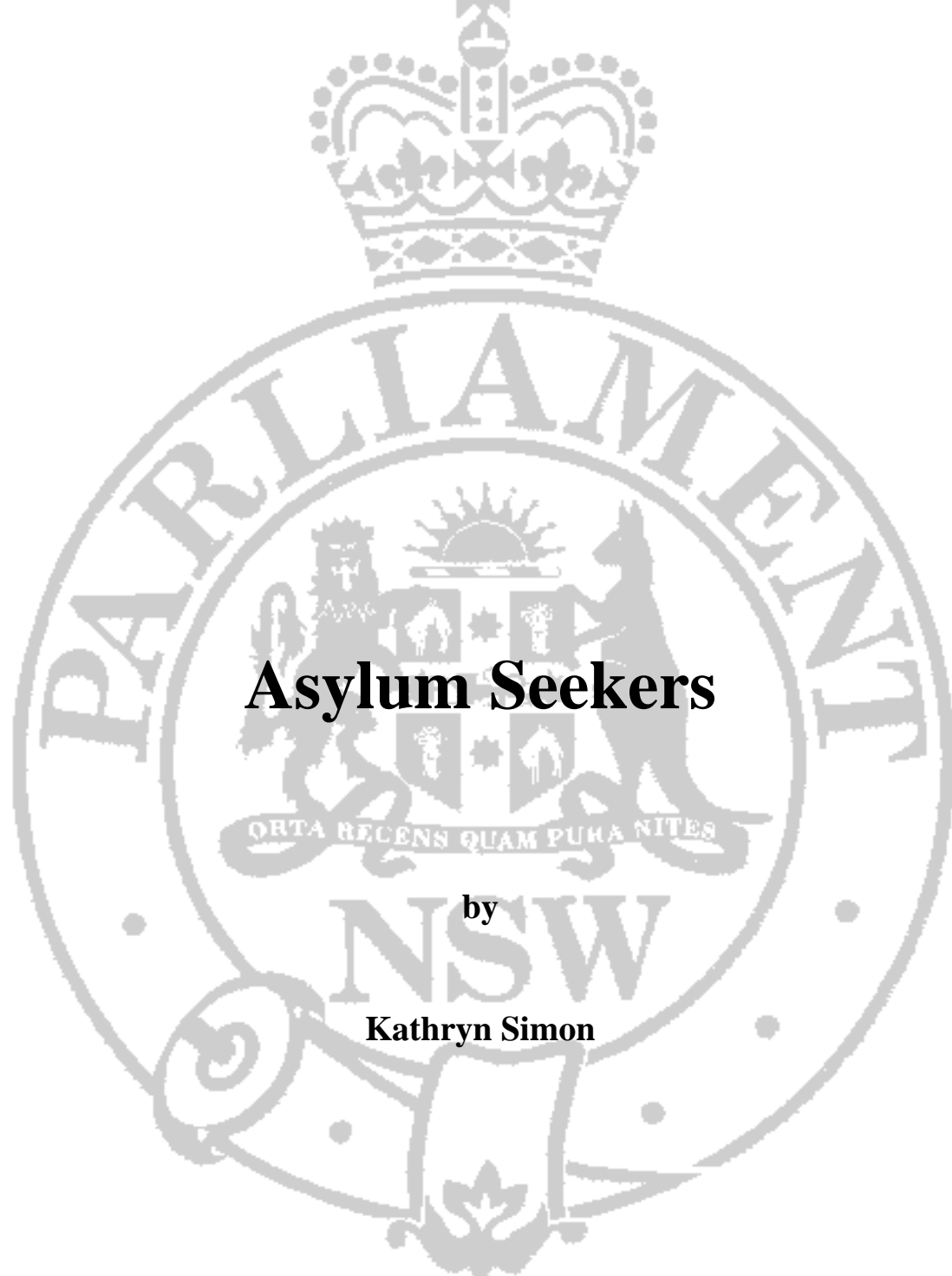


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Asylum Seekers

by

Kathryn Simon

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by

Kathryn Simon

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EXECUTIVE SUMMARY

This *Briefing Paper* considers the issue of asylum seekers in Australia. The paper commences with a summary of the current Federal Government's policy with respect to asylum seekers, in particular immigration detention. It also considers the Federal Joint Standing Committee on Migration's Inquiry into Immigration Detention in Australia, which is considering a number of key issues that will shape the future of Australia's policy towards asylum seekers [pp 1-4].

The second section considers the change in the Federal Government's policy towards asylum seekers in context. It considers the Refugee Convention and Protocol and provides a brief overview of the development of domestic law and policy, examining the policy of mandatory detention, the Tampa incident and the Pacific Solution. It also briefly considers the issue of children in immigration detention, the inquiries into the immigration detention of Cornelia Rau and the deportation of Vivian Alvarez Solon [pp 5-16].

The next section of the *Briefing Paper* considers the issue of asylum seekers from a statistical perspective. It provides the latest statistics of the number of asylum seekers in immigration detention as well as statistics regarding global and domestic trends. The vast majority of those people in immigration detention originally arrived in Australia with a valid visa [pp 17-23].

The fourth section of the paper examines the change in the Federal Government's policy towards asylum seekers. The section briefly considers seven new values with respect to immigration detention. It also considers a number of important issues that have received media attention recently for example, the arrival of two boats of asylum seekers at Christmas Island [pp 24-31].

The final section of the paper raises the challenge of the implementation of the policy and the provision of services to asylum seekers, which is relevant to both State and Federal Governments [p 32].

1. INTRODUCTION

Since the 1940s, Australia has accepted over 620,000 refugees and displaced persons from a number of different countries.¹ During this time, the issue of asylum seekers has been a subject of ongoing debate that has touched the heart of Australian national identity.² As stated by the Hon. Chris Evans MP, the Federal Minister for Immigration and Citizenship:

Immigration is central to the nation's sense of identity: how Australia develops, manages and implements its immigration policies and citizenship program directly reflects what we value as a people, and how we think of ourselves as a nation.³

The most recent development in this ongoing debate is the announcement on 29 July 2008 by the Federal Minister for Immigration and Citizenship of a new 'risk-based' immigration detention policy.⁴ Under this new policy, after health, security and identity checks have been completed, asylum seekers will not be held in immigration detention unless they present a risk to the community. In its election platform, the current Government promised that it would maintain a policy of mandatory detention and the excision of certain places from the Migration Zone. Accordingly, although mandatory immigration detention remains, rather than being a 'first resort' immigration detention will now be a 'last resort' and for the shortest practicable period.⁵

The Keating Labor Government first introduced the policy of mandatory detention in 1992. According to this policy, asylum seekers who entered Australia were detained in immigration detention until their visa status had been determined. The policy of mandatory detention was introduced in response to the arrival of Vietnamese, Cambodian and Chinese asylum seekers between 1989 and 1992 and the rationale for the policy was to save costs and to assist in the processing of refugee claims.⁶ The original legislation stated that asylum seekers could be detained for up to 273 days. However, this time limit was removed in 1994. The amendments meant that a person could only be released if they were deported or granted a visa.⁷ In 2004, the High Court held in the case of *Al-Kateb v Godwin* that asylum seekers can be held in immigration detention indefinitely.⁸

¹ M. Crock, B. Saul & A. Dastyari, *Future Seekers 11: Refugees and Irregular Migration in Australia*, The Federation Press, Sydney (2006) at p 12.

² P. Sheehan, And the challenge of migration, *The Sydney Morning Herald*, 4 August 2008.

³ The Hon Chris Evans, Minister for Immigration and Citizenship, Address to the 2008 National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal, 29 February 2008 at <http://www.minister.immi.gov.au/media/speeches/2008/ce08-29022008.htm>

⁴ The Hon Chris Evans, Minister for Immigration and Citizenship, New Directions in Detention – Restoring Integrity to Australia's Immigration System, 29 July 2008 at <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>

⁵ Ibid

⁶ J. Jupp, *From White Australia to Woomera: The Story of Australian Immigration*, Cambridge University Press, 2nd Edition, (2007), pp 184-185; R. Fitzgerald, Shift on illegals sends the wrong message to people smugglers, *The Australian*, 11 August 2008.

⁷ Ibid.

⁸ [2004] HCA 37; See also J. Curtin, Never Say Never, *Sydney Law Review*, 27 (2005)

After the 2007 election, the current Government ended the temporary visa protection system and closed the offshore processing centres at Nauru and Manus Province, which had been excised from Australia as part of the 'Pacific Solution'.⁹ The Howard Government created the 'Pacific Solution' in the aftermath of the 'Tampa' incident in 2001, in response to an influx of asylum seekers that arrived in Australia by boat.¹⁰ Under the 'Pacific Solution', asylum seekers were sent to islands such as Nauru for visa processing rather than the mainland of Australia. However, under the new policy asylum seekers at excised places will be processed at Christmas Island. The Christmas Island Detention Facility accommodates 800 people (at 'surge' capacity) and is located 320 kilometers south of Java and 2630 kilometers north of Perth.¹¹ One important change is that under the new policy, asylum seekers will have access to legal assistance and independent review of unfavorable decisions as well as review by the Ombudsman.¹²

An important issue for consideration is the implementation of the new policy through legislative amendments to the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth).¹³ As highlighted by academic commentator George Williams:

While the Rudd government has announced a major change in policy, this needs to be followed up by changes to the law. Until this occurs there will be an awkward mismatch between the law enacted under the Howard government and Labor's new values, some of which cannot be implemented. Without legal change, it will also be possible for a new government, or even a new minister, to revert to the old ways of mandatory detention and to undo the policy shift.¹⁴

Accordingly, some have suggested that the Federal Government has kept mandatory detention in name but has transformed its meaning, while others have questioned whether the new policy towards asylum seekers will be any different to the old policy of mandatory detention.¹⁵ These questions may be answered in the coming months with the implementation of the new policy by legislation.

Part of the process of implementation is the Federal Parliament's Joint Standing Committee

355.

⁹ C. Levett, Tampa recedes into a shameful past, *The Sydney Morning Herald*, 30 July 2008.

¹⁰ Y. Narushima, Detention only as a last resort: Evans, *The Sydney Morning Herald*, 29 July 2008.

¹¹ M. Dimasi, The Coalition's expensive Christmas Island Legacy, 20 May 2005 at http://www.apo.org.au/webboard/comment_results.shtml?filename_num=209290

¹² The Hon. Chris Evans, Minister for Immigration and Citizenship, note 4.

¹³ S. Kamand, Policy Shift: A More Humane and Transparent Approach to Immigration Detention, *Immigration News*, Issue 86, August 2008 at p 1.

