AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010

WRITTEN SUBMISSIONS AND VIEWS OF AUSTRALIAN LAWYERS FOR HUMAN RIGHTS TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

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INTRODUCTION

> *'The values commit us to detention as a last resort; to detention for the shortest practicable period; to the rejection of indefinite or otherwise arbitrary detention. In other words, the current model of immigration detention is* **fundamentally overturned**. '[1]
> Senator Chris Evans, 29 July 2008 (emphasis added)

This document comprises the written submissions of Australian Lawyers for Human Rights (***ALHR***) to the Senate inquiry into the Provisions of the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*. The Bill aims to end offshore processing of asylum claims and the excision policy, to ensure that detention is only used as a last resort, to end indefinite and long-term detention, and to introduce a system of judicial review of detention beyond 30 days.

ALHR supports these objectives and the legislation. ALHR considers that it is time to put into effect the promise of the government to 'fundamentally overturn' the current model of immigration detention, and to reintroduce the protection offered by Australia's judicial system.

ABOUT ALHR

1. ALHR is a voluntary human rights organisation established in 1993. It comprises a network of Australian lawyers active in the practice and promotion of international human rights law standards in Australia.

2. ALHR has over 2,000 members and has active National, State and Territory committees.

3. ALHR is a member of the Australian Forum of Human Rights Organisations and bi-annually attends the Commonwealth Attorney General's Non-Governmental Organisations (***NGOs***) Forum of Human Rights, and Department of Foreign Affairs and Trade Human Rights NGO Consultations. ALHR also attends the annual United Nations (***UN***) High Commissioner for Refugees NGO dialogue.

4. ALHR regularly informally briefs and discusses human rights issues with Australian Parliamentary Service Staff, policy advisors, the media and the general public.

5. ALHR is available for further comment and discussion in relation to the Bill as required.

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[1] Senator Chris Evans, Minister for Immigration and Citizenship, *New Directions in Detention, Restoring Integrity to Australia's Immigration System*, ANU College of Law, 29 July 2008.

ALHR'S POSITION

I. Parts 1-3: Amendments establishing asylum seeker principles, and providing for discretion in detention

Mandatory Detention and Excision: General Observations

6. ALHR notes the many international and domestic inquiries held into Australia's current detention regime, including the Views of UN treaty bodies on individual communications and the Concluding Observations of the UN Human Rights Committee,[2] the 2002 report of UN Working Group on Arbitrary Detention,[3] the many inquiries by the Australian Human Rights Commission (including its most recent report on conditions in Villawood IDC),[4] reports on long-term detention cases by the Commonwealth Immigration Ombudsman, the recommendations of the Comrie and Palmer inquiries, as well as the studies of independent experts in the fields of law, psychology and children's rights. The overwhelming consensus – domestic and international – is that the current regime:

- results in the unreasonable, unjustified and thus arbitrary detention of asylum-seekers in breach of article 9 of the International Covenant on Civil and Political Rights (ICCPR);
- results in instances of cruel, inhuman or degrading treatment in breach of the non-derogable rights contained in article 7 of the ICCPR and articles 2, 11, and 16 of the Convention against Torture[5];
- results in breaches of Article 37(a) – (d) of Convention on the Rights of the Child (CRC)
- unlawfully imposes penalties on refugees on the basis of their illegal entry or presence, in direct contravention of article 31 of the 1951 Convention relating to the Status of Refugees (the Convention);
- discriminates against a particular category of refugees, potentially in breach of article 3 of the Convention, and more broadly and directly discriminates against refugees and asylum-seekers in breach of article 26 of the ICCPR by imposing disproportionate restrictions on their liberty, access to justice and other fundamental rights;
- results in breaches of Australia's positive obligations under the International Covenant on Economic, Social and Cultural Rights, including 'the right of everyone

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[2] See, for instance, A v Australia, Human Rights Committee Communication 560/1993, UN Doc CCPR/C/D/560/1993 (1997); C v Australia, Human Rights Committee Communication 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia UN Doc A/55/40, paras 526-527.

