the majority report concerning the reactive and restrictive way in which the Federal Government has handled the issue of litigation by asylum seekers. For example, the *Migration Amendment Act 1992,* with its compulsory detention in custody of boat arrivals and their children, was passed two days before the scheduled hearing date of a relevant refugee case. The majority report appears to ignore this state of affairs and regard almost any litigation by asylum seekers as unjustified.

Hence the majority report supports, and indeed wishes to expand the substantial reduction in fair and reasonable access to the judicial system that the MRA will legislate when it comes into effect in September 1994. This situation is much more serious than the misrepresentation occurring with the supposed elimination of the visa/no-visa distinction.

The Government, through the MRA, is seeking to severely limit the actions that asylum seekers can take before the Federal Court. While the majority report seeks to present this in a benevolent light, the fact of the matter is that the extended review rights that the MRA allows before immigration tribunals will not compensate for the loss of judicial review that it is also legislating. Indeed, the limiting of grounds for judicial review of Migration Act decisions is such as to be possibly against international conventions.

Australians would be justifiably horrified if they could not challenge administrative decisions on the basis of errors of law such as breach of the rules of natural justice, agenda errors, lack of evidence, unreasonableness or bad faith. Many of these grounds are part of our legal heritage, and the exclusion of non-citizens from similar

access to judicial review of administrative decisions on these grounds is extremely discriminatory and unjust.

On related matters, I note Senator Cooney's comments and strongly concur with his recommendation that courts be given the power to release people held in administrative custody under the Migration Act.

Since migration legislation is extremely complex and regulations have been changed frequently, it is little wonder that refugee cases have been taking up time in the courts. However, the victims, their lawyers and the courts should not be blamed for this situation. The Government should also not seek to artificially shorten detention periods by shifting the goal posts and using the MRA to eliminate grounds on which detainees can claim judicial review. Shorter detention periods that are obtained at the expense of justice are not a solution.

Accordingly, it is not reasonable to use the length of court cases as an excuse for the majority report to recommend (at recommendation 4) further limitation of judicial review. On the contrary, there are many reasons for the Government to improve judicial access and ease the detention system so as to ensure consistency between the treatment of unauthorised border arrivals and other illegal entrants. International obligations also entail giving the same rights to fair hearings as are given to citizens. It should also be noted that the majority report recommendation 4 to eliminate the use of the Administrative Decisions (Judicial Review) Act and the Judiciary Act will not be effective as claimants will still be able to seek review by the High Court under section 75 of the Constitution.

Similar concern can be expressed at recommendation 5 in the majority report for a Federal Court leave requirement in migration cases. Since the effect of this would be to make the claimant show a prima facie case as to the validity of the case, the net effect would be to make many claimants prove their case twice. There is some unfairness to this approach, as well as additional legal costs as more work is required for the same applicant.

International comparisons and obligations

The majority report usefully compares Australian practices with those of other countries, and notes that a number of countries 'appear to have some arrangement for immigration detention, particularly with regard to non-citizen border arrivals'(paragraph 3.60). There are two points, however, that must be emphasised. First, most of these countries restrict the length of detention quite severely, usually requiring release within a matter of days and an independent review if the relevant authority wishes to extend the period of detention. Secondly, other countries tend to have a greater degree of flexibility in releasing detainees in contrast to Australia's mandatory regime for unauthorised border arrivals (whatever their individual circumstances). Some countries allow for conditional release of border asylum seekers into the community.

As a result, such countries are more likely than Australia to be acting in accordance with international conventions. While detention is not disallowed under international conventions, the clear intention is that detention should normally be avoided, especially for children. As is well explained in the majority report, such statements are contained in the Refugee Convention and its interpretive statements, the International Covenant on Civil and Political Rights and associated statements by the Human Rights Committee, and in the Convention on the Rights of the Child. The Attorney-General's Department has indicated that the circumstances of particular migration detention cases in Australia may lead to breaches of international law, and expressed concern about the mandatory nature of long term detention and the detention of children. The Human Rights Commissioner has submitted that Australia is currently in breach of several international conventions.

Hence the statement in the majority report (at paragraph 4.149) that Australia offers a 'generous' process of refugee determination is not supported by evidence. On the contrary, Australia has very complex and, one might argue, unnecessarily bureaucratic migration legislation, regulations and processes which have contributed to lengthy detention periods.

The majority report seems to suggest that Australia is likely to be breaching international conventions with its current practices and flags this as an issue of concern. However, no indication is given as to whether or not its recommendations would rectify this situation. Indeed, the continued arbitrary nature of the detention and the long, six month time period of detention that is possible under the recommendations of the majority report make it appear likely that Australia would still be in breach of international conventions.

Psychological effects of detention

An aspect that is given little attention in the majority report is the psychological effects of prolonged detention. Several submissions raised the psychological state of detainees and the related area of psychological effects of detention as important issues. Long term detention was seen as deleterious to detainees, with detainees suffering from boredom, frustration and anxiety, and feeling depressed and tense.

There is no shortage of evidence as to the effect of prolonged detention on individuals and families, and these effects can occur no matter how 'good' the detention facility and how robust the individual. As the Australian Red Cross (who have a full time representative in the Port Hedland detention centre) noted in their submission (Submission No. 63, p. 3) concerning detainees:

> Their behaviour during a prolonged period of incarceration changes, with the manifestation of such behaviour being apathy, anger, violence, anxiety, depression and withdrawal. ... Their ability to take control of their future, to make rational decisions, to articulate logical argument or to put forward alternative positions diminishes with the increase in this dependency syndrome. This dependency is all too prevalent within the Port Hedland facility.

In addition, it must be remembered that many unauthorised border arrivals have already been traumatised in their home countries as a result of persecution or discrimination. Studies suggest that severe psychological distress can result from the cumulative experience of traumatic events. There is no doubt that certain aspects of detention centres contribute to trauma - barbed wire, uniformed guards patrolling centres, prison-like conditions and restricted access to the outside are all stressors. Undoubtedly worst of all is the uncertainty that detainees face, not knowing how their applications are progressing, having no-one in the detention centre who can report progress on their cases, and not being well-informed as to the application and review process, options and possible results.