¹⁴ G. Williams, New refugee solution needs legal help, 5 August 2008 at http://www.apo.org.au/webboard/comment_results.shtml?filename_num=224252

¹⁵ Ibid; P. Kelly, Policy overboard, *The Australian*, 2 August 2008; Y. Narushima, Mandatory detention policy overturned, *The Sydney Morning Herald*, 30 July 2008.

on Migration, which is currently inquiring into Immigration Detention in Australia.¹⁶ The terms of reference for the Committee are as follows:

- the criteria that should be applied in determining how long a person should be held in immigration detention;
- the criteria that should be applied in determining when a person should be released from immigration detention following health and security checks;
- options to expand the transparency and visibility of immigration detention centres;
- the preferred infrastructure options for contemporary immigration detention;
- options for the provision of detention services and detention health services across the range of current detention facilities, including Immigration Detention Centres (IDCs), Immigration Residential Housing, Immigration Transit Accommodation (ITA) and community detention;
- options for additional community-based alternatives to immigration detention by:
 - a) inquiring into international experience;
 - b) considering the manner in which such alternatives may be utilized in Australia to broaden the options available within the current immigration detention framework;
 - c) comparing the cost effectiveness of these alternatives with current options.¹⁷

The Committee has received approximately 133 submissions, with seven supplementary submissions and is currently conducting hearings throughout Australia.¹⁸ The first report is expected to be released before the end of this year and will address the length of time that a person should be held in immigration detention.¹⁹ The final two reports will address issues of transparency and service provision available in immigration detention as well as options for expanding community and alternative forms of detention.

The provision of services to asylum seekers, in particular to those who will no longer be kept in immigration detention under the new policy is also an important issue. This is a relevant issue for NSW given the location of Villawood Immigration Detention Centre, where 118 asylum seekers currently are.²⁰ These issues are also relevant to refugee

¹⁶ Parliament of Australia, The Joint Standing Committee on Migration at <http://www.aph.gov.au/house/committee/mig/detention/index.htm>.

¹⁷ Ibid.

¹⁸ Parliament of Australia, Joint Standing Committee on Migration, *Are we meeting our international obligations? UNHCR to give evidence on immigration detention*, 14 October 2008, Parliament of Australia, Joint Standing Committee on Migration, *Moving forward on immigration detention reforms: DIAC to give evidence*, 23 September 2008, Parliament of Australia, Joint Standing Committee on Migration, *New inquiry into immigration detention*, 10 June 2008.

¹⁹ Parliament of Australia, Joint Standing Committee on Migration, *Ombudsman to address criteria for immigration detention*, 16 September 2008.

²⁰ Department of Immigration and Citizenship, Statistical Data as at 7 November 2008 at

communities in NSW. The *Sydney Morning Herald* recently reported that the provision of housing to refugees in Sydney is an issue.²¹ It reported that refugee families are finding accommodation in refuges for the homeless because there is insufficient affordable rental housing for the 2,500 refugee and humanitarian entrants, mostly from the Middle East and Africa who arrive in Sydney each year. These issues of service provision will become increasingly relevant as the current policy towards asylum seekers is developed in the coming months.

The current Federal Government also announced earlier this year that it would accept 13,500 people through its Humanitarian Program, with 6,500 people in its 'offshore' refugee program.²² However, a recent research poll indicated that the majority of Australians think Australia is accepting too many refugees. 24% of those who were interviewed said that the policy on asylum seekers has been too tough, whilst 62% said that it had been right or not tough enough. A sample of 1013 people were asked about the recent increase in Australia's refugee intake in the survey. 52% said that this was too large; one quarter said that it was the right number and 6% of people said that it was too small.²³ The latest statistics indicate that there are 279 asylum seekers in immigration detention, which is the lowest number since 1997.²⁴ The vast majority of people in immigration detention are people who have overstayed or breached their visas, rather than unauthorized boat arrivals.²⁵

http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20081107.pdf

- ²¹ P. Bibby, Refugees face rent anguish, *The Sydney Morning Herald*, 29 August 2008.
- ²² The Hon. Chris Evans, Minister for Immigration and Citizenship, *Australia increases commitment to refugees*, 13 May 2008 at <http://www.minister.immi.gov.au/media/media-releases/2008/ce02-buget-08.htm>
- ²³ M. Grattan, Most think refugee level is too high, *The Age*, 5 August 2008.
- ²⁴ Department of Immigration and Citizenship, note 20.
- ²⁵ Ibid.

2. THE CURRENT POLICY IN CONTEXT

2.1 The Refugee Convention and Protocol

The United Nations Convention Relating to the Status of Refugees 1951 ('the Refugee Convention') and the Protocol on the Status of Refugees (1967) ('the Protocol') are the primary sources of international obligations in relation to refugees.²⁶ The Refugee Convention was drafted in the aftermath of the Second World War to address the issue of refugees fleeing from the Nazi regime.²⁷ The Convention was drafted between 1948 and 1951 by a combination of United Nations organs, *ad hoc* committees and a conference of plenipotentiaries of 26 states.²⁸ Australia ratified the Refugee Convention on 22 January 1954 and the 1967 Protocol on 13 December 1973. The United Nations High Commission on Refugees was also established in 1950 by the United Nations General Assembly as a refugee agency with a mandate to 'lead and coordinate international action for the worldwide protection of refugees'.²⁹

The term refugee is defined in Article 1A(2) of the Refugee Convention as a person:

[who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unwilling or unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.³⁰

The Convention was initially limited to Europeans who had fled their countries of origin after World War Two. Article 1A(2) of the Convention defines a refugee as a person who has a well-founded fear of being persecuted 'as a result of events occurring before 1 January 1951'.³¹ However, the 1967 Protocol subsequently expanded the definition so that the provisions of the Convention could be applied without the geographic or time limitations.³² In the case of *MIEA v Guo & Anor*³³, the High Court held that the definition of a refugee has four main elements:

- The person must be outside his or her country of nationality;
- The person must fear 'persecution';

²⁶ J Vrachnas et al, *Migration and Refugee Law: Principles and Practice in Australia*, Cambridge University Press, 2005 at p 172.

²⁷ The United Nations High Commission on Refugees (UNHCR), Convention and Protocol Relating to the Status of Refugees (The Refugee Convention) at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

²⁸ Vrachnas, note 26 at p 173.

²⁹ UNHCR website at <http://www.unhcr.org/cgi-bin/texis/vtx/home>

³⁰ UNCHR, The Refugee Convention, note 27.

³¹ Vrachnas, note 26 at p 174.

³² *Ibid.*

³³ [1997] HCA 22 (13 June 1997).

- The person must fear such persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’; and
- The person must have a ‘well-founded’ fear of persecution for one of the Convention reasons.³⁴

Academic commentator Mary Crock has described the obligations on a State by the Refugee Convention as follows:

- It will not return refugees to a country where they could face persecution (or the threat of persecution) on one of the five refugee grounds, namely race; religion; nationality; membership of a particular social group; or political opinion (the principle of non-refoulement);
- Protection must be given to all refugees without discrimination;
- It will not penalize refugees for entering the country ‘illegally’, because people fleeing from persecution cannot be expected to leave their country and enter another in the ‘regular’ manner;
- It will only expel refugees in exceptional circumstances to protect national security or public order, because expulsion may have very serious consequences for the individual;
- Refugees should be treated as a social and humanitarian problem and should not be a cause of political tension between states;
- It will cooperate with other nations to find satisfactory solutions to refugee problems, because the grant of asylum can place unduly heavy burdens on some countries;
- It will co-operate with UNHCR to manage refugees globally; and
- It will give the same human rights to refugees that it affords to its citizens and non-residents, including rights to work, education, housing, welfare, freedom of movement and freedom of opinion.³⁵

The first obligation, which is called the principle of non-refoulement has been described as one of the most important obligations provided by the Refugee Convention.³⁶ Article 33 of the Refugee Convention provides that:

No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Accordingly, a State party to the Convention is obliged not to return a person to their country of origin if a person fulfills the definition of a refugee. This obligation includes ensuring that authorities properly identify and protect people who are entitled to refugee

³⁴ Vrachnas, note 26 at p 176; UNHCR website at <http://www.unhcr.org.au/basicdef.shtml>; The Human Rights and Equal Opportunity Commission, ‘Face the Facts’ at http://www.humanrights.gov.au/racial_discrimination/face_facts/refugee.html; Adrienne Millbank; *The Problem with the 1951 Refugee Convention*, Commonwealth Parliamentary Library, 5 September 2000.

³⁵ Crock, note 1 at p 21.

³⁶ Ibid.

status.³⁷ Australia has implemented the Refugee Convention and Protocol into domestic legislation through the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth), which sets out the criteria that a person must fulfill in order to be granted a visa.

It is also important to note that the term refugee tends to be used in public discourse more broadly than its legal meaning. There is often confusion surrounding the different terms that are used to denote people seeking protection, for example the terms ‘asylum seekers’, ‘refugees’, ‘boat people’, ‘undocumented arrivals’, ‘illegal immigrants’ and ‘unlawful entrants’.³⁸ The term refugee is often used to refer to any person who has fled his or her home country for any reason, not only for a political, religious or societal reasons but also economic problems, poverty, natural disaster, civil war and disturbance.³⁹ However, in legal terms a refugee is a person whose status has been recognized under the Refugee Convention as provided in the *Migration Act 1958* (Cth). An asylum seeker is a person who has left their country of origin, has applied for recognition as a refugee in another country and is waiting for a decision with respect to their application.⁴⁰ A refugee and asylum seeker may also be distinguished from an Internally Displaced Person (IDP), who is a person who has been forced to leave their place of residence to avoid the effects of armed conflict, generalized violence, human rights violations and disasters, however has not crossed an international border.⁴¹

At the end of 2007, the number of refugees and IDPs under the care of UNHCR care reached a total of 25.1 million.⁴² UNHCR also reported that during 2007, a total of 647,200 applications for refugee status were submitted to Governments and UNHCR offices in 154 different countries.⁴³ Globally, the number of asylum claims submitted in industrialized countries in 2007 rose by 9% compared to 2006.⁴⁴ This upward trend continued during the first half of 2008, with data showing an increase of 3% compared to the first half of 2007.⁴⁵ The UNHCR report also indicated that the number of asylum seekers in Australia remained stable in the first half of 2008, compared to both semesters of 2007.⁴⁶ During the first six months of 2008, Iraq remained the country of origin of the majority of asylum seekers. Further, the number of asylum seekers from Iraq was twice as many as the Russian Federation, which was the second largest source country of asylums seekers.⁴⁷ The other

³⁷ Ibid.

³⁸ Cited in R Germov and F Motta, *Refugee Law in Australia*, Oxford University Press, 2003 at p xl.

³⁹ Germov, note 38 at p xxxix.

⁴⁰ UNHCR website at <http://www.unhcr.org.au/basicdef.shtml>.

⁴¹ UNHCR, 2007 *Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons*, June 2008 at p 1.

⁴² UNHCR, note 41 at p 4.

⁴³ UNHCR, note 41 at p 13.

