

## AUSTRALIA

Australia is a state party to the United Nations Convention Relating to the Status of Refugees and its Protocol, as well as to the International Covenant on Civil and Political Rights and its First Optional Protocol. The Australian Migration Act of 1958 (as amended) and the Regulations issued pursuant to that Act is the legislation that covers all aspects of migration to Australia, including the treatment of refugees, and is considered one of the country's most complex laws.<sup>1</sup>

During the year 2000-2001, Australia received 13,076 on-shore applications for refugee status, and issued 5,579 grants of asylum ("Protection Visas" as they are technically termed).<sup>2</sup> Only 1,127 of the Protection Visas granted that year were Permanent Protection Visas (PPVs), which bestow permanent resident status, while 4,452 were Temporary Protection Visas (TPVs), which permit residence for three years.<sup>3</sup> Unlike PPVs, TPVs do not grant refugees the right to family reunification, the right to return if they leave Australia, or the right to settlement services and welfare benefits.<sup>4</sup> In the first quarter of 2002, 1,580 applications were filed.<sup>5</sup>

Only asylum seekers who enter the country with valid visas are initially eligible for PPVs.<sup>6</sup> Those who arrive without valid visas are not eligible for PPVs until thirty months after they have received TPVs, at which time they must prove their asylum claims again

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<sup>1</sup> David Bitel, Address Before the Refugee Council of New Zealand (Mar. 27, 1999), available at <http://www.refugee.org.nz/council3.htm> (last accessed Aug. 29, 2002).

<sup>2</sup> DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, POPULATION FLOWS: IMMIGRATION ASPECTS 28 (2001), available at [http://www.dima.gov.au/statistics/publications/popflows2001/chapter2\\_4.pdf](http://www.dima.gov.au/statistics/publications/popflows2001/chapter2_4.pdf) (last modified Feb. 2002) (last accessed Aug. 29, 2002) [hereinafter POPULATION FLOWS].

<sup>3</sup> POPULATION FLOWS, *supra* note 2.

<sup>4</sup> DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, FACT SHEET 61: KING ASYLUM WITHIN AUSTRALIA (last modified Nov. 13, 2001) and FACT SHEET 64: TEMPORARY PROTECTION VISAS (last modified July 1, 2002) available at <http://www.immi.gov.au/facts/index.htm> (last accessed Aug. 29, 2002).

<sup>5</sup> UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, ASYLUM TRENDS IN 28 INDUSTRIAL COUNTRIES: JANUARY TO MARCH 2001—JANUARY TO MARCH 2002, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+2wwBmelFXx8wwwwwwwwwwhFqAIRERfIRfgItFqA5BwBo5Boq5AFqAIRERfIRfgIcFqF+8afDm15BGowcoSnmagd1DBGon5Dzmxwwwwww/opendoc.pdf> (June 13, 2002) (last accessed Aug. 29, 2002) [hereinafter *Asylum Trends in 28 Industrialized Countries*].

<sup>6</sup> FACT SHEET 61: KING ASYLUM WITHIN AUSTRALIA, *supra* note 4.

to be successful.<sup>7</sup> Asylum seekers who arrived after September 27, 2001, and who spent more than seven days en route through nations where they could have sought and obtained effective protection are never eligible for PPVs and may only reapply for three-year TPVs, a process which also requires them to re-substantiate their need for protection.<sup>8</sup>

In 1992, Australia instituted a policy of mandatory detention of all people, including asylum seekers, who arrive in the country without proper travel documents.<sup>9</sup> Detention is immediate and automatic, meaning that charges are not brought, and appearances before magistrates or courts to decide if detention is absolutely necessary or appropriate are not permitted.<sup>10</sup> Detention is also indefinite in its duration—lasting anywhere from a few hours to a few years—as it must continue until asylum seekers are accepted as refugees or deported in all but a rare number of situations.<sup>11</sup> By contrast, people who enter Australia on valid visas and who then claim protection as refugees are not usually detained.<sup>12</sup>

The Australian government claims that asylum seekers spend an average of four and a half months in detention while their asylum claims are being processed.<sup>13</sup> Of the 13,015 applications for Protection Visas filed between July 2000 and June 2001, 4,490 were by detained asylum seekers.<sup>14</sup> Of the 12,713 applications filed between July 1999 and June

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<sup>7</sup> FACT SHEET 64: TEMPORARY PROTECTION VISAS, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> Migration Act, 1958, §§ 189, 196 (Austl.).

<sup>10</sup> AMNESTY INTERNATIONAL AUSTRALIA, FACTSHEET 09: MANDATORY DETENTION OF ASYLUM SEEKERS, *available at* <http://www.amnesty.org.au/refugees/ref-fact09.html> (last accessed Sept. 10, 2002).

<sup>11</sup> AMNESTY INTERNATIONAL AUSTRALIA, FACTSHEET 03: ALTERNATIVES TO DETENTION, *available at* <http://www.amnesty.org.au/refugees/ref-fact03.html> (last accessed Sept. 10, 2002).