The effects on children are particularly worrying. The Red Cross, in its submission (p. 4), described the severe disruption that occurs to family units as traditional care, support and maintenance functions can no longer be performed by parents when the family is in detention. The NSW Child Protection Council was concerned about the totally inadequate educational and recreational facilities and opportunities for children. In terms of the overall environment, the Council noted (Submission No. 70, p. 8):

> Children in detention lack even the stimulation available in an impoverished household on the outside. They have no pets, flowers, or pictures and few opportunities for social contact except with a very demoralised group of adults. Some of these adults have attempted suicide or gone on hunger strike.

As has been seen in several instances in Australia, long term detention can give rise to self-harm and attempts at suicide. As the Red Cross noted (p. 4):

> These responses should not be seen merely as a response to a negative outcome, but for what they are - **a result of long term detention and its concomitant effects on personality and behaviour.** Compounded by the effects of being treated differently to all other asylum seekers in Australia, suicide and self-harm is a reality.

The additional strains placed on detainees being held in remote detention centres like Port Hedland should not be ignored. Community, legal and refugee support groups and translation facilities are generally located in capital cities that are thousands of kilometres distant.

These problems need to be addressed by the Government whatever the length of detention for particular individuals. Furthermore, counselling should not just be offered when an individual's psychological health has deteriorated to the point where extreme symptoms such as self-harm are exhibited. A positive program of psychological intervention to reduce the adverse effects of even minimal detention, including the uncertainty involved, is necessary.

Costs of government detention

Before the current inquiry undertook its investigations, there were virtually no data on the costs of detention in Australia. While the data are still incomplete, that gathered and reproduced in the majority report provides a useful indication of the magnitude of migration detention costs in Australia. As an overview, detention costs for DIEA totalled $18.43 million in 1992/93 alone, and this figure does not include the costs of legal assistance.

In terms of daily detention costs per person, DIEA has estimated these to be approximately $55 per person per day at the Port Hedland detention centre and $58 per person per day at Westbridge (in earlier evidence DIEA stated that the cost in other immigration detention centres was approximately $200 per person per day). These figures do not include some significant expenses such as capital, legal or DIEA travel and accommodation costs.

A conditional release scheme

Given reservations about the justice of Australia's mandatory detention system and the resulting likelihood that international conventions are being breached, it is important to consider better mechanisms to deal with unauthorised border arrivals while their applications are being processed or reviewed. Many submissions and witnesses discussed alternatives to detention, including a release scheme for detainees utilising community sponsorship.

The basic thrust of a conditional release scheme would be to release relevant detainees into the community under specific conditions. Community groups and their resources would be utilised in a cooperative approach to provide such releasees with accommodation, material goods, transport, medical services, health and counselling that are adequate for their basic needs. The Federal Government would provide funds for most of these services, although community organisations may be able to provide some from their own resources. Key elements of such a scheme are discussed briefly below.

Particular emphasis on early release should be given to vulnerable individuals (such as children, the elderly, the infirm, and those who have been victims of trauma or torture) since they are likely to be particularly affected by detention.

Costs

As well as being more appropriate for the level of offence, a community-based scheme also has considerable potential for savings compared to mandatory detention. The Society of St Vincent de Paul has estimated that the cost (in a boarding style arrangement) would be in the order of $14 per person per day. This figure, like the figures for government detention in the section above, does not include capital or

legal costs. Additionally, it does not cover on-going maintenance, medical, counselling, education or recreation expenses.

While any long term involvement of community groups in a release scheme would involve expenses that would increase the $14 per person per day amount, clearly there is a considerable margin with the government costs. Thus it is more than likely that there would be financial benefits from implementing a release scheme that involved community groups.

Matters for consideration

The mechanism to allow conditional release of unauthorised border arrivals would be the same as that recommended in the majority report (bridging visas). However, the matters to be taken into account in determining whether or not detained asylum seekers are eligible for a bridging visa would be:

- whether the application for refugee status is manifestly unfounded;
- whether the person would pose a threat to the safety of either themselves or the community upon release; and
- in the limited cases where this is appropriate, any previous breach by the person of a condition of a visa, entry permit or release, and the nature of that breach.

The list is brief but exhaustive because the level of offence (unauthorised arrival) is regarded as relatively minor.

Absconding

The main issue canvassed in the majority report with respect to any release scheme is the possibility that those released may abscond. It is obviously very difficult to obtain an accurate estimate of what the rate of absconding might be should a release scheme be implemented, but evidence given to the Committee concerning the release scheme that currently operates for illegal entrants eligible for release provides broad estimates:

> In terms of the success rate of the conditions imposed, 28 out of 648 persons (4.3 percent) have breached the reporting conditions and 11 out of 697 sureties (1.6 percent) have been forfeited.(paragraph 2.54)

It should also be noted that DIEA released 7 percent of illegal immigrants unconditionally (paragraph 2.53).

This indicates quite a good success rate in terms of adherence to release conditions. In view of this, it should be possible to achieve an acceptable success rate with the release of unauthorised border claimants. Safeguards for release would build upon the experience gained from the system that currently operates for illegal immigrants.

Release conditions

Any unauthorised border arrival eligible for release should be required to agree to:

- report regularly, at least once a fortnight, to a nominated office of DIEA;
- reside at a nominated address notified in advance to DIEA;
- notify DIEA at least one week in advance of any change of address; and
- depart Australia or present for removal if refused refugee status.

Administration

It would be necessary for DIEA to obtain itemised costings for such a scheme and specify the administrative details. A pilot scheme could be run before the Government embarked upon a fully-fledged release program.

It is envisaged that DIEA would still retain some responsibility for those released. DIEA would also coordinate the program and provide the necessary resources to appropriate community groups to ensure that an adequate scheme is established.

Risk-benefit approach

Replacing mandatory detention with a conditional release scheme is basically the application of a risk-benefit approach. It is acknowledged that some unauthorised border arrivals may abscond on a conditional release scheme, just as do some illegal entrants and some citizens on bail. However, these numbers can be minimised by the use of safeguards such as the conditions and reporting requirements listed above. It should not be forgotten that what is being offered is no more than is offered to Australian citizens who are invariably able to apply for release when the type of the offence involves a relatively minor level of criminality. Meanwhile, the Government could save considerable amounts in terms of costs spent on unauthorised border arrivals.

Detention centres

Evidence was given concerning the standard of the detention centres in which unauthorised border arrivals have been, and continue to be, held.