⁴⁴ UNHCR, *Asylum Levels and Trends in Industrialized Countries, First Half of 2008, Statistical Overview of Asylum Applications Lodged in 38 European and 6 Non-European Countries*, 17 October 2008 at p 3.

⁴⁵ Ibid.

⁴⁶ Ibid at p 4.

source countries included China, Somalia, Pakistan, Afghanistan and Serbia.⁴⁸

2.2 The Development of Domestic Law and Policy

On 24 May 1977, the Minister for Immigration, the Hon. M MacKellar MP presented a statement to Parliament that formed the basis for domestic law and policy for asylum seekers and refugees. The Minister made the following statements:

- Australia fully recognises its humanitarian commitment and responsibility to admit refugees for resettlement;
- The decision to accept refugees must always remain with the government of Australia;
- Special assistance will often need to be provided for the movement of refugees in designated situations or their resettlement in Australia; and
- It may not be in the interest of some refugees to settle in Australia. Their interests may be better served by resettlement elsewhere. The Australian government makes an annual contribution to the UNCHR, which is the main body associated with such resettlement.⁴⁹

These statements, which were tabled in Parliament, signified the commencement of a separate program for refugees and asylum seekers.⁵⁰ Further, since the official abolition of the White Australia policy in 1973, the number and nationality of asylum seekers has changed significantly.⁵¹ In his discussion of the history of refugees and asylum seekers, James Jupp suggests that ‘immigrants settling for primarily political reasons (as refugees or fearing future persecution)’ over the last fifty years may be described as follows:

- Europeans escaping communism (former Soviet bloc and Soviet Union): 150 000;
- Asians escaping communism (Vietnam, Laos, Cambodia, China): 300 000;
- Africans escaping civil disorder (Ethiopia, Somalia, Sudan and Eritrea): 25 000;
- Latin Americans escaping dictatorship (Chile, Argentina, Uruguay, El Salvador): 53 000;
- Yugoslavs escaping communism or civil disorder: 120 000;
- Middle Easterners escaping religious/political fundamentalism (Iran, Iraq, Afghanistan, Syria, Lebanon): 120 000; and
- Others, for miscellaneous reasons (Sri Lanka, Fiji, Timor): 60 000.⁵²

⁴⁷ Ibid at p 6.

⁴⁸ Ibid.

⁴⁹ Germov, note 38 at p 34.

⁵⁰ B York, *Australia and Refugees, 1901 – 2002 Annotated Chronology Based on Official Sources: Summary*, Australian Parliamentary Library, 16 June 2003; *Australia's Humanitarian Program*, Australian Parliamentary Library, 9 September 2005.

⁵¹ L Roth, *Multiculturalism*, NSW Parliamentary Library, Briefing Paper No 9/2007 at p 2; Crock note 1 at p 14.

⁵² Jupp, note 6 at p 181.

2.3 The Policy of Mandatory Detention

The Federal Government's policy with respect to asylum seekers has been the subject of much debate and the policy of mandatory detention has been a particular source of controversy.⁵³ The policy was introduced with bi-partisan support in 1992 through the *Migration Amendment Act 1992* (Cth).⁵⁴ It was developed by the Government as an 'interim measure' for 'a specific class of persons' to 'address only the pressing requirements of the current situation', namely concerns regarding the influx of asylum seekers arriving in Australia by boat from Indo-China.⁵⁵ The following table shows the trends in relation to the number of asylum seekers who entered Australia via boat between 1997 and 2006:

Year	Number of Vessels	Number of Unauthorized Arrivals
1997-1998	13	157
1998-1999	42	926
1999-2000	75	4,175
2000-2001	54	4,137
2001-2002	23	3,649
2002-2003	Nil	Nil
2003-2004	3	82
2004-2005	Nil	Nil
1 July 2005-20 January 2006	2	50

Source: The Senate Legal and Constitutional Affairs Committee Inquiry into the administration and operation of the Migration Act 1958 (Cth) at paragraph 5.1.

The *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) establish a system whereby an 'unlawful non-citizen', namely a citizen who does not hold a valid visa⁵⁶ must be detained⁵⁷ until they are removed from Australia, deported or granted a visa.⁵⁸ Commentators have described the primary rationale for the policy of mandatory detention as deterrence and the protection of Australia's borders.⁵⁹ However, since its introduction there has been ongoing debate about the policy's effectiveness in reducing the number of

⁵³ A. Samson & J. Gibson, An Overview of Immigration Detention in Australia, *Precedent* 81 (2007) 42; The Human Rights and Equal Opportunity Commission, *Summary of observations following the inspection of mainland immigration detention facilities*, Sydney (2007).

⁵⁴ The Senate Legal and Constitutional References Committee, Inquiry into the Administration and Operation of the Migration Act 1958 (Inquiry into the Migration Act 1958 (Cth)), March 2006 at paragraph 5.2, see also A. Millbank and J. Phillips, *The detention and removal of asylum seekers*, Australian Parliamentary Library E Brief, 5 July 2002.

⁵⁵ Inquiry into the Migration Act 1958 (Cth) at paragraph 5.5.

⁵⁶ Section 14 *Migration Act 1958* (Cth). The distinction between a lawful and unlawful non-citizen was introduced through the *Migration Reform Act 1992* (Cth).

⁵⁷ Section 189 *Migration Act 1958* (Cth).

⁵⁸ Section 196 *Migration Act 1958* (Cth).

⁵⁹ See also A. Schloenhardt, To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia, *International Journal of Refugee Law* 14 (2002) 305.

asylum seekers, its legality (including its compliance with international obligations) and the indeterminate nature of mandatory detention.⁶⁰ There have been a large number of developments in law and policy with respect to asylum seekers over the last ten years. This *Briefing Paper* does not intend to address each of these developments in detail. Instead, it will briefly address a number of key developments, including notable reports.

2.4 The Tampa Incident and the ‘Pacific Solution’⁶¹

On 26 August 2001, 433 asylum seekers were rescued at sea by a Norwegian container ship, the ‘MV Tampa’⁶² The Tampa was informed that the asylum seekers would not be able to disembark from the ship at Christmas Island.⁶³ On 29 August 2001, Special Air Service troops boarded the ship to prevent any of the asylum seekers from disembarking at Christmas Island.⁶⁴ The Victorian Council for Civil Liberties and a private solicitor called Eric Vadarlis then commenced proceedings in the Federal Court seeking a number of orders, including the release of the asylum seekers to stop their unlawful detention on board the MV Tampa (a ‘writ of habeas corpus’).⁶⁵ North J held in favor of the applicants and ordered that the asylum seekers be released and brought to the Australian mainland.⁶⁶ However, the Full Federal Court allowed the appeal against North J’s decision and the majority held that the actions of the Executive with respect to the asylum seekers were within its power.⁶⁷ French J stated that the *Migration Act 1958* (Cth) did not evince ‘clear and unambiguous intention to deprive the Executive of the power to prevent entry into Australian territorial waters of a vessel carrying non-citizens apparently intending to land on Australian territory and the power to prevent such a vessel from proceeding further

⁶⁰ Inquiry into the Migration Act 1958 (Cth) at paragraph 5.37; Jupp, note 4 at p 184.

⁶¹ F. Feld, The Tampa Case: Seeking Refuge in Domestic Law, *Australian Journal of Human Rights* 8(1)(2002) AJHR 157; P. Lynch and P. O’Brien, From dehumanisation to demonisation: the MV Tampa and the denial of humanity’ (2001) 26(5) *Alternative Law Journal* 215.

⁶² In October 2001, the ‘children overboard’ incident, where an Indonesian vessel called SIEV X was intercepted by HMAS Adelaide within Australian waters off Christmas Island also resulted in a Select Senate Committee Inquiry into a Certain Maritime Incident in February 2002 (Inquiry into a Certain Maritime Incident); See also Crock, note 1 at p 113; Jupp, note 4 at p 188; P Mares, *Borderline: Australia’s Response to Refugees and Asylum Seekers in the Wake of the Tampa* at p 121.

⁶³ Feld, note 61; *The Border Protection Bill 2001* (Cth) was introduced into the Parliament on 29 August 2001 ‘to put beyond doubt the domestic legal basis for actions taken in relation to foreign ships within the territory of Australia’. However the Bill was rejected in the Senate. *The Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) was later assented to in order to retrospectively validate the actions of the Government with respect to the Tampa. See also S Taylor, Sovereign Power at the Border, *Public Law Review* 16 (2005) 55.

⁶⁴ Ibid.

⁶⁵ *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) FCA 1297; See also Crock, note 1 at pp 114-115 and Feld, note 61.

⁶⁶ Ibid.

⁶⁷ *Ruddock v Vadarlis* (2001) FCA 1329; M. Crock, Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law, *Sydney Law Review* 26 (2004) 51.

towards Australian territory and to prevent non-citizens on it from landing upon Australian territory'.⁶⁸ In dissent, Chief Justice Black held that there was no executive or prerogative power and that, even if such a power existed, it had been abrogated by the *Migration Act 1958* (Cth) because the legislation 'provides for a very comprehensive regime'.⁶⁹ The asylum seekers were prevented from disembarking on Australian territory and on 3 September they were transferred to the HMAS *Manoora* and taken to the Nauru, New Zealand and Papua New Guinea.⁷⁰

In response to the incident, on 26 September 2001, the Senate passed the following legislation on its final sitting day:

- *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth);
- *Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth);
- *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth);
- *Migration Legislation Amendment Act (No. 1) 2001* (Cth);
- *Migration Legislation Amendment Act (No. 6) 2001* (Cth); and
- *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).

These legislative amendments formed the basis for what has been described as the 'Pacific Solution' (later renamed the 'Pacific Strategy').⁷¹ In particular, the *Migration Amendment (Excision from the Migration Zone) Act 2001* excised Christmas, Ashmore, Cartier and Cocos (Keeling) Islands from the Migration Zone.⁷² Under the 'Pacific Solution', unauthorized boat arrivals that arrived at an excised place were diverted to a processing centre on Nauru and Manus Province. Under the legislative changes, asylum seekers who entered Australia at an excised offshore place were deemed not to have entered the Migration Zone for the purpose of applying for a visa.⁷³ This meant that asylum seekers who were processed at offshore processing centres at Nauru and Manus Province were generally processed by UNHCR and did not have access to refugee processing procedures that applied on the Australian mainland.⁷⁴ *The Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) also retrospectively validated any action taken by the Government in relation to the MV Tampa between 27 August and 26 September.⁷⁵ The legislation also gave Australian authorities the power to detain and move ships if they reasonably suspect that the ship will be or has been involved in a contravention of the *Migration Act 1958* (Cth).

⁶⁸ *Ruddock v Vadarlis* (2001) FCA 1329 at paragraph 201; See also Feld, note 61.

⁶⁹ *Ibid* at paragraph 64; see also Lynch & O'Brien, note 61 at p 217.