<sup>12</sup> AMNESTY INTERNATIONAL AUSTRALIA, FACTSHEET 09: MANDATORY DETENTION OF ASYLUM SEEKERS, *available at* <http://www.amnesty.org.au/refugees/ref-fact09.html> (last accessed Sept. 10, 2002).

<sup>13</sup> Michael Thawley, *Letter to the Editor Re: "Asylum Seekers Detained in Australia Suspend Hunger Strike,"* N.Y. TIMES, Feb. 5, 2002.

<sup>14</sup> Detention Policy and Procedures Section, Australian Department of Immigration and Multicultural and Indigenous Affairs, Response to LCHR Questionnaire on Detention of Asylum Seekers (Jan. 10, 2002) (on file with Debevoise & Plimpton) [hereinafter Australian Response to LCHR Questionnaire].

2000, 4,371 were by detained asylum seekers.<sup>15</sup> Using a “snapshot” approach to statistics, which has also been criticized, the Australian government reported that there were fewer than 3,000 immigrants detained in October 2001.<sup>16</sup>

The United Nations High Commissioner for Refugees, numerous NGOs, and Australia’s Human Rights and Equal Opportunity Commission have criticized Australia’s mandatory detention policy.<sup>17</sup> In the case of an asylum seeker who was detained for a period of over four years, the United Nations Human Rights Committee found Australia’s detention policy to be arbitrary in practice.<sup>18</sup> A number of Australian health professionals have raised concerns about the negative mental health implications of detaining asylum seekers and NGOs have decried the dismal conditions in Australia’s six immigrant detention facilities.<sup>19</sup> Detention centers, most prominently the Woomera Immigration Reception and Processing Centre, have been the sites of hunger strikes by asylum seekers protesting lengthy delays in processing their applications and mistreatment.<sup>20</sup>

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<sup>15</sup> Australian Response to LCHR Questionnaire, *supra* note 14.

<sup>16</sup> Mitchell M. Smith, *Asylum Seekers in Australia*, 175 MED. J. AUSTL. 587 (2001) (citing personal communication with Department of Immigration and Multicultural Affairs, Detention Operations Branch), *available at* [http://www.mja.com.au/public/issues/175\\_12\\_171201/smith/smith.html](http://www.mja.com.au/public/issues/175_12_171201/smith/smith.html) (last accessed Aug. 29, 2002).

<sup>17</sup> *Id.*; U.N.: *Wrong to Detain Asylum Seekers*, N.Y. TIMES, Jan. 24, 2002; Becky Gaylord, *Protests by Refugees Spread, Putting Pressure on Australia to Act*, N.Y. TIMES, Jan. 24, 2002, at A6; *Heat Takes Toll on Hunger Strikers*, ASSOCIATED PRESS, Jan. 25, 2002; AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION (HREOC), *THOSE WHO’VE COME ACROSS THE SEAS: DETENTION OF UNAUTHORIZED ARRIVALS* (1998), *available at* [http://www.hreoc.gov.au/pdf/human\\_rights/asylum\\_seekers/h5\\_2\\_2.pdf](http://www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf) (last accessed Aug. 29, 2002) [hereinafter HREOC I].

<sup>18</sup> *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, Communication No. 560/1993: Australia, U.N. GAOR, Hum. Rts. Comm., 59th Sess., Annex, U.N. Doc. CCPR/C/59/D/560/1993 (1997).

<sup>19</sup> Zachary Steel & Derrick M. Silove, *The mental health implications of detaining asylum seekers*, 175 MED. J. AUSTL. 596 (2001), *available at* [http://www.mja.com.au/public/issues/175\\_12\\_171201/steel/steel.html](http://www.mja.com.au/public/issues/175_12_171201/steel/steel.html) (last accessed Aug. 29, 2002); Amer Sultan & Kevin O’Sullivan, *Psychological Disturbances in Asylum Seekers Held in Long Term Detention: a Participant-Observer Account*, 175 MED. J. AUSTL. 593 (2001); Gaylord, *supra* note 17; *Heat Takes Toll on Hunger Strikers*, *supra* note 17.

<sup>20</sup> Gaylord, *supra* note 17.