Under the scheme proposed in this dissenting report, the need remains for detention centres to hold unauthorised border arrivals until their preliminary identity, security and health checks have been made.

The recommendations in the majority report seeking to improve and monitor migration detention centres are useful. However it can be argued that detainees should not be located in such remote places as Port Hedland, far away from community support networks, translation facilities and legal assistance. This situation may contribute to the feeling of isolation and abandonment from which detainees can easily suffer.

In addition, the majority report recommendation to establish an advisory committee, (comprising representatives of DIEA, APS, detention centre residents, community based service providers and local community representatives) is highly desirable. For the purposes of this dissenting report, such a committee would monitor both the release system and the detention centres. Its terms of reference should require it to consider and make recommendations on matters pertaining to both the conditions and services provided within migration detention centres and the establishment and operations of the conditional release scheme.

Conclusion

The practices of other countries, cost-effectiveness, common justice and our obligations with respect to international conventions, all point to the elimination of mandatory detention as a government policy and, at the very least, maintaining current processes of judicial review.

Meanwhile, there is no question that the processing of applications for refugee status from unauthorised border arrivals and persons held in detention must be given absolute precedence (the Committee's recommendation 8). This is particularly necessary given the existing situation of mandatory detention and the Minister for Immigration and Ethnic Affairs refusing to exercise his discretion and release all long term detainees. It also is necessary because of the extremely unsympathetic and restrictive nature of the majority report recommendations.

Recommendations

My alternative recommendations are that:

1. The Government amend the *Migration Reform Act 1992* so as to end the system of mandatory detention of unlawful non-citizens, including unauthorised border arrivals, save for the limited purposes of preliminary checks on identity, security and health.

2. After preliminary identity, security and health checks on unauthorised border arrivals claiming refugee status, or within two months of the commencement of detainment, whichever is the sooner, the Minister for Immigration and Ethnic Affairs effect their release by including such detainees in a prescribed class of detention non-citizens eligible for the grant of a bridging visa. In considering whether to exclude any such detainees from the prescribed class, the Minister should have regard to the following:

   - whether the application for refugee status is manifestly unfounded;
   - whether the person would pose a threat to the safety of either themselves or the community upon release; and
   - in the limited cases where this is appropriate, any previous breach by the person of a condition of a visa, entry permit or release, and the nature of that breach.

3. Any unauthorised border arrival eligible for release be required to agree to:

   - report regularly, at least once a fortnight, to a nominated office of the Department of Immigration and Ethnic Affairs;
   - reside at a nominated address notified in advance to the Department of Immigration and Ethnic Affairs;
   - notify the Department of Immigration and Ethnic Affairs at least one week in advance of any change of address; and
   - depart Australia or present for removal if refused refugee status.

4. If the Minister for Immigration and Ethnic Affairs wishes to detain an unauthorised border arrival beyond two months, the Minister table a report before Parliament, within three sitting days of the expiry of the two month period, containing reasons as to why the detainee should be denied a bridging visa. These reasons should be based on the matters noted in recommendation 2 above. Reasons concerning the continued detention of vulnerable persons (children, the elderly, the infirm, and those who have been victims of trauma or torture) should be particularly compelling.

5. Decisions by the Minister for Immigration and Ethnic Affairs concerning the refusal of bridging visas be fully reviewable by the Federal Court, especially if vulnerable persons are involved.

6. Preliminary checks be conducted while holding the applicants in hostels located in or near major city centres so that detainees are closer to legal advice, translation facilities and community support networks. The detention centre in Port Hedland and other centres not located near major cities should be closed.

7. A positive program of psychological intervention, to reduce the adverse effects of any detention, be introduced at all detention centres.

8. The Government amend the *Migration Reform Act 1992* so as to reinsert the full rights of judicial review to take action before the Federal Court. This would restore the current situation under which detainees can seek review on the basis of errors of law such as natural justice, agenda errors, no evidence, unreasonableness, relevant and irrelevant considerations and bad faith.

9. The Department of Immigration and Ethnic Affairs and the Refugee Review Tribunal, as an absolute priority, ensure that applications for refugee status are processed in a fair and expeditious manner, and that the processing of applicants for refugee status from unauthorised border arrivals and persons held in detention continues be given precedence.

10. The Government consult with relevant peak community groups concerning the draft regulations which will accompany the *Migration Reform Act 1992* (however amended).

11. The Joint Standing Committee on Migration be invited to report to the Parliament on the operation of the *Migration Reform Act 1992* (however amended) within twelve months of commencement of the Act.

12. The Department of Immigration and Ethnic Affairs coordinate, in consultation with accredited community support or charitable organisations and relevant ethnic groups, the development of appropriate support arrangements for released detainees.

13. The Government provide funding to assist the support of accredited charitable organisations and relevant ethnic groups to provide suitable accommodation, counselling, education, medical and other services.

14. The Government establish an Immigration Detention and Release Advisory Committee, comprising representatives of the Department of Immigration and Ethnic Affairs, the Australian Protective Service, detention centre residents, community based service providers and local community representatives. The terms of reference for the advisory committee should require it to consider and make recommendations on matters pertaining to the conditions and services provided within immigration detention centres and operations of the conditional release scheme.

SENATOR CHRISTABEL CHAMARETTE

February 1994

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Appendix One

SUBMISSIONS

No.	Name of person/organisation
1	N A Harman
2	Mr D A McKenzie
3	Mr B Murray
4	Mr M Rendall
5	Mr M Grant
6	Burnside
7	Name and address not for publication
8	Mr B Gratwick
9	Captain W Prins
10	Hedland Reception and Processing Centre Support Group
11	H J Grant
12	Uniting Church in Australia Parish of Port Hedland
13	Mr P G Bercene
14	The Uniting Church in Australia Synod of Victoria The Avenue Church, Blackburn
15	Ms B Netting
16	Australian Protective Service
17	Dr C Sochan