⁷⁰ *Ibid*.

⁷¹ Crock, note 1 at p 117.

⁷² J. Phillips, *Protecting Australia's Borders*, Australian Parliamentary Library, 24 November 2003.

⁷³ Crock, note 1 at p 117.

⁷⁴ Inquiry into a Certain Maritime Incident at paragraph 1.28; M Coombs, *Excising Australia: Are we really shrinking?* Australian Parliamentary Library, 31 August 2005.

⁷⁵ Crock, note 1 at p 166; The Act's long title stated that it was: 'An Act to validate the actions of the Commonwealth and others in relation to the MV Tampa and other vessels, and to provide increased powers to protect Australia's borders, and for related purposes'.

According to a report released by Oxfam and ‘A Just Australia’, the ‘Pacific Solution’ cost the Federal Government more than \$1 billion.⁷⁶ The ‘Pacific Solution’ was abolished earlier this year and asylum seekers are now processed at Christmas Island.⁷⁷ Despite the abolition of the ‘Pacific Solution’, some commentators have questioned whether the new policy that provides that asylum seekers are to be processed on Christmas Island will be any different. As stated by David Manne ‘we seem to be moving from the Pacific Solution to the Indian Ocean solution’. However, on the other hand academic commentator Ben Saul has suggested that abolishment of Temporary Protection Visas and the Pacific Solution are considerable improvements in domestic policy.⁷⁸

2.5 The National Inquiry into Children in Immigration Detention

In November 2001, the Human Rights and Equal Opportunity Commission (HREOC) announced the National Inquiry into Children in Immigration Detention. The Inquiry was established to examine whether the laws requiring the detention of children met Australia’s obligations under the *Convention on the Rights of the Child* (CRC).⁷⁹ Article 3 of the CRC states that the best interests of the child must be a primary consideration in all decisions affecting children. The CRC also states that no child shall be deprived of his or her liberty unlawfully or arbitrarily, the arrest detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort for the shortest period of time. Accordingly, the HREOC Inquiry considered the following issues:

- the safety and security of children in detention;
- the effect of detention on children’s mental and physical health;
- whether children in detention received and appropriate education;
- the care available to children with a disability in detention;
- the opportunity for children in detention to enjoy recreation and play;
- the care of unaccompanied children in detention; and
- children’s ability to practice their religion and culture in detention.⁸⁰

The HREOC report found that a total of 976 children were in immigration detention during the period 1999-2000; 1,923 children were in immigration detention during the period 2000-2001; 1,696 children were in immigration detention during the period 2001-2002 and 703 children were in detention between 2002-2003. The total number of unauthorized arrival children who applied for refugee protection visas between 1 July 1999 and 30 June

⁷⁶ C. Levett, Pacific Solution cost \$1 billion, *The Sydney Morning Herald*, 25 August 2007.

⁷⁷ Pacific Solution to end on Friday, *The Sydney Morning Herald*, 6 February 2008.

⁷⁸ B. Saul, *The Rudd Government’s Human Rights Record: One Year On*, New South Wales Young Lawyers, Sydney, 29 October 2008 at http://www.apo.org.au/linkboard/results.shtml?filename_num=237908.

⁷⁹ The Human Rights and Equal Opportunity Commission, A last resort? National Inquiry into Children in Immigration Detention (2004) at http://www.hreoc.gov.au/human_rights/children_detention_report/index.html.

⁸⁰ The Human Rights and Equal Opportunity Commission, *A last resort? A summary guide to the National Inquiry into Children in Immigration Detention* (2004) at http://www.humanrights.gov.au/human_rights/children_detention_report/index.html at p 5.

2003 was 2,184. The highest number of children in detention during the time of the inquiry was 842 on 1 September 2001.⁸¹ The inquiry also found that by the beginning of 2003, the average detention period for a child in immigration detention was one year, three months and 17 days. As at 26 December 2003, the average length of detention had increased to one year, eight months and 11 days and the longest period that a child was in immigration detention was five years, five months and 20 days.⁸²

The report also made mention of children who came to Australia as unaccompanied asylum seekers. This phenomenon has been the subject of a report written by Mary Crock and Jacqueline Bhabba, titled 'Seeking Asylum Alone', that considered the experiences of law, policy and practice regarding unaccompanied and separated children in Australia, the US and UK.⁸³ Further, according to the report the majority of children in detention came from Iraq, Afghanistan, Iran, the Palestinian Territories and Sri Lanka.⁸⁴ The inquiry also found that between 1 July 1999 and 30 June 2003, 2,184 children arrived in Australia without a valid visa and sought asylum. More than 92% of these children were found to be refugees and were granted a temporary protection visa (98% of Iraqi and 95% of Afghani refugees in this situation were granted a visa). Between 1 July 1999 and 30 June 2003, 3,125 children arrived in Australia with a valid visa and then sought asylum and only 25% of these children were found to be refugees. The majority of these types of asylum seekers came from Fiji, Indonesia and Sri Lanka.

The HREOC report found that immigration detention was detrimental to the physical and mental health of children and that the system was inconsistent with the CRC. The HREOC report made a number of recommendations, including the following:

- Children in immigration detention centres and residential housing projects should be released with their parents as soon as possible;
- Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the CRC. In particular the new laws should be amended to comply with the CRC:
 - (a) There should be a presumption against the detention of children for immigration purposes;
 - (b) A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention;
 - (c) There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes;
 - (d) Courts should be guided by the following principles:
 - 1) detention of children must be a measure of last resort and for the shortest appropriate period of time;
 - 2) the best interests of the child must be a primary consideration;

⁸¹ Ibid.

⁸² The Human Rights and Equal Opportunity Commission, note 80 at p 12.

⁸³ See also M. Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children*, Themis Press, Sydney (2007); J. Bhabba and M. Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the U.K. and the U.S.*, Themis Press, Sydney (2007).

⁸⁴ The Human Rights and Equal Opportunity Commission, note 80 at p 14.

- 3) the preservation of family unity;
 - 4) special protection and assistance for unaccompanied children.
- An independent guardian should be appointed for unaccompanied children and they should receive appropriate support;
 - Minimum standards of treatment for children in immigration detention should be codified in legislation;
 - There should be a review of the impact on children of legislation that creates ‘excised offshore places’ and the ‘Pacific Solution’.⁸⁵

Although the report was criticised by the Federal Government as ‘unbalanced’ and ‘backward looking’ at the time of its release, it became a significant catalyst for a number of changes.⁸⁶ Section 4AA was subsequently inserted into the *Migration Act 1958 (Cth)* through the *Migration Amendment (Detention Arrangements) Act 2005 (Cth)*, which affirms the principle that a child should be detained as a measure of last resort and children were subsequently released from immigration detention.⁸⁷ However, the *Australian* reported that the previous Federal Attorney General ‘has expressed regret about how long it took for the government to release these children from detention’.⁸⁸

2.6 The Palmer and Comrie Reports⁸⁹

In 2005, it was discovered that an Australian permanent resident with mental illness who claimed to be a German tourist had been detained in a Queensland prison for six months and in Baxter Immigration Detention Centre for four months due to a failure of officials to recognize her true identity.⁹⁰ Ms Rau was released from immigration detention after her family recognized her in a newspaper article.⁹¹ This incident led to an Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (the Palmer Inquiry). The terms of reference of the Inquiry were:

- To examine and make findings on the sequence of events that gave rise to her being held in immigration detention;
- To examine and make findings on the circumstances, actions and procedures which resulted in Ms Rau remaining unidentified during the period in question;
- To examine and make findings on measures taken to deal with Ms Rau’s medical condition and other care needs during that period;
- To examine and make findings on the systems and processes of, and co-operation between, the relevant State and Commonwealth agencies in relation to identification or

⁸⁵ Ibid at pp 68 and 69.

⁸⁶ C. Banham, Detention policy damned as cruel to children, *The Sydney Morning Herald*, 14 May 2004.

⁸⁷ Ibid.

⁸⁸ J. Lyons, Philip Ruddock’s detention regret: kids, *The Australian*, 14 October 2008.

⁸⁹ See M. Palmer, *Inquiry into the circumstances of the Immigration Detention of Cornelia Rau: Report*, Australian Parliamentary Library, Canberra, July 2005; P. Prince, *Detention of Cornelia Rau: legal issues*, Australian Parliamentary Library, 31 March 2005.

⁹⁰ Crock, note 1 at p 156.

⁹¹ Prince, note 89.

- location of missing persons and provision of mental health services; and
- To recommend any necessary system or process improvements.⁹²

As well as investigating the particular issues that resulted in Ms Rau's detention, a number of systemic issues were raised in the Palmer Report. The report addressed the obligation of the Department of Immigration and Citizenship to detain people 'known or reasonably suspected' of being 'unlawful non-citizens'. Section 189(1) *Migration Act 1958* (Cth) obliges officers to detain anyone that they know or reasonably suspect of being an 'unlawful non-citizen', as defined by section 14 *Migration Act 1958* (Cth). The report noted that it had not been fully understood that section 189(1) *Migration Act 1958* (Cth) operates in a mandatory way only after an officer has formed the requisite 'reasonable suspicion' that a person is an unlawful non-citizen.⁹³ The report also stated that the officers did not appreciate that section 189(1) *Migration Act 1958* (Cth) places a strict onus on officers to make due inquiries to ensure that any suspicions of unlawful status are well founded and continue to be well founded, even after the initial decision to detain a person.

Accordingly, the Palmer Report stated that the initial detention of Ms Rau was based on a reasonable suspicion formed from the information that Ms Rau had provided to Departmental officials as well as their inquiries on Departmental databases. However, the report criticized the inadequacy of the attempts of Departmental officers to continue to verify the reasonableness of the decision to detain Ms Rau. The following comments were made in relation to the operation of section 189(1) *Migration Act 1958* (Cth):

Comment was made to the Inquiry on a number of occasions that the operation of s 189(1) was not reviewable since it was mandatory in nature and immigration detention was administrative, not criminal. There did not appear to be – even at senior management level – an understanding of the distinction between the discretionary nature of the detention that must follow the forming of a “reasonable opinion”.⁹⁴

During 2005, it was also discovered that Vivian Alvarez Solon, an Australian citizen, had been deported to the Philippines. Accordingly, the Palmer Inquiry was extended to cover this incident (the Comrie Report) and the Commonwealth Ombudsman also investigated the incident involving Ms Solon.⁹⁵ Ms Solon first came to the attention of immigration officers in April 2001 when a social worker found a woman in the streets, who was subsequently admitted to a psychiatric ward of Lismore Base Hospital. Between April 2001 and July 2001, Departmental officials interviewed Ms Solon to determine her immigration status. Ms Solon was deported to Manila in July 2001, where she remained until May 2005. The Comrie Report made a number of recommendations with respect to

⁹² The Palmer Report, note 89 at p 196.