Since 1994, detained asylum seekers have been allowed to apply to the Minister for Immigration and Multicultural and Indigenous Affairs for “Bridging Visas” to gain release from detention pending the outcome of their applications for Protection Visas.<sup>21</sup> But, while the Minister must decide whether to grant requests for Bridging Visas within two days, his power is discretionary and he very rarely grants such requests.<sup>22</sup> Detained asylum seekers granted Bridging Visas must be interviewed by officers appointed by the Secretary of the Department of Immigration and Multicultural and Indigenous Affairs (“DIMIA”) and may be required to lodge security before their release from detention.<sup>23</sup> Those deemed likely to abscond are not eligible for Bridging Visas or release from detention.<sup>24</sup>

Asylum seekers who arrive with valid visas but file applications for Protection Visas after their visas have expired are eligible to apply for “Class C” Bridging Visas. Asylum seekers with such visas may be granted permission to work upon their release from detention in very exceptional circumstances.<sup>25</sup> Asylum seekers who arrive without valid visas are only eligible to apply for “Class E” Bridging Visas, which are reserved for minors, the elderly, applicants with special medical needs, and applicants married to

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<sup>21</sup> Bridging visas expire upon the final adjudication of the application for a Protection Visa. HREOC I, *supra* note 17, at 18 (citing Migration Act, 1958, § 73). Any non-citizen in Australia without a current visa is labeled, under the Migration Act, an “unlawful non-citizen,” and must convince the court that they were wrongly categorized as an “unlawful non-citizen” to be released from detention without a bridging visa. Migration Act §§ 13-14 (Austl.); HREOC, Submission to the Senate Legal and Constitutional References Committee Inquiry into Australia’s Refugee and Humanitarian Program, at 9, at [http://www.hreoc.gov.au/word/human\\_rights/asylum\\_seekers/h5\\_2\\_3.doc](http://www.hreoc.gov.au/word/human_rights/asylum_seekers/h5_2_3.doc) (last visited June 26, 2002) [hereinafter HREOC II].

<sup>22</sup> 268 Migrations Regulations § 2.24(2); Migration Act §72(7) (providing that “The Minister does not have a duty to consider whether to make a determination under paragraph (1)(c) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or any other person, or in any other circumstances.”)

<sup>23</sup> 268 Migrations Regulations, Schedule 2, § 50.214.

<sup>24</sup> 268 Migrations Regulations, Schedule 2, § 50.212(3)(a) (modified 1996).

<sup>25</sup> Those with C Bridging Visas are granted permission to work on the basis of financial hardship, certain skills, or a declaration by the Minister regarding conditions in the home country. This visa remains valid during the asylum application and review process and for 28 days after final denial by the Refugee Review Tribunal. The asylum seeker may apply for a new Bridging Visa “C” while she applies for judicial review to the Federal Court or High Court, and this visa will remain valid until 28 days after final denial. HREOC II, *supra* note 21.

Australian citizens or permanent residents.<sup>26</sup> These categories are very limited in practice. For example, between 1994 and 1998, only two children arriving as boat people or born in detention were released out of a total of 581.<sup>27</sup> The release of people on the basis that they are elderly, meaning over the age of 75, is also rare, since few elderly people travel to Australia by boat or otherwise without authority. And, even in the case of people affected by past torture or trauma, the presumption is in favor of continued detention.

In response to an increase in the number of people trying to reach the country by boat in recent years and the infamous “Tampa” incident, in which the government refused landing to a Norwegian vessel whose passengers included a boatload of asylum seekers it had rescued, the Australian government has established a so-called “Pacific Solution”. Since September 2001, it has made a number of amendments to the Australian Migration Act intended to “reduce incentives for people to journey to Australian territories” that have alarmed asylum seekers and their advocates.<sup>28</sup>

New legislation removes or “excises” certain parts of Australian territory from the migration zone, including the Ashmore and Cartier Islands, Christmas Island, Cocos (Keeling) Islands, offshore sea and resource installations and potentially a number of other areas in the future.<sup>29</sup> Undocumented persons who enter Australia at these places are subject to mandatory detention and are no longer allowed to apply for Australian visas of any class unless the Minister for Immigration and Multicultural and Indigenous Affairs finds that it is in the public interest to grant them permission to apply for TPVs.<sup>30</sup> The

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<sup>26</sup> Migration Act §72 and Migration Regulation § 2.20. Note that those with special medical needs are eligible only where a medical officer *appointed by the Immigration authorities* has determined that the non-citizen cannot properly be cared for in a detention environment (emphasis added). HREOC I, *supra* note 17 at 20. Note further that there is one exception here for persons who have managed to avoid detection by immigration authorities for more than 45 days. 268 Migration Regulations § 2.20(8) (1994). These individuals are entitled to a Bridging Visa “E,” which does not permit them to work while they apply for judicial review. Those who are caught before 45 days are eligible for a Bridging Visa “E.”

<sup>27</sup> HREOC I, *supra* note 17 at 20.

<sup>28</sup> DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, INTRODUCTION OF NEW LEGISLATION, *available at* <http://www.immi.gov.au/legislation/refugee/01.htm> (last modified April 15, 2002) (last accessed Aug. 29, 2002) [hereinafter INTRODUCTION OF NEW LEGISLATION].

<sup>29</sup> DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, EXCISED OFFSHORE PLACES, *available at* <http://www.immi.gov.au/legislation/refugee/02.htm> (last modified April 15, 2002) (last accessed Aug. 29, 2002) [hereinafter OFFSHORE PLACES].