18	Uniting Church in Australia Synod of Victoria Refugee Taskgroup of Commission for Mission
19	Mercy Refugee Service
20	Catholic Bishops' Committee on Migrant Affairs
21	Ms V Campbell
22	Catholic Education Office Diocese of Parramatta Social Justice Group
23	Mr J Ball
24	Anglican Social Responsibilities Commission
25	The Refugee Association
26	Refugee Council of Australia
27	Australian Lawyers For Refugees Incorporated
28	Uniting Church in Australia Synod of Western Australia
29	Mrs I Guest
30	Caritas Social Justice and Development Group
31	Australian Council of Churches
32	The Ethnic Communities Council of the ACT Incorporated
33	Australian Catholic Refugee Office
34	Cambodian Support Group
35	Australian Red Cross
36	South Brisbane Immigration and Community Legal Service Inc
37	Indo-China Refugee Association (NSW) Incorporated
38	Legal Aid Commission of Victoria

39	Gilton Business Consultants
40	Jesuit Refugee Service - Australia
41	C Albany
42	Mr B Murray
43	South Australian Multicultural and Ethnic Affairs Commission
44	Refugee Council of WA
45	Amnesty International Australia
46	Sister Kath Ragg
47	Catholic Migrant Centre
48	Marie-Rose Droulers
49	Ethnic Affairs Commission of NSW
50	Society of St Vincent de Paul
51	Janine & Keith McDougall
52	Society of the Sacred Heart
53	Sister Maria Roberts
54	Geoff Seaman
55	B J Atkinson
56	Care force Migrant Services Team Anglican Home Mission Society
57	Immigration Advice and Rights Centre Inc
58	Senator Sid Spindler
59	Miss J Armstrong
60	Legal Aid Commission of NSW
61	Mercy Foundation
62	Church of Christ Wembley Downs

63	Australian Red Cross
64	Federation of Ethnic Communities' Councils of Australia Inc
65	Susanna Agardy
66	Dr John Atchison
67	Human Rights Commissioner
68	Chinese Student Union
69	Sister Elizabeth O'Brien
70	NSW Child Protection Council
71	Victorian Immigration Advice and Rights Centre Inc
72	Western Australian Government
73	Ethnic Communities Council of Western Australia
74	Department of Immigration and Ethnic Affairs
75	The Religious Society of Friends (Quakers) in Australia Inc
76	Northern Territory Government
77	Justice Commission Sisters of Mercy (Perth)
78	Catholic Social Justice Commission
79	Christopher Ryan
80	Waverley Refugee Support Group
81	Edward Bacon
82	Khmer Community of NSW Inc
83	John Wade
84	Catholic Diocesan Centre Archdiocese of Adelaide
85	Sister Pauline Masters

86	Ms Jessie Maroya
87	Australian Council For Overseas Aid
88	The Hon Justice Marcus Einfeld
89	Department of Foreign Affairs and Trade
90	Law Council of Australia
91	The Attorney-General's Department
92	South-East Asian Assistance Committee
93	Law Institute of Victoria
94	United Nations High Commissioner for Refugees
95	Ethnic Communities Council of NSW
96	Victorian Government
97	Department of Immigration and Ethnic Affairs - supplementary submission
98	Department of Immigration and Ethnic Affairs - supplementary submission
99	Department of Immigration and Ethnic Affairs - supplementary submission
100	Department of Immigration and Ethnic Affairs - supplementary submission
101	Department of Immigration and Ethnic Affairs - supplementary submission
102	Department of Immigration and Ethnic Affairs - supplementary submission
103	Ethnic Affairs Commission of New South Wales - supplementary submission
104	Australian Protective Service - supplementary submission
105	United Nations High Commissioner For Refugees - supplementary submission

106	Conferences of Churches of Western Australia - supplementary submission
107	Mrs Marion Le
108	Australian Red Cross - supplementary submission
109	Society of St Vincent de Paul - supplementary submission
110	Department of Immigration and Ethnic Affairs - supplementary submission
111	Confidential
112	Department of Immigration and Ethnic Affairs - supplementary submission

Appendix Two

EXHIBITS

1. Arthur Helton, 'Making Refugee Detention Policy More Rational And Compatible With International Standards, Reforming Alien Detention Policy In The United States: A Case Study', June 1993

2. Information on the policy and procedure related to detention of persons under Canada's immigration system, provided by Mr T M Ryan, Consul (Immigration), Canadian Consulate General, Sydney, Australia

3. Papers from the Coalition For Asylum Seekers conference held in Sydney on 23 June 1993, provided by Ms Mary Crock, Artarmon, New South Wales

4. A communication forwarded to the United Nations Human Rights Committee on behalf of an asylum seeker detained at Port Hedland, provided by Mr Nicholas Poynder, Melbourne, Victoria

5. Frank Brennan, 'The Ethics of Migration, Asylum and Refuge', an address to the Bureau of Immigration Research conference entitled 'Immigration Policy: The Moral and Ethical Dimensions', Australian Catholic University Mackillop Campus, 17 June 1993

6. Legal Aid Commission of Victoria guidelines (extract)

7. 1991/92 Annual Report of the Victorian Immigration Advice and Rights Centre Incorporated

8. Federation of Ethnic Communities Councils of Australia Incorporated, Congress Report 1992

9. Federation of Ethnic Communities Councils of Australia Incorporated Policies, 'Access and equity for all Australians', 1993

10. Ethnic Communities Council of the ACT Incorporated, draft notes on detention issues

11. Dr William Maley, 'Freedom, Detention and the Rule of Law', Department of Politics, University College, University of New South Wales

12. Charles E Sinclair, 'The Migration Legislation Amendment Act 1989: A Puzzle in Decision Making', University of New England, Armidale

13. Australian Institute of Criminology, *The Future of Immigration Detention Centres in Australia*, July 1989

14. Denis McCormack, Australians Against Further Immigration, 'The Desirable Composition of Any Migrant Intake', and related documents

15. Documents provided by the Refugee Council of Australia including:

    . 'Australia's response to the World Refugee Situation';

    . extract from the Refugee Council of Australia submission dated 29 July 1992 to the Joint Standing Committee on Migration Regulations;

    . European Consultation on Refugees and Exiles, 'Synthesis of Country Reports'; and

    . article from Sydney Morning Herald dated 1 September 1993

Appendix Three

WITNESSES AT PUBLIC HEARINGS

Witnesses/Organisation	Date(s) of appearance
Anglican Social Responsibilities Commission	
Mrs Anne Annear Member	21-09-93
Canon Gregory Harvey Chair	21-09-93
Amnesty International Australia	
Ms Kerry Brogan Refugee Co-ordinator	24-08-93
Mr Andre Frankovits Campaign Director	24-08-93
Attorney-General's Department	
Mr Henry Burmester Principal International Law Counsel Office of International Law	12-10-93
Ms Joan Sheedy Senior Government Counsel Human Rights Branch	12-10-93
Australian Catholic Bishops' Conference	
Most Reverend Barry Hickey Secretary Migrant Affairs Committee	21-09-93