⁹³ Ibid at pp 21-22. See also *Goldie v Commonwealth* (2002) 188 ALR 708, where the Full Federal Court held that the exercise of reasonable suspicion 'must be justifiable upon objective examination of relevant material' and that an officer must 'make efforts of search and inquiry that are reasonable in the circumstances'.

⁹⁴ The Palmer Report, note 89 at p 25.

⁹⁵ The Commonwealth Ombudsman, *Inquiry into the circumstances of the Vivian Alvarez Matters*, Report No 03/2005; M. Palmer, *Inquiry into the Circumstances of the Immigration Detention of Vivian Alvarez Solon*, Commonwealth of Australia, Canberra (2005).

the Department of Immigration and Citizenship, in particular its culture and work practices.⁹⁶ A number of changes were made by the Department of Immigration and Citizenship after the two reports.⁹⁷ However, according to one commentator:

In his speech Chris Evans stated that the department “will have to justify a decision to detain – not presume detention.” While alternatives to detention have become more commonplace recently, this approach will still be discomforting for a department not known for the quality of its decision making or for adjusting its procedures to suit individual circumstances...Mick Palmer and Neil Comrie, who investigated the Cornelia Rau and Vivian Alvarez cases, were appalled by the department’s inability to undertake rudimentary investigations and to check facts. They were scathingly critical of the department’s “assumption culture,” which turned officers’ suspicions into actions against vulnerable individuals... in July 2008, the *Canberra Times*’s editor-at-large, Jack Waterford, delivered an...analysis. He reported that, despite the Rau and Alvarez scandals, “an old departmental culture” had survived unscathed and continued to regard immigration enforcement as “a thing in itself, outside the mainstream of administrative law and judicial review, and subject as little as possible to broader precedents about natural justice, rights of review and access to the law”.⁹⁸

The Department of Immigration and Citizenship’s annual report, which was tabled in Parliament on 31 October 2008, stated that the 247 cases, which were referred to the Commonwealth and Immigration Ombudsman for review because they may have involved wrongful immigration detention, have now been reassessed. The Ombudsman’s reports found legal or factual deficiencies in most of the cases and highlighted problematic practices in the use of the detention power in section 189 *Migration Act 1958* (Cth). The annual report indicated that a ‘247 Detention Remedial Action Project’ has been established by the Department of Immigration and Citizenship to review each case and to determine and implement appropriate remedies.⁹⁹

⁹⁶ The Department of Immigration and Citizenship, *Palmer Report: 2 years of progress*; Media Release, 1 July 2007 at <http://www.immi.gov.au/media/media-releases/2007/d07034.htm>; A Metcalfe, *Implications of the Palmer Report Future Changes*, 25 November 2007 at <http://www.immi.gov.au/media/media-releases/2005/ippa-speech.pdf>

⁹⁷ Ibid.

⁹⁸ G. Nicholls, *Immigration’s culture war*, 21 October 2008 at http://www.apo.org.au/webboard/comment_results.chtml?filename_num=237378; D. Palmer, The values shaping Australian Asylum Policy: The Views of Policy Insiders, *The Australian Journal of Public Administration* 67(3) (2008) 370; See also G. Nicholls *Deported, A History of Forced Departures from Australia*, UNSW Press, 2007 and C. Banham, Beheaded after seeking asylum in Australia, *The Sydney Morning Herald*, 1 November 2008.

⁹⁹ The Department of Immigration and Citizenship, *Annual Report 2007-2008* (The Department of Immigration and Citizenship Annual Report) at pp 5 and 222: <http://www.immi.gov.au/about/reports/annual/2007-08/html/index.htm>

3. ASYLUM SEEKERS: A STATISTICAL ANALYSIS

3.1 The Offshore and Onshore Programs

Australia has both an Offshore and an Onshore Humanitarian Program. The Offshore Program grants visas to two categories of people, namely refugees and those people who enter Australia under the Special Humanitarian Program (SHP).¹⁰⁰ The Special Humanitarian Program was established in 1981 for people who do not meet the United Nations' definition of a refugee but who faced gross violation of human rights in their home country.¹⁰¹ The majority of persons in the 'refugee category' are identified by UNHCR as refugees and then referred by UNHCR to Australia. During 2007-2008, 13,014 visas were granted under the Humanitarian Program, which included 10,799 visas under the Offshore Program.¹⁰² The visas that were granted under the Offshore Program included 6,004 Refugee Visas (46%) and 4,795 Special Humanitarian Program Visas (37%). The remaining 2,215 (17%) visas were Protection and other visas granted to Onshore applicants.¹⁰³ The following table shows Humanitarian Program Grants by category between 2003-2004 and 2007-2008.¹⁰⁴

Category	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008
Refugee	4,134	5,511	6,022	6,003	6,004
Special Humanitarian	8,927	6,755	6,836	5,275	5,026
Onshore Protection	788	895	1,272	1,701	1,900
Temporary Humanitarian Concern	2	17	14	38	84
Total	13,851	13,178	14,144	13,017	13,014

Between 2007 and 2008, the Offshore visa grants by country of birth were as follows: Burma/ Myanmar: 2,961; Iraq: 2,215; Afghanistan: 1,185; Sudan: 1,158; Liberia: 410; Congo (DRC): 348; Burundi: 303; Iran: 302; Sierra Leone: 267; and Sri Lanka: 243.¹⁰⁵ The Accordingly, the Offshore visa component granted visas to people from Africa (30.48%); the Middle East and South West Asia (35.25%) and people from the Asia/Pacific region (33.67%).¹⁰⁶ The following table outlines the Offshore Settlement grants by region between 2003-2004 and 2006-2007:¹⁰⁷

¹⁰⁰ Crock, note 1 at p 15.

¹⁰¹ Australian Parliamentary Library, note 50.

¹⁰² The Department of Immigration and Citizenship Annual Report, note 99 at p 79.

¹⁰³ Ibid.

¹⁰⁴ The Department of Immigration and Citizenship, Australian Immigration Fact Sheet 60: Australia's Refugee and Humanitarian Program at <http://www.immi.gov.au/media/fact-sheets/60refugee.htm>

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

Region	2003-2004	2004-2005	2005-2006	2006-2007	2006-2007
Europe	354	20	55	50	59
Middle East and SW Asia	2,867	3,174	4,335	3,126	3,807
Africa	8,353	8,486	7,100	5,695	3,291
Asia	221	415	1,260	2,315	3,636
America	7	1	8	0	6
Total	11,802	12,096	12,758	11,186	10,799

These trends reflect the resettlement caseloads in these regions and the resettlement priorities of the UNHCR. Accordingly, the following table shows the refugee population by UNCHR region as at the end of 2007:¹⁰⁸

UNCHR Regions	Refugees	People in Refugee-like situations	Total refugees end-2007
Central Africa and Great Lakes	1,100,100	-	1,100,100
East and Horn of Africa	815,200	-	815,200
Southern Africa	181,200	-	181,200
West Africa	174,700	-	174,700
Total Africa	2,271,200	-	2,271,200
Americas	499,900	487,600	987,500
Asia and Pacific	2,675,900	1,149,100	3,825,000
Europe	1,580,200	5,100	1,585,300
Middle East and North Africa	2,654,000	67,600	2,721,600
Total (excluding North Africa)	9,681,200	1,709,400	11,390,600

In the first half of 2008, the Minister for Immigration and Citizenship announced that Australia's refugee and humanitarian intake for 2008-2009 will increase to 13, 500.¹⁰⁹ This number will include 6,500 refugees, of which 500 places will be for people affected by the conflict in Iraq.¹¹⁰ In his media release, the Minister for Immigration said that 'over the next 12 months Australia's refugee and humanitarian intake from Africa will be 3,548 people, an increase of 300 from last year'. The Minister continued: 'The new priorities continue Australia's commitment to refugees which has seen more than 700 000 humanitarian entrants come to Australia since World War 11'.¹¹¹ He also highlighted that Australia is one of the world's top three humanitarian resettlement countries along with the United States and Canada.¹¹²

In contrast to the Offshore Program, the Onshore Program involves giving protection visas

¹⁰⁸ UNHCR, note 41 at p 7.

¹⁰⁹ The Hon. Chris Evans, *Australia balances refugee priorities*, 20 June 2008 <http://www.minister.immi.gov.au/media/media-releases/2008/ce08056.htm>

¹¹⁰ Ibid; The Department of Immigration and Citizenship Annual Report, note 99 at p 9.

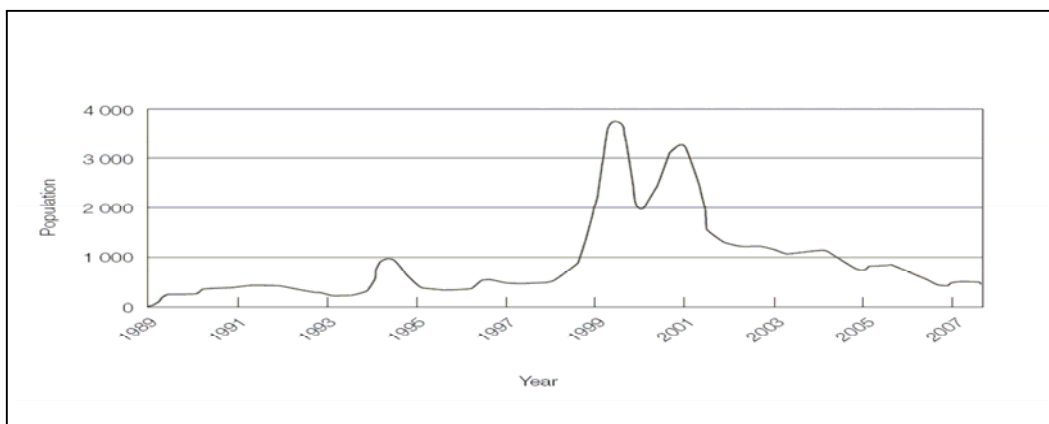
¹¹¹ Ibid.

¹¹² Ibid.

to asylum seekers who claim refugee status after their arrival in Australia.¹¹³ During the period between 2007-2008, 3987 initial Protection visa applications were lodged, which is a 6.5% increase from 3,743 in 2006-2007.¹¹⁴ The Onshore Program has always been only a minority part of the Humanitarian Program and the majority of applicants arrive in Australia on a valid visa and then seek to change their status when they arrive.¹¹⁵ Asylum Seekers are also prevented from making a claim for refugee status if they have had access to protection in any country other than their country of origin.¹¹⁶ This has been described as the '7 day rule', whereby Australia has no protection obligations to anyone who failed to take all possible steps to seek asylum in a country where they spent over seven days prior to arriving in Australia.¹¹⁷

3.2 Immigration Detention

The number of people in Immigration Detention has greatly reduced over the last ten years and the number of people in immigration detention is one of the lowest figures since March 1997.¹¹⁸ However, there is ongoing debate regarding the extent to which any downward trend in asylum seekers may be attributed to a policy of mandatory detention.¹¹⁹ The following graph represents trends of the number of asylum seekers in immigration detention between 1989 and 2007:¹²⁰



The downward trend in the number of people in immigration detention between 2005 and

¹¹³ Crock, note 1 at p 16.