[3] Commission on Human Rights, 'Civil and Political Rights including the Question of Torture and Detention', 59th sess, Annex: Report of the Working Group on Arbitrary Detention on its visit to Australia (24 May-6 June 2002), [19], UN Doc E/CN.4/2003/8/Add.2 (2002).

[4] See, *inter alia*, *A last resort? National Inquiry into Children in Immigration Detention* (2004); *Those who've come across the seas: Detention of unauthorised arrivals* (1998); *2010 Immigration detention on Christmas Island* (2010; *2011 Immigration detention at Villawood (2011)*. The Commission's consistent position over the years has been to call for an end to mandatory detention because it leads to breaches of Australia's human rights obligations, including obligations to refrain from subjecting anyone to arbitrary detention.

[5] See Concluding Observations of the Committee Against Torture: Australia, UN Doc CAT/C/AUS/CO/1 (15 May 2008), at http://www.hrlrc.org.au/files/CX9F5DW2WB/Australia%20CAT%20COBs.pdf

to the enjoyment of the highest attainable standard of physical and mental health' (article 12), as well as the Covenant's non-discrimination clause;

- is inconsistent with UNHCR's authoritative views, based upon international jurisprudence, on the legitimate grounds under which asylum-seekers can be detained, reflected in the UNHCR Executive Committee Conclusion No 44 and the UNHCR's 1999 Revised Guidelines on Detention;[6]
- is inhumane and unworthy of a country that espouses respect for equality and human dignity.

7. At the broader level of policy, the mandatory detention regime undermines Australia's international reputation, perpetuating the historical image of a country that is racist and xenophobic. This in turn undermines Australia's credibility in promoting universal respect for human rights in its bi-lateral and multilateral diplomatic relationships, as well as Australia's standing in the region. One need only consider the regional and international media coverage afforded to the recent remarks of Navi Pillay, UN High Commissioner for Human Rights, that there was a 'strong undercurrent of racism' in Australia.[7]

8. ALHR recognizes that some positive changes have been introduced into the detention regime under successive governments, first as a result of the Comrie and Palmer inquiries and public concerns about the number of children in detention, then as a result of Labor's welcome attempts to introduce a more humane detention model consistent with certain core values. As a result, there are now greater opportunities to be released into residential and community detention; a recognition that the requirement in s189 *Migration Act* to detain a person where there is reasonable suspicion that they are unlawful is, as a minimum, an ongoing duty that requires review; and a principle that children will only be detained as a last resort.

9. However, these attempts to 'humanize' the regime have primarily been made at the level of policy. Recent events have made clear that the problem lies in the maintenance of the legislative framework of mandatory detention, which has proven itself again and again to be incompatible with the most basic standards of humanity reflected in international law.

10. The results are as predictable as they are tragic: indefinite and long-term detention for thousands of refugees, instances of self-harm and suicide, overcrowding, the overstretching of resources that could be better utilized elsewhere, chronic lack of expertise, inadequate provision of basic services, exacerbation of trauma and sense of isolation, and a system once again in crisis.

11. Mandatory detention is simply too blunt an instrument. It does not work, either as a mechanism for processing claims or as a deterrent measure – itself an illegitimate

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[6] UNHCR, ExCom Conclusion No. 44 (XXXVII) – 1986 on Detention of Refugees and Asylum-Seekers; UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (26 February 1999).