<sup>30</sup> OFFSHORE PLACES, *supra* note 29.

Minister is to consider alternatives for resettling those granted asylum in other countries before contemplating granting them access to visas that would allow residence in Australia.<sup>31</sup>

New legislation also provides that immigrants who arrive at excised offshore places or are intercepted in international waters may be taken to countries other than Australia that have been “declared” by the Minister for Immigration and Multicultural and Indigenous Affairs as countries that have appropriate arrangements in place to prevent *refoulement* of refugees.<sup>32</sup> Currently, Nauru and Papua New Guinea are declared countries.<sup>33</sup> Persons transferred to and held in Nauru and Papua New Guinea are labeled “transitory persons”, and are ineligible for any class of Australian visa, including Bridging Visas, without the exercise of discretion by the Minister.<sup>34</sup> Under agreements concluded between the government of Australia and the governments of Nauru and Papua New Guinea, approximately 1800 asylum seekers who were intercepted en route to Australia were detained as of March 2002 in those two declared countries.<sup>35</sup> During the summer of 2002, the Minister granted 3-year Temporary Protection Visas to 56 asylum seekers from

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<sup>31</sup> DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, NEW VISA REGIME, *available at* <http://www.immi.gov.au/legislation/refugee/04.htm> (last modified April 15, 2002) (last accessed Aug. 29, 2002) [hereinafter NEW VISA REGIME].

<sup>32</sup> DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, DECLARED COUNTRIES, *available at* <http://www.immi.gov.au/legislation/refugee/03.htm> (last modified April 15, 2002) (last accessed Aug. 29, 2002) [hereinafter DECLARED COUNTRIES].

<sup>33</sup> DECLARED COUNTRIES, *supra* note 32. The Australian government acknowledges that its obligations under the Refugee Convention and the principle of *non-refoulement* apply to newly excised offshore places and declared countries, but maintains that it is fulfilling those obligations by granting the Minister for Immigration and Multicultural and Indigenous Affairs the aforementioned discretionary powers. INTRODUCTION OF NEW LEGISLATION, *supra* note 28.

<sup>34</sup> Legislation Change -12 April 2002: Migration Legislation Amendment (Transitional Movement) Act 2002, *available at* [http://www.immi.gov.au/legislation/lc1204\\_1.htm](http://www.immi.gov.au/legislation/lc1204_1.htm). The only reasons for which a transitory person would be allowed into Australia are: to receive medical treatment for a condition that cannot be adequately treated in the declared country; to provide evidence in the prosecution of people smugglers; or to transit through Australia, en route to a country of origin or to a third country. All stays would in Australia would be only as long as necessary to accomplish these goals. *Id.*

<sup>35</sup> U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 2002 at 110 *available at* <http://www.refugees.org/WRS2002>. (Immigration and Refugee Services of America 2002) [hereinafter USCR WORLD REFUGEE SURVEY 2002].

Nauru<sup>36</sup> and 42 from Papua New Guinea, almost all of whom had immediate family members in Australia.<sup>37</sup> (See chapters on Nauru and Papua New Guinea below).

*Is there independent review of the detention decision?* No.

Decisions to detain asylum seekers within the Australian migration zone are not subject to judicial review, except in the very narrow sense that a court may conduct a factual inquiry as to whether a given detainee was in fact in the country “unlawfully” at the time she was detained and on very narrow constitutional grounds.<sup>38</sup>

As noted above, asylum seekers detained for lack of proper travel documents may only be released if they have been granted Australian visas. An October 2001 amendment to the Migration Act sought to significantly reduce the right to judicial review of visa decisions.<sup>39</sup> This legislation is currently being challenged in the High Court of Australia.<sup>40</sup>

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<sup>36</sup> DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, REFUGEES ARRIVE IN AUSTRALIA FROM NAURU, *available at* [http://www.immi.gov.au/media\\_releases/media02/d02055.htm](http://www.immi.gov.au/media_releases/media02/d02055.htm) (last visited Aug. 10, 2002).

<sup>37</sup> DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, REFUGEES LEAVE MANUS FOR AUSTRALIA, *available at* [http://www.minister.immi.gov.au/media\\_releases/media02/r02070.htm](http://www.minister.immi.gov.au/media_releases/media02/r02070.htm) (last visited Aug. 10, 2002).

<sup>38</sup> Australian Response to LCHR Questionnaire, *supra* note 14; E-mail from Nehal Bhuta, Mallesons Stephen Jacques, to Jaya Ramji, Debevoise & Plimpton, (Mar. 20, 2002) (on file with Debevoise & Plimpton) [hereinafter Mallesons Stephen Jaques Correspondence]; E-mail from Vanessa Lesnie, Australian Human Rights and Equal Opportunity Commission (HREOC), to Suzanne Spears, Debevoise & Plimpton, (Aug. 13, 2002)(on file with Debevoise & Plimpton)[hereinafter HREOC Correspondence]; *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1 (Austl.), *available at* [http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high\\_ct/176clr1.html?query=title+%28+%22+1992+176+clr+1%22+%29](http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high_ct/176clr1.html?query=title+%28+%22+1992+176+clr+1%22+%29) (last visited Aug. 10, 2002).