¹¹⁴ The Department of Immigration and Citizenship Annual Report, note 99 at p 88; T Hatton & A Lim, Australian Asylum Policy: The Tampa Effect, *Agenda*, Volume 12, Number 2, 2005 at p 116.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

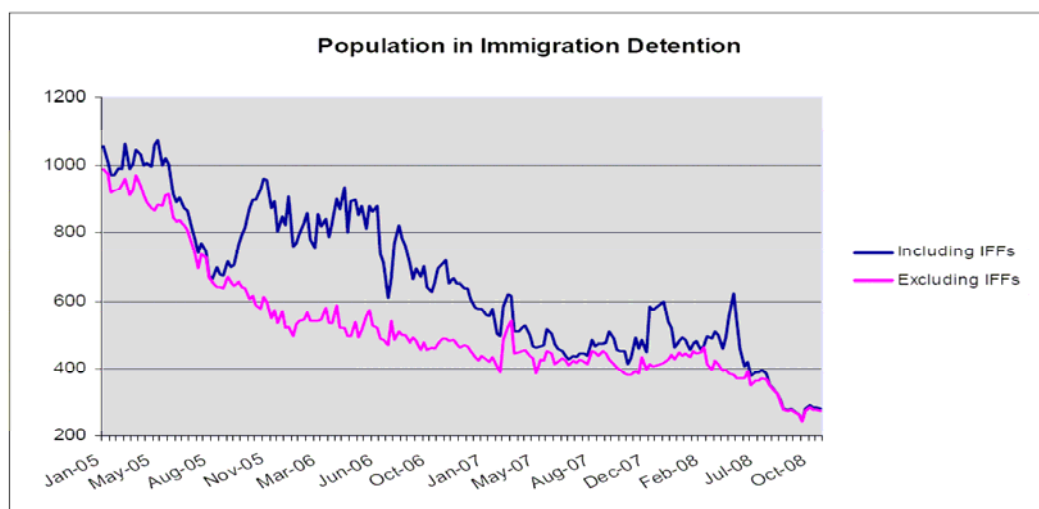
¹¹⁷ Crock, note 1 at p 110; S Kumand et al, *The Immigration Kit*, 8th Edition, Sydney, 2008 at p 516.

¹¹⁸ Paul Kelly, Policy overboard, *The Australian*, 2 August 2008.

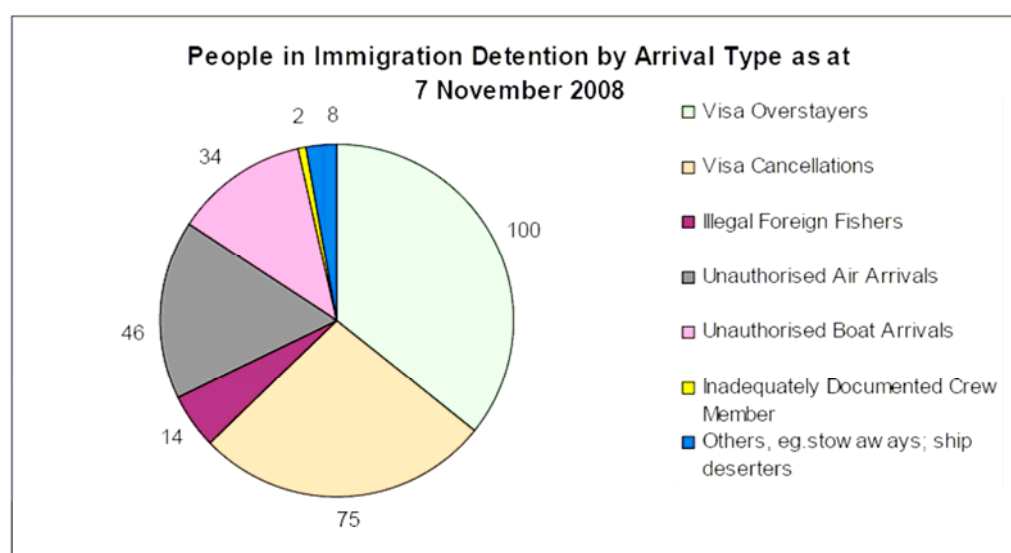
¹¹⁹ Inquiry into the Migration Act 1958 (Cth) at paragraph 5.39.

¹²⁰ The Department of Immigration and Citizenship Annual Report, note 99 at p 226; See also Hatton & Lim, note 114.

2008 is also represented in the following graph:¹²¹



Statistics from the Department of Immigration and Citizenship indicate that as at 7 November 2008, there were 279 people in immigration detention, including 44 people in community detention. Of the 279 people, 14 were illegal foreign fishers ('IFFs').¹²² There were 175 (63% of the total immigration detention population) who had arrived in Australia lawfully and then been taken into immigration detention for overstaying their visa or breaching their visa conditions. Eighty people arrived in Australia unlawfully by boat or air, which is 29% of the immigration detention population.¹²³



The Department of Immigration and Citizenship's recent Annual Report also indicates that 4,514 people were taken into immigration detention in 2007-2008, compared to 4,718 in 2006-2007. There were also 4,601 people who were released or removed from immigration detention during the period 2007-2008, with approximately 78% removed overseas. Of the 4,514 people taken into immigration detention during 2007-2008:

¹²¹ The Department of Immigration and Citizenship, note 20.

¹²² Ibid.

¹²³ Ibid.

- 1,865 were people who had been living in the community but overstayed or breached visa conditions representing 41.3 % of the total;
- 1,232 were illegal foreign fishers representing 27.3 % of the total;
- 452 were unauthorized arrivals (423 by air and 29 by boat) representing 10.0 % of the total; and
- 965 were in other categories representing 21.4 % of the total.¹²⁴

The number of people in immigration detention for the period 2007-2008 may also be divided as follows:¹²⁵

Category	Number
Illegal foreign fishers	1,232
Visa overstayers taken into detention	1,283
Total number of people taken into detention	4,514
Illegal foreign fishers in detention as at 30 June 2008	4,601
Visa overstayers or people in detention as at 30 June 2008	26
Visa overstayers or people who breached their visa conditions as at 30 June 2008	323
Total number of people in detention as at 30 June 2008	402

Asylum seekers held in immigration detention are accommodated in a variety of types of immigration detention facilities, including:

- Immigration Detention Centres (IDC), which accommodate a range of unlawful non-citizens, mainly people who have over-stayed their visa, people in breach of their visa conditions or people who were refused entry at Australia's international airports;
- Immigration Residential Housing (IRH), which provides a flexible detention arrangement to enable people in immigration detention to live in family-style accommodation; and
- Immigration Transit Accommodation (ITA), which provides accommodation to house people who are a low security risk.¹²⁶

Immigration Detention facilities may be found in the following locations in Australia:

- Brisbane Immigration Transit Accommodation: opened in November 2007;
- Christmas Island Immigration Detention Centre: located offshore and provides accommodation for unauthorised boat arrivals;
- Maribyrnong Immigration Detention Centre: located in suburban Melbourne and has been operational since 1983;
- Melbourne Immigration Transit Accommodation: located in suburban Melbourne and was opened in June 2008;

¹²⁴ The Department of Immigration and Citizenship Annual Report, note 99 at p 124.

¹²⁵ The Department of Immigration and Citizenship Annual Report, note 99 at p 2.

¹²⁶ The Department of Immigration and Citizenship at <http://www.immi.gov.au/managing-australias-borders/detention/facilities/about/immigration-detention-facilities.htm>.

- Northern Immigration Detention Centre: located near Darwin in the Northern Territory and is a facility primarily for illegal foreign fishers;
- Perth Immigration Detention Centre: located near the airport in Perth, Western Australia and provides accommodation primarily for people in breach of border security and visa compliance requirements;
- Perth Immigration Residential Housing: located in suburban Perth and provides alternative accommodation in a residential setting;
- Sydney Immigration Residential Housing: located next to Villawood IDC and provides alternative accommodation in a residential setting; and
- Villawood Immigration Detention Centre: located in suburban Sydney, New South Wales and provides accommodation for people in breach of border security and visa compliance requirements.¹²⁷

As at 7 November 2008, the location of asylum seekers in immigration detention is provided in the following two graphs:¹²⁸

Place of Immigration Detention	Men	Women	Children	Total
Villawood IDC	107	11		118
Northern IDC	8	0		8
Maribyrnong IDC	41	2		43
Perth IDC	6			6
Christmas Island IDC	14			14
Total in IDCs	176	13	0	189
Sydney Immigration Residential Housing	9	1	0	10
Perth Immigration Residential Housing	4	2	0	6
Brisbane Immigration Transit Accommodation	1		1	2
Melbourne Immigration Transit Accommodation		1	0	1
Total in Immigration Residential Housing and Immigration Transit Accommodation	14	4	1	19
Community Detention	21	10	13	44
Alternative Temporary Detention in the Community	14	2	9	25
Restricted on Board Vessels in Port	2			2
Total	227	29	23	279

The nationality of people in immigration detention as at 7 November 2008 is provided in the table below:¹²⁹

¹²⁷ The Department of Immigration and Citizenship at <http://www.immi.gov.au/managing-australias-borders/detention/facilities/locations/index.htm>.

¹²⁸ Ibid.

¹²⁹ The Department of Immigration and Citizenship, note 20.