[7] See, for instance, *Al Jazeera* ('Australian asylum policy has 'racial element', 25 May 2011) *The Independent* ('UN Claims Canberra has Racist Policies', 26 May 2011), *The Daily Mail* ('Racist' Australia compared to Apartheid South Africa by UN Human Rights commissioner', 25 May 2011), *Indian Express* ('UN official likens 'racist' Australia to 'apartheid' South Africa', 26 May 2011), *China Daily* ('UN rights chief raps Australia on refugees, racism', 25 May 2011).

objective when it results in harm or punishment of those seeking asylum. Tweaking various element of the scheme does not address its fundamental flaw, viz. the absence of a considered decision to detain, or not to detain, and meaningful judicial scrutiny of that decision. Alternative detention models have been put to successive governments over several years. UN Committees have made numerous calls upon the government to consider alternatives as a means of avoiding arbitrary detention. ALHR urges the Committee to take note of these models, including the one introduced in this Bill, and recommends that Parliament consider safer, more effective and more humane approaches to the processing of asylum-seekers who arrive on our shores.

Asylum Seeker Principles and the exercise of administrative discretion

12. ALHR supports the inclusion of principles to guide the interpretation of the Migration Act with respect to the treatment of asylum-seekers, and endorses the principles contained in s4AAA of the Bill. Alongside the repeal of the mandatory detention provision in s189 (through the replacement of the word 'must' with 'may'), these principles will guide the accountable exercise of discretion with respect to detention, and provide what PIAC have called 'regulatory flexibility' for addressing future scenarios. They are consistent with international human rights law's insistence on detention being only used as a last resort, that it not be indefinite, and that it be humane.

13. ALHR notes that the principles contained within s4AAA are based upon four of the Key Immigration Detention Values announced by the government as part of its *New Directions in Detention* policy in July 2008.[8] These values have filtered into the operation of the Department at the level of policy, but in an inconsistent manner. At the time, the Minister announced:

> *'The values commit us to detention as a last resort; to detention for the shortest practicable period; to the rejection of indefinite or otherwise arbitrary detention. In other words, the current model of immigration detention is fundamentally overturned.'*[9]

14. These objectives can hardly be said to have been met. The codification of the principles is thus a precondition to their effective implementation. This much has been recognized by the government in its earlier attempts to enshrine the values in law.[10]

15. It is crucial that these principles be made *mandatory considerations* for all administrative officials making decisions about refugees, asylum seekers, or immigration detention both under the Migration Act *and under other pieces of relevant legislation*. We would therefore not restrict their application to the Migration Act and instruments made under it.

16. While the amendments appear to create a presumption against the automatic detention of an unlawful non-citizen – the mechanism which currently results in instances of

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[8] See Senator Chris Evans, Minister for Immigration and Citizenship, *New Directions in Detention, Restoring Integrity to Australia's Immigration System*, Seminar at the Centre for International and Public Law, ANU College of Law, 29 July 2008.

[9] Senator Chris Evans, Minister for Immigration and Citizenship, *New Directions in Detention, Restoring Integrity to Australia's Immigration System*, ANU College of Law, 29 July 2008.

[10] See Migration Amendment (Immigration Detention Reform) Bill 2009.

arbitrariness – we concur with other submissions that there is too little guidance as to how the discretion is to be exercised. At present, the new s198B merely provides that written 'reasons for the decision' and 'the grounds for the decision' be set out and given to a detained person. Similarly, on review a magistrate must merely be 'satisfied that, in all the circumstances, it is appropriate that the person is to continue to be detained.'

17. Without greater clarity, it is uncertain which 'grounds' and 'reasons' will be relied upon, or on what basis a magistrate need be satisfied that detention is appropriate or inappropriate. As a result, discretion will be guided by non-binding policy, resulting in inconsistency, a lack of transparency and certainty, and confusion when the matters are eventually brought before judicial officers.

18. In this regard, we endorse the observations of the Law Society, PIAC and Professor Pene Mathew, Freilich Foundation Chair at the Australian National University, that instances in which detention is appropriate could be inserted into the legislation. These could be based upon those grounds contained in Excom 44.

19. We also endorse the recommendation of Professor Mathew that such amendments be introduced alongside new criteria for the issuing of bridging visas to provide for release from detention.