Australian Catholic Refugee Office

Father William Reitmeyer Co-ordinator	12-10-93

Australian Council of Churches

Mrs Hermine Partamian National Co-ordinator Refugee and Migrant Services	25-08-93
Mrs Barbara Walsh Policy Officer Refugee and Migrant Services	25-08-93

Australian Council for Overseas Aid

Mr Russell Rollason Executive Director	12-10-93

Australian Lawyers for Refugees Incorporated

Mr Michael Kennedy Honorary Secretary and Honorary Executive Officer	21-09-93

Australian Protective Service

Mr John Mackay Director	13-10-93
Chief Superintendent Peter Phillips Portfolio Manager	13-10-93

Australian Red Cross

Mr Angus Norris National Tracing Manager	24-08-93 22-09-93
Miss Noreen Minogue Acting Deputy Secretary-General	22-09-93
Miss Beryl Raufer Acting Secretary-General	24-08-93

Burnside

Mr Chong-Hean Ang Centre Manager Burnside Cabramatta Centre	25-08-93
Ms Merryn Dowling Senior Manager South West Sydney	25-08-93
Mr Lychantha Sok Welfare Worker Burnside Cabramatta Centre	25-08-93

Catholic Education Office

Dr Michael Bezzina Member Social Justice Group	25-08-93
Mrs Noela Kelman Member Social Justice Group	25-08-93

Department of Foreign Affairs and Trade

Ms Lisa Mackey Refugees, Immigration and Asylum Section	12-10-93
Mr Jonathan Thwaites Acting Legal Adviser B	12-10-93

Department of Immigration and Ethnic Affairs

Mr David Adcock Director Compliance Co-ordination Section	13-10-93
Mr Noel Barnsley Acting Assistant Secretary Determination Of Refugee Status Operations Branch	13-10-93
Mr Laurence Bugden Acting First Assistant Secretary Corporate and International Division	13-10-93

Mr Christopher Conybeare Secretary	13-10-93
Mr Daniel Crennan Director Immigration Detention Centres Project Section	13-10-93
Ms Sue Ingram Acting First Assistant Secretary Entry Compliance and Systems Division	13-10-93
Mr Andrew Metcalfe Assistant Secretary Advisings, Legislation and Legal Policy Branch	13-10-93
Mr Graham Mowbray General Counsel to the Department of Immigration and Ethnic Affairs, Attorney-General's Department	13-10-93
Mr Mark Sullivan Deputy Secretary	13-10-93
Ms Roseanne Toohey Acting Assistant Secretary Refugees, Asylum and International Branch	13-10-93
Mr Douglas Walker Director Legal Policy Section	13-10-93

Ethnic Affairs Commission of NSW

Mr John Brennan Principal Policy Officer	25-08-93
Mr Stepan Kerkyasharian Chairman	25-08-93

Ethnic Communities Council of the ACT

Mr Albert Corboz Executive Member	12-10-93
Mr Harold Grant Associate Member	12-10-93

Mr Lundy Keo Associate Member	12-10-93
Mr Mark Tiirikainen Vice-President	12-10-93

Ethnic Communities Council of WA

Mr Bunthan Chan Member	20-09-93
Ms Wendy Rose Grant-in-aid Worker for Women's Issues	20-09-93
Mr Ramdas Sankaran Executive Officer	20-09-93
Mr Gerald Searle Member	20-09-93

Human Rights and Equal Opportunity Commission

Mr Brian Burdekin Federal Human Rights Commissioner	24-08-93
Mr Kieren Fitzpatrick Senior Policy Officer	24-08-93
Ms Susanne Tongue Assistant Secretary Law Policy and Conciliation Branch	24-08-93

Federation of Ethnic Communities' Councils of Australia

Mr Peter Einspinner Honorary Consultant	23-09-93
Mr Luciano Ferracin Executive Officer	23-09-93
Ms Anne Hampshire Deputy Executive Officer	23-09-93

Hedland Reception and Processing Centre Support Group

Mrs Rosemary Mitchell Secretary	21-09-93

Immigration Advice and Rights Centre

Mr Jonathon Duignan Education/Policy Officer	23-90-93
Ms Christine Gibson Co-ordinator/Policy Officer	23-09-93
Ms Jane Goddard Principal Solicitor	23-09-93

Indo-China Refugee Association (NSW) Incorporated

Ms Anne Hurni Community Development Worker	23-09-93
Mr Edward Mamo Co-ordinator	23-09-93
Dr Kenneth Rivett President	23-09-93
Mrs Beryl Way Honorary Secretary	23-09-93
Mr Esmond Way Vice-President	23-09-93

Jesuit Refugee Service

Father Peter Hosking Australian Co-ordinator	23-09-93
Mr Kerry Murphy Refugee Desk Co-ordinator	23-09-93

Law Council of Australia

Mr Paul Baker Member Executive Committee	22-09-93
Mr Denis O'Brien Chairman Administrative Law Committee	12-10-93

Law Institute of Victoria

Mr Alex Grossman Chairperson Migration Committee	22-09-93
Mr Erskine Rodan Member Law Institute Council	22-09-93

Legal Aid Commission of NSW

Ms Maritsa Eftimiou Legal Officer	25-08-93
Mr Ronald Kessels Legal Officer	25-08-93
Ms Christine Vizzard Officer in Charge Administrative Law Section	25-08-93

Legal Aid Commission of Victoria

Ms Elizabeth Gray Deputy Director General Law Division	22-09-93
Ms Irene Klusemann Solicitor Assignments Division	22-09-93

Mercy Refugee Service

Sister Bernardine Evens — 23-09-93
Co-ordinator

Sister Marea Roberts — 23-09-93
Social Worker

New South Wales Child Protection Council

Mr Adrian Ford — 23-09-93
Chairperson

Ms Constantina Lioumis — 23-09-93
Legal Officer

Ms Patricia Ravalico — 23-09-93
Council Member

Mr Garry Rogers — 23-09-93
Executive Officer

Refugee Council of Australia

Father Jefferies Foale — 25-08-93
president

Ms Eve Lester — 25-08-93
Co-ordinator
Refugee Advice and Casework Service (Victoria) Incorporated