Nationalities	Male	Female	Male Child under 18 years old	Female Child under 18 years old	Total
China, People's Republic Of	63	16	1	3	83
Afghanistan	21		8	1	30
Indonesia	18	2	3	2	25
New Zealand	19	2			21
Vietnam	19				19
South Korea	7	2			9
Iran	6	2		1	9
Iraq	5	3			8
Bangladesh	5				5
India	4				4
United Kingdom	4				4
Sri Lanka	4				4
Other	52	2	2	2	58
Total	227	29	14	9	279

The Department of Immigration and Citizenship's statistics also indicate that the length of time of asylum seekers in immigration detention varies from 7 days or less to greater than 2 years. Of the 279 asylum seekers in immigration detention as at 7 November 2008, 12% had been in immigration detention between one week and one month and 15% had been in immigration detention for more than two years. These statistics are provided in the table below:¹³⁰

Period Detained	Total	% of Total
7 days or less	23	8%
1 week – 1 month	33	12%
1 month – 3 months	61	22%
3 months – 6 months	30	11%
6 months – 12 months	38	14%
12 months – 18 months	33	12%
18 months – 2 years	19	6%
Greater than 2 years	42	15%
Total	279	100%

4. THE CURRENT POLICY

In a paper titled ‘New Directions in Detention – Restoring Integrity to Australia’s Immigration System’, the Federal Minister for Immigration and Citizenship, The Hon. Chris Evans MP outlined a new set of values for immigration detention. These seven new immigration detention values are as follows:

1. Mandatory detention is an essential component of strong border control;
2. To support the integrity of Australia’s immigration program, three groups will be subject to mandatory detention:
 - a. all unauthorized arrivals, for management of health, identity and security risks to the community.
 - b. unlawful non-citizens who present unacceptable risks to the community;; and
 - c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC);
4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention including the appropriateness of both the accommodation and the services provided would be subject to regular review;
5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time;
6. People in detention will be treated fairly and reasonably within the law;
7. Conditions of detention will ensure the inherent dignity of the human person.¹³¹

4.1 A ‘Risk-Based’ Approach to Immigration Detention

As already mentioned, the new immigration detention values are founded on a ‘risk-based’ approach to immigration detention. Under the new policy mandatory detention will only apply to people who pose a risk to society, who repeatedly breach visa conditions and those who arrive in Australia by boat, while identity and security checks are being carried out.¹³²

This means that a person who is not a threat to the community will be able to remain in the community while their visa status is resolved.¹³³ In his speech, the Minister stated:

[d]esperate people are not deterred by the threat of harsh detention – they are often fleeing much worse circumstances. The Howard government’s punitive policies did much damage to those individuals detained and brought great shame on Australia.¹³⁴

The new policy is a significant shift away from the previous policy, which commentators have suggested was founded on principles such as deterrence.¹³⁵ However, others have

¹³¹ The Hon. Chris Evans MP, Minister for Immigration and Citizenship, note 4.

¹³² Narushima, note 10.

¹³³ Samantha Maiden, Detention centres to be last resort under new immigration policy, *The Australian*, 26 September 2008.

¹³⁴ Ibid.

¹³⁵ C. Lambert & Pickering, Deterrence: Australia’s Refugee Policy, *Current Issues in Criminal Justice*, 14(1) July (2002) 65.

expressed concerns that the new policy will encourage people smugglers, which will result in a subsequent increase the number of asylum seekers who arrive in Australia by boat.¹³⁶

4.2 Review of Long Term Immigration Detention Cases

During this year, the Minister for Immigration and Citizenship also carried out a review of 72 long-term immigration detention cases. Out of these 72 cases, 31 cases were placed on a pathway to visas, 24 will be removed from Australia and 17 people were subject to ongoing legal proceedings at the time of the review. He also indicated that at least 31 of the 72 cases should not have been in immigration detention. During a period of two years, the Department of Immigration and Citizenship failed to remove 24 people from the country who should have been removed. The Minister indicated that he had asked the Department of Immigration and Citizenship to review all current long-term detainees, using the same principles that had been used to review the 72 cases of immigration detainees who have been in immigration detention for more than two years.¹³⁷

Another important change is that a senior official in the Department of Immigration and Citizenship will be required to review a detainee's case every three months to certify that further immigration detention of a person is justified.¹³⁸ The Immigration Ombudsman will also carry out a review of each detainee's case every six months. Under Section 486N *Migration Act 1958* (Cth) the Secretary of the Department of Immigration and Citizenship was previously required to provide the Ombudsman with a report about a person's detention when they have been in detention for two years or more. Section 486O also requires the Immigration Ombudsman to give the Minister an assessment of the appropriateness of the arrangements of a person's detention.¹³⁹ Accordingly, this new policy provides increased oversight of the decisions of the Department of Immigration and Citizenship.

4.3 Reversal of Onus of Proof for Immigration Detention

Another key change in the current Federal Government's immigration detention policy is that the onus of proof will be reversed when determining the ongoing detention of an asylum seeker.¹⁴⁰ According to the new policy, a decision maker in the Department of Immigration and Citizenship will be required to justify why a person should remain in detention. This means that the Department of Immigration and Citizenship will be required to prove that it has a sufficient reason to hold a person in immigration detention, which shifts the onus away from an asylum seeker to show why they should not be detained.¹⁴¹ This has been described as one of the most significant changes in the current Federal

¹³⁶ Fitzgerald, note 6.

¹³⁷ Joint Standing Committee on Migration Inquiry into Immigration Detention, Public Hearing, 24 September 2008 at M4.

¹³⁸ The Hon. Chris Evans MP, Minister for Immigration and Citizenship, note 4.

¹³⁹ However, pursuant to Section 486O(4), the Minister is not required to follow the recommendation of the Commonwealth Ombudsman in relation to the release of a detainee into the community.

¹⁴⁰ Williams, note 14.

¹⁴¹ Ibid.

Government's new policy.¹⁴²

4.4 Children in Detention

In his announcement of the new policy, the Minister also stated that 'Labor's detention values explicitly ban the detention of children in immigration detention centres'.¹⁴³ The issue of children in detention has been the subject of much media attention and scrutiny in recent years.¹⁴⁴ An inquiry was released by the Human Rights and Equal Opportunity Commission in 2004 titled 'A last resort? National Inquiry into Children in Immigration Detention'.¹⁴⁵ This inquiry considered whether Australia's immigration detention laws and its treatment of children in immigration detention complied with the United Nations Convention on the Rights of the Child. In 2005, the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) introduced section 4AA(1) into the *Migration Act 1958* (Cth), which states that Parliament 'affirms as a principle that a minor shall only be detained as a measure of last resort'.¹⁴⁶

The Human Rights and Equal Opportunity Commission has expressed concerns that section 4AA *Migration Act 1958* (Cth) is a 'statement of principle only and does not create legally enforceable rights'.¹⁴⁷ Further, Section 4AA(1) *Migration Act 1958* (Cth) is qualified by section 4AA(2) which states that 'for the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a Residence Determination'. A Residence Determination is an alternative form of detention, whereby a person lives in the community but must abide by certain conditions, which may include residence at a specified place.¹⁴⁸ The issue of what constitutes 'detention' is another issue that will need to be resolved as the new policy is implemented in the future. In his paper outlining the new immigration detention policy, the Minister for Immigration and Citizenship stated:

Children in the company of family members will be accommodated in immigration residential housing (IRH) or community settings. The expansion of community housing options and the resolution of definitional issues around what constitutes detention under the Migration Act will be pursued as priorities.¹⁴⁹

In a recent newspaper article, Liberal MP Petro Georgiou was reported as criticizing the

¹⁴² Williams, note 14.

¹⁴³ The Hon Chris Evans, Minister for Immigration and Citizenship, note 4.

¹⁴⁴ C. Banham, Detention policy damned as cruel to children, *The Sydney Morning Herald* 14 May 2005; J. Lyons, Philip Ruddock's detention regret: kids, *The Australian*, 14 October 2008.

¹⁴⁵ The Human Rights and Equal Opportunity Commission, note 80.

¹⁴⁶ Ibid.

¹⁴⁷ The Human Rights and Equal Opportunity Commission, Submission to the Federal Inquiry into Immigration Detention in Australia (2008) at paragraphs 50-51.

¹⁴⁸ The Human Rights and Equal Opportunity Commission, Submission to the Federal Inquiry into Immigration Detention in Australia (2008) at paragraph 53.

¹⁴⁹ The Hon. Chris Evans, Minister for Immigration and Citizenship, note 4.

Department of Immigration and Citizenship for continuing to keep children in residential housing and allowing them to be separated from a parent.¹⁵⁰ He recently told a public hearing of the Joint Standing Committee on Migration Inquiry into Immigration Detention:

I regard that as a breach of the commitments that were entered into that children and their families would be put into unsupervised community settings. An immigration residential setting is not a community setting; it is a highly supervised, controlled environment where people cannot come and go at will, they are under the supervision of immigration officers or contractors.¹⁵¹

In response, the Department of Immigration and Citizenship drew attention to:

[P]rinciple 3 which says ‘Children will not be detained in an immigration detention centre.’ Principle 5 says ‘Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.’ I am not aware of any intention to have a situation where children would be kept in secure accommodation for anything other than a very, very short period of time, if at all.¹⁵²

As at 7 November 2008, Department of Immigration and Citizenship statistics indicate that there were 23 children aged under the age of 18 years old in immigration detention. Thirteen of these children were detained in the community under residence determinations, nine were in alternative temporary detention in the community (eight on Christmas Island) and one child was in immigration transit accommodation.¹⁵³ The location of these children in detention is set out in the table below:¹⁵⁴

Type	Total
Immigration Detention Centres	0
Immigration Residential Housing (IRH)	0
Immigration Transit Accommodation	1
Alternative Temporary Detention in the Community	9
Community Detention	13
Total	23

4.5 Christmas Island Detention Facility

Under the new immigration detention policy, asylum seekers who arrive by boat in excised territories such as Christmas Island will be subject to mandatory detention and processed offshore.¹⁵⁵ In his announcement of the new immigration policy, the Minister for

¹⁵⁰ Sarah Smiles, Not good enough, says Liberal MP, of children in detention, *The Age*, September 25, 2008.

¹⁵¹ Joint Standing Committee on Migration Inquiry into Immigration Detention, Public Hearing, 24 September 2008 at M9.

¹⁵² Ibid.

¹⁵³ Department of Immigration and Citizenship, note 20.

¹⁵⁴ Ibid.

¹⁵⁵ The Hon. Chris Evans MP, Minister for Immigration and Citizenship, note 4.

Immigration and Citizenship stated that ‘the architecture of excision of offshore islands and non-statutory processing of persons who arrive unauthorised at an excised place will remain’ and that those ‘unauthorised arrivals will be processed on Christmas Island’. These asylum seekers will be held at Christmas Island while they undergo health, security, identity and other checks to establish their identity and reasons for traveling to Australia. However, in contrast to the previous policy, asylum seekers who are processed at an excised place such as Christmas Island will have access to publicly funded legal advice and will be able to apply for an independent review of an adverse decision.¹⁵⁶ The Minister continued:

Labor believes that the excision and offshore processing at Christmas Island will signal that the Australian Government maintains a very strong anti people-smuggling stance. It also reinforces in the minds of our neighbours that strong commitment and the value we place on their cooperation.

Although no decision has been taken on the boundaries of the current excision zone, the Rudd Government believes that a strong border security regime is in the national interest and supports the integrity of our immigration system as well as our humanitarian and refugee programs.¹⁵⁷

In July this year a press article said of the Christmas Island facility:

The controversial 800-person detention centre on Christmas Island, which has cost taxpayers more than \$300 million to upgrade and remains empty, will be used to cope with any major influxes of boat people.¹⁵⁸

In September and October 2008, two groups of asylum seekers were taken to Christmas Island after the *ACV Triton* and the *HMAS Larrakia* intercepted their boats.¹⁵⁹ The first boat had one female and eleven males from Afghanistan and Iran on board and was intercepted on 30 September 2008.¹⁶⁰ On 7 October 2008, 14 asylum seekers were picked up from a boat in the Timor Sea.¹⁶¹ The Minister stated: ‘Despite this latest arrival, 2008 has seen the smallest number of arrivals in three years’.¹⁶² The Minister for Immigration and Citizenship had stated that the interception of the group ‘demonstrated the Rudd Government’s border security arrangements were working’.¹⁶³ As at 17 October 2008,

¹⁵⁶ Ibid.