<sup>39</sup> Migration Act § 8A. Until October 2001, Australian courts could review a denial of certain classes of “bridging visas” to ensure that the law was applied correctly. However, they did not have the authority to order the Minister to release a particular asylum seeker or to grant a “bridging visa.” They were merely able to remit decisions displaying a legal error for reconsideration to the Minister, who would exercise his decision afresh. Migration Act §196(3); HREOC II, *supra* note 21 at 9; HREOC I, *supra* note 17 at 21.

<sup>40</sup> HREOC Correspondence, *supra* note 38; HREOC, Submission to the High Court of Australia in Proceeding No. S134 of 2002, Minister for Immigration and

Although the 2001 legislation made judicial review of visa and asylum decisions largely futile, the government maintains that, in providing asylum seekers whose refugee assessments are unfavorable access to merits review by the Refugee Review Tribunal, it complies with the UNHCR's guidelines, which suggest that asylum decisions be subject to at least one level of review, either administrative or judicial.<sup>41</sup>

*Are there limits on the period of detention?* No.

Once asylum seekers have been detained, they are not eligible for release until they are granted Bridging Visas, TPVs or PPVs, or are to be deported.<sup>42</sup> There are no time limits on detention pending visa decisions, asylum decisions, or removal once asylum applications have been rejected. Detention is, therefore, potentially indefinite. The UN Human Rights Committee found Australia in breach of the International Covenant on Civil and Political Rights for having detained one asylum seeker for more than four years.<sup>43</sup>

*Is there periodic review of detention?* No.

There is no automatic or independent review of continuing detention.<sup>44</sup> The Minister for Immigration and Multicultural Affairs may, in very limited circumstances, exercise his non-enforceable discretionary power to grant detained asylum seekers' applications for Bridging Visas where primary decisions on their asylum applications have not been made within six months or where they are found to meet the eligibility requirements for a Class E Bridging Visa.<sup>45</sup> However, he rarely chooses to exercise such power.

*Is there access to government-funded legal aid?* Limited.

Asylum seekers who arrive without valid visas are initially placed in "separation detention" for indefinite periods during which they are denied access to legal advice,

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Multicultural and Indigenous Affairs and the Refugee Review Tribunal v. Ex Parte Applicants S134/2002, *available at* [http://www.humanrights.gov.au/legal/guidelines/submission\\_s134.html](http://www.humanrights.gov.au/legal/guidelines/submission_s134.html) (last visited Sept. 11, 2002).

<sup>41</sup> DECLARED COUNTRIES, *supra* note 32.

<sup>42</sup> Migration Act §§ 178(2), 196(1).

<sup>43</sup> *A v. Australia*, Communication No. 560/1993: CCPR/C/59/D/560/1993 (Apr. 30, 1997).

<sup>44</sup> HREOC II, *supra* note 21, at 9.

<sup>45</sup> HREOC I, *supra* note 17, at 20.

news coverage, visitors and phone calls.<sup>46</sup> Although there is no statutory basis for separation detention, DIMIA claims it is necessary to enable the Department to determine whether given asylum seekers are persons who “prima facie invoke Australia’s protection obligations”; although, there is likewise no statutory basis for DIMIA making such a preliminary determination.<sup>47</sup> Asylum seekers deemed not to meet this test are “screened out,” meaning that they are not permitted to apply for asylum in Australia, and are detained until arrangements can be made for them to leave the country.<sup>48</sup> Persons deemed to meet the test are “screened in”, meaning that they are permitted to apply for asylum, and are detained until their asylum claims are adjudicated.<sup>49</sup>

The Immigration Advice and Application Assistance Scheme (IAAAS) provides application assistance to screened in Protection Visa (PV) applicants in immigration detention.<sup>50</sup> However, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) is under no legal obligation to inform detainees of their right to counsel or of the availability of government funded counsel.<sup>51</sup> The amount of information provided varies, therefore, from center to center.<sup>52</sup>

Under the IAAAS, the Australian government contracts staff members of various legal aid and private law offices as migration agents to advise and assist screened in asylum seekers detained within the migration zone in the preparation, filing and presentation of their visa applications. IAAAS assistance is available to those who qualify for it free of charge from the primary decision through the merits review stages, but is not available for applications for judicial review.<sup>53</sup> Migration agents must possess a “sound knowledge

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<sup>46</sup> *Id.*; AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION (HREOC), AUSTRALIAN HUMAN RIGHTS COMMISSIONER’S 1998-1999 REVIEW ON IMMIGRATION DETENTION at 31 *available at* [http://www.hreoc.gov.au/word/human\\_rights/asylum\\_seekers/idc\\_review.doc](http://www.hreoc.gov.au/word/human_rights/asylum_seekers/idc_review.doc) (last accessed Aug. 29, 2002) [hereinafter HREOC III].