Ms Philippa McIntosh — 25-08-93
Co-ordinator
Refugee Advice and Casework Service (NSW)

Ms Margaret Piper — 25-08-93
Executive Director

Refugee Council of Western Australia

Mrs Eileen Bouwman — 21-09-93
Member

Ms Vanessa Haigh — 21-09-93
Member

Reverend Wesley Hartley — 21-09-93
Member

Society of St Vincent de Paul

Mr Bernard Atkinson — 24-08-93
Chairman
National Refugees and Migrants Committee

Mr Edward Bacon — 24-08-93
Member
National Refugees and Migrants Committee

Mr Brian Murnane — 24-08-93
President
National Council

Mr James Zanotto — 24-08-93
Co-ordinator
Project Development Team
National Council

United Nations High Commissioner for Refugees

Mr Pierre-Michel Fontaine — 12-10-93
Regional Representative for Australia, New Zealand
and the South Pacific

Mr George Lombard — 12-10-93
Legal Officer

Uniting Church Social Responsibility and Justice Working Group

Reverend John Dunn — 20-09-93
Chairperson

Ms Eversley Ruth — 20-09-93
Co-ordinator
Uniting in Care

Uniting Church Victorian Synod

Mr John Ball Member Refugee Task Group	22-09-93
Dr Cesar Benalcazar Member Refugee Task Group	22-09-93
Reverend Rex Fisher Fieldworker Refugee Task Group	22-09-93
Ms Lia Kent Member Refugee Task Group	22-09-93
Mr Ben Whippy Member Refugee Task Group	22-09-93

Victorian Immigration Advice and Rights Centre

Mr Matthew Beckman Case Officer	22-09-93
Mr Seth Richardson Solicitor	22-09-93

Western Australian Government

Ms Maria Cristoffanini Director Office of Multicultural Interests	21-09-93

Appendix Four

REPORT ON OVERSEAS DETENTION PRACTICES
EXECUTIVE SUMMARY

The situation and conditions around the world are constantly changing. Very few nations enjoy the economic balance, the wealth and progress that many countries aspire to have. Poverty in Eastern Europe and the third world is pushing migrants towards Western Europe.[1] Persecution, as well as the fear of being persecuted even further, has generated a large number of asylum seekers who flee their countries of origin, seeking asylum and refugee status in Europe, Canada, the USA and Australia.[2] How do these countries and the many others cope with undocumented and unauthorised arrivals, as well as asylum seekers who arrive at their borders seeking refugee status or economic asylum? What do they do with them? A majority of the countries that were studied in this report used some form of detention at one time or another, to deal with this situation. Some of these detention practices are strict while others are carried out to establish the identity of the persons concerned. Once this is done, and it is proven beyond doubt that the asylum seeker or unauthorised arrival will not be of risk to public safety, he/she is released into the community.

FINDINGS

1. Countries such as Austria, the EC countries of Germany and Greece and the Scandinavian countries of Norway and Sweden carry out detention purely for deportation purposes.
2. Amongst the EC countries, the following countries have a different policy for

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1 *Europe's Immigrants, The Economist, vol. 322, 15 February 1992, p.19.*

2 *G. Barrett, "Migrant Tide Threatens a Flood" in The Age, 7 July 1993. In a survey done by the UN, it was found that Europe was the first country people would seek asylum in, followed by Canada, the USA and finally Australia.*

they refer to as illegal immigrants or aliens:

a. Germany
b. Greece
c. Italy
d. Portugal
e. United Kingdom

2.1 Denmark and the Netherlands, member countries of the EC community, view refugees as distinct from asylum seekers and aliens.

2.2 Ireland and Spain do not have special laws for dealing with refugees and asylum seekers, or aliens.

3. Where the Scandinavian countries are concerned, Norway views its asylum seekers and refugees as one and has a separate policy for them and another for the illegal immigrants. Finland and Sweden on the other hand, group their aliens and asylum seekers together, and therefore have a policy for them and another for the refugees.

4. Amongst the Asian countries that were researched, Japan was the only country that had a different policy for refugees, and one for asylum seekers and aliens. Although this is the case, a recent appraisal by Amnesty International[3] accuses Japan of not honouring the 1951 Convention and the 1967 Protocol of which it is a signatory. Japan is criticised for :

a. failing to ensure that all asylum seekers arriving in Japan have access to a fair and satisfactory procedure for assessing the merits of their claims;

b. for putting asylum seekers who make a formal claim, through an arbitrary and secretive process without regard for the vulnerable situation the asylum seekers are in;

c. detaining asylum seekers for months; and

d. keeping other asylum seekers, whose applications have been refused, on visas that must be renewed every 30 days with the possibility of deportation

3 *Amnesty International, Japan : Inadequate Protection For Refugees and Asylum Seekers, March 1993, pp. 1 - 2.*

looming over them.

This is in direct conflict with Japan's immigration policy.

5. In the case of Canada, detention is carried out purely for establishing the identity of the individual. Once this is done, the individual is released. In the case of unauthorised arrivals and illegal entrants who are not detained, they are issued with a conditional removal order and released on bond. Canadian authorities attest that this release on bond has been rather successful, and that those who have been released have complied with the conditions. This, when compared with the recent US system of releasing refugees and asylees on parole seems to have worked rather well. Although DIEA claims that the pre-screening provided the success rate, it is arguable, since the US also has pre-screening interviews before releasing refugees and asylum seekers on parole, but the success rate was not that high, as reported by the INS.

6. The new policy that was implemented in the US allows for pre-screening interviews to take place. Refugees and asylum seekers who have been detained are released on parole if they can verify their true identity; guarantee that they will not abscond; pay a bond; will not pose a threat to public safety; and agree to a number of conditions laid down by the INS interviewer. These conditions include contacting the local INS office every month to let them know their whereabouts; appearing for all asylum and other immigration hearings/interviews; appearing for deportation if determined as an excludable alien; and reporting for detention if failed to comply with the terms of release.