¹⁵⁷ Ibid; See also *The Hon. Chris Evans MP, Minister for Immigration and Citizenship, Labor unveils new risk-based detention policy*, 29 July 2008 at <http://www.minister.immi.gov.au/media/media-releases/2008/ce08072.htm>.

¹⁵⁸ N. Berkovic, Clash looms over asylum-seeker detention policy, *The Australian*, 30 July 2008; See also Dimasi, note 11.

¹⁵⁹ M Dimasi, The Christmas Island Challenge, 4 November 2008 at http://www.apo.org.au/webboard/comment_results.chtml?filename_num=238099.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² P Taylor, Suspected asylum seekers in Christmas Island, *The Australian*, 18 October 2008.

¹⁶³ Ibid.

eight males were held in detention in the Phosphate Hill Centre and the rest of the group was held in 'Alternative Temporary Detention in the Community', which the Department of Immigration and Citizenship states is 'detention in the community with a designated person in private houses; correctional facilities; watch houses, hotels; apartments; foster care and hospitals'.¹⁶⁴ Michelle Dimasi has noted: 'The Phosphate Hill centre is quite separate from the new \$400 million mega detention centre, which isn't being used to house the new arrivals because it is too expensive to run with fewer than 100 residents'.¹⁶⁵ Accordingly, Dimasi was critical of the immigration detention of the two groups of asylum seekers on Christmas Island:

The events on Christmas Island over the past five weeks suggest that transparency and accountability are still an issue under the Rudd government's asylum seeker and detention policy. This is not only a problem for asylum seekers (both families and detainees) held on Christmas Island but also a challenge for this small island community in Australia's excision zone.¹⁶⁶

However, in contrast another press article praised the Department of Immigration for 'moving swiftly and co-operatively' to assess the protection claims of 26 Afghan and Iranian asylum seekers on Christmas Island'.¹⁶⁷ Although the author also confirmed that the asylum seekers are held in the old detention centre, while the '\$396 million centre that looks like a high security prison built remains empty', the article continued:

In the first test of how the Rudd Government would deal with asylum seekers arriving by boat, Steven Glass, a volunteer for the Refugee Advice and Casework Service who spent a week on Christmas Island, said he had never seen anything like the dramatic change in attitude of both Department of Immigration and Citizenship officers and the GSL guards.¹⁶⁸

4.6 Responses to the New Immigration Policy

There have been a number of responses to the new policy towards asylum seekers. While some commentators argue that the changes reflect the values of Australia, others express concerns that it will send a message to people smugglers that Australia is 'open for business again'.¹⁶⁹ Some have suggested that asylum seekers, knowing that they are unlikely to meet the legal requirements of a visa may 'disappear' into the community.¹⁷⁰ Opposition immigration spokesperson, Christopher Ellison MP, expressed this concern and

¹⁶⁴ Ibid.

¹⁶⁵ C. Levett, Refugee cases moving quickly, *The Age*, 6 November 2008.

¹⁶⁶ Dimasi, note 159.

¹⁶⁷ Levett, note 165.

¹⁶⁸ Levett, note 165. Also note that Dimasi's article states that: 'On 9 November, after this article was published, Michelle Dimasi visited the asylum seekers on Christmas Island at the invitation of the Department of Immigration and Citizenship. She found that the families and other asylum seekers were being well cared for. The gate to the builder's camp is no longer locked and guards are no longer stationed outside the entrance.'

¹⁶⁹ Fitzgerald, note 6.

¹⁷⁰ Kelly, note 15.

commented that ‘it sends a message to the region that Australia is relaxing border control’.¹⁷¹ *The Australian* also reported that despite the ‘softening’ of the policy of mandatory detention in 2005 by the Howard Government (particularly with respect to children), surveys suggest that mandatory detention is still popular with a majority of the general public.¹⁷² The article continued ‘like it or not, the majority of Australians continue to agree with the notions proclaimed by Howard in 2001, that “we decide who comes to this country”’.¹⁷³

Other commentators have stated that the Government has ‘not properly thought through’ the changes and has not yet explained how asylum seekers who are released into the community will be supported.¹⁷⁴ Others have suggested that the current Federal Labor Government is ‘running a significant risk’ and that there will be ‘little sympathy for a weakening of our border protection if the numbers of arrivals begin to rise’. *The Australian* commented that while ‘it has been easy to placate a vocal minority with immigration policy changes, if more illegals start to arrive, and stay, within Australia, it will be a hard sell for the PM to convince working families and battlers of the benefits’.¹⁷⁵

In contrast, the Minister for Citizenship and Immigration stated that the new policy ‘isn’t about a mass opening of the gates; this is about a more humane treatment of asylum seekers’.¹⁷⁶ He commented that the new policy expresses the ‘the compassion and tolerance of the Australian community’.¹⁷⁷ The Chairman of the Refugee Advisory Council, Bruce Baird stated that the changes were ‘long-overdue’ and that moving to a risk based model ‘will ensure a more realistic approach to immigration processing, as well as the humane treatment of vulnerable immigrants, not least refugees and asylum seekers’.¹⁷⁸ Senator Xenophon expressed the view that the new policy seemed to be a more humane and cost effective alternative to mandatory detention as long as there were adequate safeguards for the community.¹⁷⁹ Academic commentator George Williams also stated that the new risk based approach is ‘more compassionate and more consistent with human rights’. Further, the Refugee Council of Australia stated that the policy changes were a ‘very positive’ and ‘fundamental shift in policy’.¹⁸⁰ However, some commentators have questioned whether the new policy differs in substance from the previous policy.¹⁸¹ An article in the *Sydney Morning Herald* commented:

¹⁷¹ Berkovic, note 158.

¹⁷² Fitzgerald, note 6.

¹⁷³ Ibid.

¹⁷⁴ Berkovic, note 158.

¹⁷⁵ Fitzgerald, note 6.

¹⁷⁶ Ibid.

¹⁷⁷ The Hon. Chris Evans, Minister for Immigration and Citizenship, note 4.

¹⁷⁸ Narushima, note 10.

¹⁷⁹ Ibid.

¹⁸⁰ Berkovic, note 158.

¹⁸¹ J. Waterford, *From Ruddock to new Rudders*, 20 July 2008 at http://www.apo.org.au/webboard/comment_results.html?filename_num=223376.

The Rudd Labor Government is not dismantling the detention system first set up by the Keating Labor. It is not ending the excision of Australian territory from the Immigration Act, which prevents asylum-seekers from entering Australian territory via offshore islands. It is not ending the detention of adults until security and health checks are completed. It is not cutting funding for navy border patrols. It is maintaining the new Christmas Island detention centre, far from Australia's shores, and capable of housing 800 people short-term, as a place to warehouse any new wave of boat people.¹⁸²

In contrast, another commentator has suggested that:

Minister Chris Evans has been careful to retain a few tough-sounding words to discourage a fresh wave of boat people, and keep detention as an option in bad cases involving adults. But the substance of his announcement was in the opposite direction: for a more humane approach to those previously subject to automatic, sometimes indefinite, detention; and for a reversed onus of proof as to why people should be detained at all.¹⁸³

A key issue for the future is the way in which the policy will be implemented. The Department of Immigration and Citizenship said to the Joint Standing Committee on Migration that the Committee's report will be 'an important consideration in how immigration detention services are delivered and how people are cared for in a humane way that maintains their dignity'.¹⁸⁴ As also stated by the Minister for Immigration and Citizenship 'the Government is interested in broadening alternative detention strategies, most particularly community-based options. The work of the federal parliamentary Joint Standing Committee on Migration will be critical in examining alternative pathways and taking forward a reform agenda'.¹⁸⁵

¹⁸² Sheehan, note 2.

¹⁸³ Waterford, note 181.

¹⁸⁴ Joint Standing Committee on Migration, *Inquiry into Immigration Detention*, Public Hearing 24 September 2008 at M3.

¹⁸⁵ The Hon. Chris Evans, Minister for Immigration and Citizenship, note 4.

5. CONCLUSION

Australia's policy with respect to asylum seekers, in particular the policy of mandatory detention has been subject to much criticism and debate in recent years, both in Australia and overseas.¹⁸⁶ In July 2008 the current Federal Government announced a number of changes to its policies towards asylum seekers. A notable change is that asylum seekers will be held in immigration detention as a measure of last rather than first resort, which is a significant shift away from the previous policy. However, the challenge for both the State and Federal Governments will be the implementation of the policy as well as the provision of services for asylum seekers who are not accommodated in immigration detention facilities. As stated by academic commentator Ben Saul:

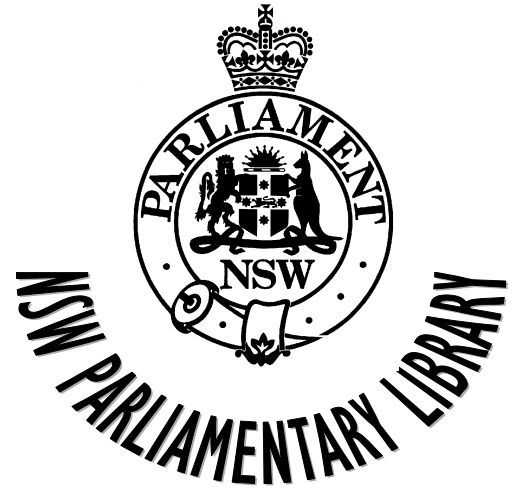
The lack of federal support shifts the burden for the care of asylum seekers onto state and territory governments and particularly onto charitable, community and religious groups. These groups have been overwhelmed by financial pressures of caring for large numbers of bridging visa holders, as the government has vacated its responsibility for their welfare. While it is preferable for asylum seekers to live in the community rather than in detention, without federal government support there is risk that people on these visas may be left homeless, destitute, starving or seriously ill.¹⁸⁷

Accordingly, the future release of the Report of the Federal Joint Standing Committee's inquiry into immigration detention will play an important role in shaping changes in the future, in particular the way in which services are provided to asylum seekers when they live in the community.

¹⁸⁶ J McAdam, *Asylum Seekers: Australia and Europe – Worlds Apart*, *Alternative Law Review* 28 (2003) 193; D McMaster, *Asylum Seekers: Australia's Response to Refugees*, Melbourne University Press (2001) at p 98.

¹⁸⁷ Saul, note 78 at p 5.

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