<sup>47</sup> Mallesons Stephen Jaques Correspondence, *supra* note 38.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, FACT SHEET: IMMIGRATION ADVICE AND APPLICATION ASSISTANCE SCHEME, *available at* <http://www.immi.gov.au/facts/63advice.htm> (last accessed Sept. 15, 2002) [hereinafter IAAAS Fact Sheet].

<sup>51</sup> HREOC Correspondence, *supra* note 38.

<sup>52</sup> *Id.*

<sup>53</sup> IAAAS Fact Sheet, *supra* note 50.

of migration law and procedure” but are not required to hold legal qualifications.<sup>54</sup> As IAAAS service providers are paid through DIMIA, concerns have been raised about a potential conflict of interest with their clients’ needs, and the quality of advice provided.<sup>55</sup> Even for those who are eligible for IAAAS assistance, access to legal assistance is often limited by the remoteness of their detention centers.<sup>56</sup> Although screened in asylum seekers are allowed to make phone calls, in some centers they must pay for calls themselves.<sup>57</sup>

*Alternatives to detention:* None.

In 1994 the Australian Parliament’s Joint Standing Committee on Migration (JSCM) examined the appropriateness of the government’s detention policy and considered alternative options, such as supervised release to community groups.<sup>58</sup> The Committee expressed doubt that any alternative could ensure that released asylum seekers would not abscond during the processing of their applications.<sup>59</sup> It rejected the notion that a community release program would be more cost effective than immigration detention, questioned the ability of community groups to adequately care for released detainees, and insisted that requiring asylum seekers released into the community to carry identity cards to minimize the risk of absconding would be contrary to Australian values of individual freedom and open society.<sup>60</sup> Based on the Committee’s findings, the government

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<sup>54</sup> DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, FACT SHEET: MIGRATION AGENTS REGISTRATION AUTHORITY, (last modified Jul. 19, 2002), *available at* <http://www.immi.gov.au/facts/100mara.htm> (last accessed Aug. 29, 2002). Migration agents are registered with the Migration Agents Registration Authority, a regulatory authority appointed by the Minister for Immigration and Multicultural Affairs.

<sup>55</sup> Mallesons Stephen Jaques Correspondence, *supra* note 38.

<sup>56</sup> HREOC Correspondence, *supra* note 38 (the Curtin Immigration Reception and Processing Centre (IRPC), for example, is an eight hour flight from Sydney, where the principal non-governmental and governmental refugee assistance programs are based).

<sup>57</sup> Mallesons Stephen Jaques Correspondence, *supra* note 38.

<sup>58</sup> DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, UNAUTHORIZED ARRIVALS AND DETENTION—INFORMATION PAPER (Oct. 15, 2001), at 12 [hereinafter *Unauthorized Arrivals*]; DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, FACT SHEET 82: IMMIGRATION DETENTION (Mar. 24, 2000), at 1 [hereinafter *Fact Sheet 82*].

<sup>59</sup> *Unauthorized Arrivals*, *supra* note 58, at 12; *Fact Sheet 82*, *supra* note 58, at 1.

<sup>60</sup> *Unauthorized Arrivals*, *supra* note 58, at 12.

renewed its commitment to mandatory detention of all undocumented migrants and rejected all alternatives.<sup>61</sup>

According to DIMIA, only “[d]etention ensures that unlawful non-citizens are available for processing and, where necessary, removal.”<sup>62</sup> Release, by contrast, “could inadvertently lead to people achieving their objective of remaining in Australia, regardless of whether or not they were ultimately found to be in need of protection under the Refugees Convention (or were found to be eligible for some other visa)”, which “in turn would send a strong signal to people smugglers and potentially encourage more families to risk their ...lives ...to travel to Australia unlawfully.”<sup>63</sup>

*Vulnerable groups:* Some alternative detention arrangements.

Mandatory detention of those without valid visas seeking asylum in Australia applies to everyone, including children.<sup>64</sup> In 2000-2001, 1103 children were held in Australian immigration detention centers.<sup>65</sup> In May 2002, there were 168 children under the age of 18 in Australian detention centers, including 12 in the Woomera Project and 15 in the Adelaide foster care program.<sup>66</sup> As of June 2002, only one unaccompanied child had been released from detention and placed in foster care upon being granted a “Class E” Bridging Visa at the discretion of the Minister for Immigration and Multicultural and Indigenous Affairs.<sup>67</sup>

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<sup>61</sup> *Fact Sheet 82, supra* note 58.

<sup>62</sup> Department of Immigration and Multicultural and Indigenous Affairs, Submission in Response to the Terms of Reference of the Human Rights and Equal Opportunity Commission's Inquiry into Children in Immigration Detention and to Issues Raised in the Background Papers, *available at* <http://www.dima.gov.au/illegals/hreoc/index.htm> (last accessed Sept. 15, 2002).