6.1 The INS found that about 33 percent of unauthorised arrivals admitted to the US, who claim asylum, do not appear for scheduled interviews at asylum offices. (This was for the period 1 October 1992 - May 1993). Also, of the 1,078 deportation notices issued by the New York INS office, there was a non-compliance rate of 87 percent.

6.2 It was found that less than 50 percent of applicants whose cases were scheduled for hearing before an immigration judge actually appeared before the hearing (for the period 1 October 1991 - 30 September 1992).

6.3 The current policy of intercepting Haitians fleeing Haiti, without any attempt to determine the status of the Haitians, not only shows the double standards

in the 1992 policy, but also violates the international principle of non - refoulement. Furthermore, it raises the question of racial discrimination, and whether it was US governmental plan to deter a particular group from entering the US.

CHANGING PHASES

As more and more asylum seekers flock to these countries, a number of these have begun to change their legislation with a view of keeping the number of immigrants under control. Members of the EC Countries feel that Europe has very liberal asylum laws and that it is about time that these laws are tightened. The EC Ministers agreed that "persons who had entered the EC illegally, including those who have applications for asylum turned down, should be expelled unless there were compelling humanitarian reasons for allowing them to stay."[4] In its 1993 Annual Report, Amnesty International stated that a number of EC member states had adopted proposals designed to obstruct asylum seekers from gaining access to full asylum procedures. One of these is the agreement by the EC countries to draw up a joint list of countries whose citizens would require visas to enter the EC.

A few EC countries have changed their policy towards illegal immigrants and are clamping down on them. Italy, up to two years ago, used to grant an amnesty for illegal immigrants. Now it has begun to clamp down on them by having a strict quota system and introducing visas for Turks and North Africans.[5] This is probably done to deter these two groups from seeking asylum in Italy. Germany has introduced detention of undocumented arrivals who arrive in Germany by air, and asylum seekers who come from safe countries of origin. Ireland too has implemented detention of aliens who overstay their visas or work permits, or hold invalid passports or documents.

The US is contemplating introducing a *Summary Exclusion Bill* which will exclude people from entering the US if they carry fraudulent or no documentation. It is also proposing an *Immigration Preinspection Bill 1993,*

4 *A. McCathie, "EC Gets Tough With Unwelcome Immigration," in The Australian Financial Review, 3 June 1993.*

5 *Europe's Immigrants, p. 20.*

which involves pre-screening of passengers before they board flights to the US. The countries researched in this report detain their unauthorised arrivals and asylum seekers or refugees. In the case of asylum seekers and those seeking refugee status, their identity and status is established as soon as possible and they are released. In most cases, detention is used as a deterrent, while in others, it is used to establish identity or for deportation purposes.

Although detention is practiced in the countries surveyed, most of the countries which are signatories to the 1951 Convention and 1967 Protocol have been cautious not to abuse the use of detention. These countries review their detention practices quite regularly, and the unauthorised arrivals or asylum seekers and refugees are not detained for a lengthy period of time. An individual's identity is established as quickly as possible so that his/her status can be determined speedily and the necessary step can be taken immediately. Detention of illegal immigrants and asylum seekers, to a point, has not been a major issue in the EC and Scandinavian countries mainly because of this. Australia on the other hand, is under a lot of criticism (not internationally, but from the Australian population) because of its mandatory nature of detention and the duration. It has also been described as being discriminatory. As the research shows, if Australia is being discriminatory, it is not the only one: the very deterrent nature of the detention practice in the various countries studied, attests to this.

Saraswathi Karthigasu
Student Intern
Australian National University
Canberra

October 1993

ATTACHMENT
DETENTION PRACTICES

COUNTRIES	DETENTION PRACTICES - Who is detained, for what purpose	LENGTH OF DETENTION	SUBJECT TO JUDICIAL REVIEW
Austria	(1) An alien may be taken into provisional custody for the maintenance of public peace, order or safety. (2) Pre-expulsion detention for illegal immigrants who arrive undocumented or cross the borders illegally. (3) Asylum seekers are detained only if it is determined as absolutely necessary to establish their identity.	Detention should not exceed two (2) months.	Detention orders can be appealed with judicial - like organisations.
EC COUNTRIES			
Denmark	(1) Asylum seekers may be detained: - to establish identity; - if fear exists that he/she might go into hiding;and - if he/she refuses to follow orders from the Directorate of Alien's concerning his/her stay. (2) Asylum seekers who arrive at the border without identification. (3) Asylum seekers whom the Directorate for Immigration has decided to reject, deport or expel. Pre-screening is carried out at point of entry - by the border police	No time limit is stipulated for detention. No time limits on (2) and (3) detentions.	□ Court of law reviews the detention after a maximum of 72 hours of detaining the asylum seekers. □ Court also decides on the extension of the detention period. □ Detention can only take place when prescribed by law. □ Appeal is made to the Refugee Appeals Board which is a semi-judicial body headed by a judge.

COUNTRIES	DETENTION PRACTICES - Who is detained, for what purpose	LENGTH OF DETENTION	SUBJECT TO JUDICIAL REVIEW
German Federal Republic	(1) Undocumented arrivals who arrived in Germany by air. (2) Asylum seekers who arrived by air from countries of safe origin. (3) Preparatory detention (i) where alien is detained prior to deportation if no immediate decision can be made on deportation. (ii) alien needs to be detained so that expulsion can be carried out smoothly. (4) Preventative detention - An alien who is to be expelled will be detained if there are reasons to believe that he/she will evade expulsion. In most cases detention takes place in prisons.	Period of preparatory detention may not exceed six weeks. Preventative detention - alien may be detained up to 6 months. Should the alien pose obstacles, it can be extended to 12 months.	Need a court order to detain an alien or an asylum seeker. Appeals can be made to an Administrative Court, Higher Administrative Court and Federal Administrative Court. The appeal can finally be taken to the Federal Constitutional Court.
Greece	Admissibility screening is carried out at point of entry by the Athens Police Department. 1. Till 1992, illegal immigrants who entered Greece without valid passports or documents were imprisoned. 2. An alien who has been placed under police surveillance and has violated it, can be detained.	Imprisonment was up to 3 months. Detention period can be a prison sentence of up to 2 years.	
Ireland	1. An alien who does not have a valid passport or other valid documents can be detained under the discretion of the immigration officer. 2. An alien who overstayed his visa can be detained under the discretion of the immigration officer. 3. An alien who is prohibited to land in Ireland can be detained under the discretion of the immigration officer.	Detention periods range from 2 weeks to 3 months.	No possibility to lodge an appeal against a negative first instance decision.

COUNTRIES	DETENTION PRACTICES - Who is detained, for what purpose	LENGTH OF DETENTION	SUBJECT TO JUDICIAL REVIEW
Italy	1. No law as such that detains asylum seekers and refugees or foreign nationals arriving in Italy without valid documents. 2. Persons without required entry visa will not be allowed into Italy and should be turned away at the border towards their country of origin. 3. Undocumented arrivals at the airports are held within the transit halls until their departure takes place.		Under Italian judicial system, it is possible to lodge a further appeal with the State Council.
Netherlands	1. As a rule, asylum seekers and refugees are not detained in the Netherlands. However, in the first phase of their application, they remain in special centres where they have to report regularly. 2. But asylum seekers and refugees can be detained if they arrive in Netherlands via air or sea and are awaiting decision on admission into the country. 3. Asylum seekers and refugees can also be detained if they are awaiting expulsion. 4. An alien who is to be deported and is determined as highly likely to disappear into the community, will be detained.	Detention can be up to a month (30 days) or longer.	A negative decision by the Ministry of Justice can be appealed before the judicial division of the Council of State. However, the appeal is with regards to the application of the law.
Portugal	Asylum seekers are interviewed at the point of entry on the basis of their request for asylum. Under Portuguese laws, detention is meant for investigative purposes only. An asylum seeker who enters the country illegally, using a false passport or fraudulent documents, can be detained.	Detention can only last 48 hours and for investigative purposes only. This detention can last from six months to a year.	A negative decision is subject to appeal to the Supreme Administrative Court.

COUNTRIES	DETENTION PRACTICES - Who is detained, for what purpose	LENGTH OF DETENTION	SUBJECT TO JUDICIAL REVIEW
Spain	1. Asylum seekers who arrive undocumented, or on forged passports and visas are detained. 2. Asylum seekers can also be detained for illegal stay or causing disruption to public peace and order.	If detained on these grounds, detainees can be released on parole, a few days later. Detention of this nature (2) cannot exceed 40 days.	There are provisions for a judicial review.
United Kingdom	Preliminary examination is made of asylum seekers arriving from third countries. 1. Unauthorised arrivals are detained if they are pending a decision whether they are allowed entry or not. 2. Asylum seekers are not detained because they are seen as least likely to disappear into the community. 3. However, an asylum seeker will be detained, if his/her application is seen as unfounded and if there is a possibility that the application will be rejected.		
Scandinavian Countries : Finland	Application for asylum must be submitted at the time of arrival or soon after. 1. An alien will be detained if his/her identity has not been established. 2. An alien will be detained if it has been proven that he/she will hide or commit criminal offences in Finland.		Courts of law are to treat detention cases as matters of urgency. There is room for semi judicial review. The Asylum Appeals Board decision is definitive.
Norway	1. Any person (including an asylum seeker) who arrives at the border undocumented or with false documentation will be detained. 2. However, detention of asylum seeker is decreasing.		

COUNTRIES	DETENTION PRACTICES - Who is detained, for what purpose	LENGTH OF DETENTION	SUBJECT TO JUDICIAL REVIEW
Sweden	Preliminary interview is carried out by the border police once an application for asylum is lodged. Aliens aged 16 and above can be detained if:- (i) identity is unclear at time of arrival in Sweden (ii) unable to prove that the stated identity is correct especially when applying for a residence permit (iii) the alien has to be investigated, to determine his/her right to remain in Sweden (iv) the alien stands to be deported or will be refused entry However, detention orders may only be issued if there are circumstances to show that the alien will go into hiding. An alien child below the age of 16 is not to be detained unless he/she will disappear into the community.	An alien child may not be detained for more than 72 hours and is not to be separated from the parent/guardian.	
Asian Countries : Japan	The following aliens will be detained under the Japanese Immigration system:- (i) any alien who has landed in Japan when not given permission to do so (ii) an alien who overstays the period stated in the passport (iii) an alien who has been convicted of criminal offences and is facing imprisonment or heavier penalties (iv) an alien whose activities are upsetting the peace and order, and are posing a threat to the security of Japan (v) one who has been given permission for emergency landing, or permission to land for temporary refuge and overstays the period reflected in the passport or permit.	30 days The detention period may be extended another 30 days if the supervising immigration officer feels there is a need to detain the alien longer.	No provisions for judicial review.

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COUNTRIES	DETENTION PRACTICES - Who is detained, for what purpose	LENGTH OF DETENTION	SUBJECT TO JUDICIAL REVIEW
Hong Kong	Vietnamese refugees are held in prison-like detention camps.		Under the comprehensive plan of action, these 3 countries along with Indonesia & Philippines have worked out a refugee status determination program (see attachment 2 page 3)
Malaysia	Indochinese refugees are detained in camps. Of late, Malaysia has adopted a pushback policy where it pushed back to sea 4,000 Vietnamese asylum seekers; and detained 7,300 longstayers in Sungei Besi Camp.		
Thailand	Detention is still being carried out and there are sporadic pushbacks of Vietnamese and Laotian asylum seekers.		
Canada	1. As a general rule, asylum seekers refugees and aliens are normally not detained in Canada 2. However, under the Immigration Act, a person can be detained (i) if he/she cannot establish his/her identity (ii) if the person seeking asylum or entry into Canada is a member of an inadmissable class. 3. An alien can be detained if he/she poses a danger to the public and/or; 4. if he/she will not appear for an examination or inquiry, or for the expulsion to which he/she has been issued an order. 5. In practice, very few asylum seekers and refugees are ever detained in connection with immigration matters.	Detention period is not to exceed 7 days from the time the person was first detained.	

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COUNTRIES	DETENTION PRACTICES - Who is detained, for what purpose	LENGTH OF DETENTION	SUBJECT TO JUDICIAL REVIEW
United States of America	1. Haitian asylum seekers are turned away at the borders 2. New policy (implemented in 1992) allows pre-screening interviews, and refugees and asylum seekers who have been detained are released on parole if they can verify their true identity; that they will not abscond; will pay a bond, have financial support, will not pose a threat to public safety, and agree to a number of conditions laid down by the INS interviewer.		