<sup>63</sup> *Id.*

<sup>64</sup> Australian Response to LCHR Questionnaire, *supra* note 14.

<sup>65</sup> AMNESTY INTERNATIONAL AUSTRALIA, FACTSHEET 04: CHILDREN IN IMMIGRATION DETENTION IN AUSTRALIA, *available at* <http://www.amnesty.org.au/refugees/ref-fact04.html> (last accessed Sept. 15, 2002).

<sup>66</sup> Human Rights and Equal Opportunity Commission, Internal e-mail communication containing numbers gathered from DIMIA forwarded to Suzanne Spears, Debevoise & Plimpton (May 2, 2002) (on file with Debevoise & Plimpton) [hereinafter HREOC II Correspondence].

<sup>67</sup> The Castan Centre for Human Rights Law, Monash University, *Submission to the National Inquiry into Children in Immigration Detention, available at* [http://www.humanrights.gov.au/human\\_rights/children\\_detention/submissions/castan.html](http://www.humanrights.gov.au/human_rights/children_detention/submissions/castan.html) (last accessed Aug. 29, 2002) [hereinafter Castan Centre] (citing Human Rights and Equal Opportunity Commission (HREOC), *National Inquiry into*

Although there are no alternatives to detention, DIMIA maintains that “[w]ithin the mandatory detention framework and consistent with the Act, however, the Department takes innovative approaches to alternative detention arrangements.”<sup>68</sup> These arrangements purportedly seek to respond to the needs of particular groups, such as women and children and unaccompanied minors.<sup>69</sup> Alternative places of detention include the Woomera Residential Housing Project and foster care arrangements undertaken in conjunction with the State child welfare authority.

The Woomera Alternative Detention Arrangements for Women and Children Project, launched in August 2001, permits up to 25 volunteer women and children detained in the Woomera Immigration Reception and Processing Center (IRPC) to live in four supervised houses that they run themselves outside of the center.<sup>70</sup> Those eligible for the program include women with children who have family members remaining at Woomera; their female children of any age; and their male children of under 13 years of age. Participants may visit each other but must arrange with authorities for other people to visit them. Some fathers remaining at the IRPC have reportedly been allowed to visit their participating families.<sup>71</sup> As they are still detained, participants are only permitted to leave their cluster of houses to go on “supervised excursions to community facilities”.<sup>72</sup> Children in the Project participate in the IRPC education program although DIMIA is assessing the possibility of enrolling them in local schools.<sup>73</sup> During its first month of operation, only thirteen people opted to participate in this “home

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*Children in Immigration Detention Background Paper 1: Introduction.* [hereinafter HREOC IV] available at [http://www.humanrights.gov.au/human\\_rights/children\\_detention/background/introduction.html](http://www.humanrights.gov.au/human_rights/children_detention/background/introduction.html) (last accessed Aug. 29, 2002)).

<sup>68</sup> Department of Immigration and Multicultural and Indigenous Affairs, *Submission in Response to the Terms of Reference of the Human Rights and Equal Opportunity Commission's Inquiry into Children in Immigration Detention and to Issues Raised in the Background Papers*, available at <http://www.dima.gov.au/illegals/hreoc/index.htm> (last accessed Sept. 15, 2002) [hereinafter DIMIA Submission].

<sup>69</sup> *Id.*

<sup>70</sup> DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, FACT SHEET 65: NEW HUMANITARIAN VISA SYSTEM, available at <http://www.immi.gov.au/facts/65humanitarian.htm>. (last accessed June 30, 2002) [hereinafter *Fact Sheet 65*].

<sup>71</sup> HREOC Correspondence, *supra* note 38.

<sup>72</sup> Australian Response to LCHR Questionnaire, *supra* note 14.

<sup>73</sup> *Fact Sheet 65*, *supra* note 70.

detention” program, presumably because most families were reluctant to be split up.<sup>74</sup>

DIMIA complains that other “alternative places of detention, such as fostering arrangements, are costly to implement”, entail “complex administrative and legal ramifications,” and are limited by “the availability of culturally appropriate families.”<sup>75</sup> However, the Department has made a few such arrangements where special circumstances existed and the State child welfare authority was able to provide assistance. For example, in January 2002, to protect them from incidents of self-harm and hunger strikes, the Minister removed nine unaccompanied minors from the Woomera IRPC to alternative places of detention in foster care arranged by the South Australian Department of Human Services.<sup>76</sup>

Australia is a party to the United Nations Convention on the Rights of the Child. The Australian Minister for Immigration is entrusted with the guardianship of all non-citizen unaccompanied minors, but has largely delegated guardianship responsibility for detained minors to the DIMIA managers of detention facilities and for released minors to state child welfare agencies.<sup>77</sup> DIMIA has issued guidelines concerning the protection of unaccompanied minors, but they are non-binding and unenforceable.<sup>78</sup> Detained children participate in school classes and recreational activities inside the centers and in some cases outside them.<sup>79</sup> Women and children are not always provided with separate accommodation.<sup>80</sup>

Children who have already suffered the trauma of fleeing their homes and human rights abuses in their home countries have witnessed and participated in traumatic events in Australian detention centers, such as detainees rioting and sewing their lips together in protest of their prolonged detention.<sup>81</sup> Children have also suffered when guards have

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<sup>74</sup> Smith, *Asylum Seekers in Australia*, *supra* note 16, at 578-79.

<sup>75</sup> DIMIA Submission, *supra* note 68.

<sup>76</sup> *Id.*; Castan Centre, *supra* note 67.

<sup>77</sup> Notes of Conversation with Dr. Sev Ozdowski, Human Rights Commissioner of Australia, at the Lawyers’ Committee for Human Rights by Suzanne Spears (New York, May 10, 2002)(on file with Debevoise & Plimpton) (Dr. Ozdowski notes that the Minister’s guardianship responsibilities conflict with his power to grant visas) [Hereinafter HRCA Conversation]; HREOC Correspondence, *supra* note 38; Mallesons Stephen Jaques Correspondence, *supra* note 38.

<sup>78</sup> Mallesons Stephen Jaques Correspondence, *supra* note 38.

<sup>79</sup> Australian Response to LCHR Questionnaire, *supra* note 14.

<sup>80</sup> Australian Response to LCHR Questionnaire, *supra* note 14.

<sup>81</sup> AMNESTY INTERNATIONAL AUSTRALIA, FACTSHEET 04, *supra* note 65.

responded with tear gas or late night spot checks.<sup>82</sup> Allegations of child sexual abuse in the Curtin Detention Center in 2000 highlighted the dangers of detaining children in cramped conditions with adults, many of whom suffer from depression and post-traumatic stress disorder.<sup>83</sup>

In March 2001, the Commonwealth Ombudsman's Office issued a formal report on Immigration Detention Centers that contained a number of recommendations to DIMIA for improvements in arrangements for children.<sup>84</sup> In late November 2001, Australia's Human Rights Commissioner, Dr. Sev Ozdowski, announced that the Human Rights and Equal Opportunity Commission would be conducting a national inquiry into children in immigration detention, the results of which he hoped to present to Australia's Parliament by the end of 2002.<sup>85</sup> As of August 2002, the Commission had received more than 300 submissions from organizations critical of Australia's treatment and detention of asylum seeker children.<sup>86</sup> In addition to considering public submissions, the Commission has visited all of Australia's immigration detention facilities—including on Cocos and Christmas Islands—and has conducted public hearings in the states where such facilities are located.<sup>87</sup> In 2002, Amnesty International and Human Rights Watch, among other

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> COMMONWEALTH OMBUDSMAN, REPORT OF AN OWN MOTION INVESTIGATION INTO THE DEPARTMENT OF MULTICULTURAL AND IMMIGRATION AFFAIRS' IMMIGRATION DETENTION CENTRES, *available at* [http://www.ombudsman.gov.au/publications\\_information/Special\\_Reports/IDCMarch11.pdf](http://www.ombudsman.gov.au/publications_information/Special_Reports/IDCMarch11.pdf) (last accessed Aug. 29, 2002); *also*, COMMONWEALTH OMBUDSMAN – AUSTRALIA, ANNUAL REPORT 2000-2001, *available at* [http://www.ombudsman.gov.au/publications\\_information/Annual\\_Reports?AR2000-01/ARindex.html](http://www.ombudsman.gov.au/publications_information/Annual_Reports?AR2000-01/ARindex.html) (last accessed Aug. 29, 2002).

<sup>85</sup> HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, NATIONAL INQUIRY INTO CHILDREN IN IMMIGRATION DETENTION, *available at* [http://www.humanrights.gov.au/human\\_rights/children\\_detention/index.html](http://www.humanrights.gov.au/human_rights/children_detention/index.html) (last accessed Aug. 29, 2002) [hereinafter CHILDREN IN IMMIGRATION DETENTION].

<sup>86</sup> HREOC Correspondence, *supra* note 38; *Also* Human Rights and Equal Opportunity Commission, *Submissions to the National Inquiry into Children in Immigration Detention*, *available at* [http://www.humanrights.gov.au/human\\_rights/children\\_detention/submissions/index.html#legal](http://www.humanrights.gov.au/human_rights/children_detention/submissions/index.html#legal) (last accessed Aug. 29, 2002) (figures as of June 2002) [hereinafter *Submissions*].

<sup>87</sup> CHILDREN IN IMMIGRATION DETENTION, *supra* note 85.

non-governmental organizations, criticized Australia's detention of unaccompanied minors as a violation of its international treaty obligations.<sup>88</sup>

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<sup>88</sup> HREOC Correspondence, *supra* note 38; *Fact Sheet 04*, *supra* note 81.