Review of Detention by Judiciary

20. ALHR supports providing the Federal Magistrates Court with the authority to provide a merits review of a decision to detain after 30 days in detention under s195C.

21. Article 9(4) ICCPR requires that:

> *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*[11]

22. One of the foremost criticisms of the detention regime from the UN Human Rights Committee is the incapacity of our judiciary to examine the legality of detention outside the very narrow ground which currently exists – where a person is or is reasonably suspected to be an unlawful non-citizen. The Committee has confirmed that, consistent with article 9(1) and (4), a Court must be able to consider whether detention was necessary and reasonable in all of the circumstances of the case.[12]

23. The absence of such jurisdiction has also created tensions within Australia's constitutional system, as evident in the *Al Masri* line of authority which found such detention to be potentially unconstitutional (and therefore read down ss189 and 196 in light of a principle of legality), and the High Court's eventual endorsement, by 4-3, of the legislation as within the 'aliens power', despite its 'tragic' consequences (see

[11] The UN Human Rights Committee has repeatedly confirmed the application of article 9(4) to non-citizens. See General Comment No 8 (para 1) ('…in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.')

[12] See *A v Australia*, Communication No 560/1993, UN doc CCPR/C/59/560/1993 (30 April 1997), para 9.5. The Committee also found that article 2(3), which obliges states to provide an effective remedy for any human rights violation, had been breached. See para 10.

Justice McHugh in *Al-Kateb*). The Australian judicial system, founded upon a common law tradition that jealously guards against unfettered executive detention, and accustomed to considering applications for writs of habeas corpus as well as bail applications, is well placed to undertake this role.

Part 3 — Amendments repealing excised offshore places provisions

24. ALHR supports the repeal of those provisions of the Migration Act which excise parts of Australia from the migration zone and allow for removal of asylum-seekers to other countries for processing, a unique mechanism for circumventing obligations that is highly problematic in international law. While Australia does not assert that its international obligations do not apply in excised areas, the excision regime has several pernicious effects that amount to virtually the same thing. Without providing detailed submissions on this point, we note:

- Excision creates a two-tiered system which discriminates against a category of people on the basis of their means of arrival by removing the protections and rights otherwise available to migrants and asylum-seekers under the Migration Act. This is an illegitimate ground upon which to discriminate against any group, and has the effect of criminalizing their conduct in the eyes of the general public.
- International law expressly recognizes the right to seek asylum (article 14 of the Universal Declaration of Human Rights) and that refugees will often cross borders without permission in exercising this right (article 31 Refugee Convention, which is widely agreed to include the capacity to transit through countries on the way to seek asylum).[13]
- Excision is a key mechanism for removing asylum-seekers to third countries for processing, a system with few if any safeguards against breaches of fundamental rights (see below).
- Excision is designed specifically to remove fundamental rights: rights to liberty of person and to access judicial remedies are expressly removed as a means of deterrence. Even if such limitations could be justified on the basis of border control (a point which ALHR does not concede), the mechanism for achieving this objective is disproportionate, and the means for re-establishing those rights for 'recognized' refugees is inappropriate, reliant upon the Minister's non-compellable, non-reviewable discretion in section 46A.

25. The excision regime cannot be seen outside the context of Australia's attempts to implement offshore processing in other states. It provides authority for those excluded from the migration zone and the broader operation of the Migration Act ('offshore entry persons') to be removed to a 'declared country' for processing.

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[13] See discussion of the correct interpretation of art 31 in *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] 4 All ER 520. See also Guy S. Goodwin-Gill, Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection, in Erika Feller et al, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (CUP, 2003), 185-252, where the author notes, at 192, that in the course of the drafting debates, then High Commissioner for Refugees, Dr. Van Heuven Goedhart, 'recalled that he himself had fled the Netherlands in 1944 on account of persecution, had hidden for five days in Belgium and then, because he was also at risk there, had been helped by the Resistance to France, thence to Spain and finally to safety in Gibraltar. It would be unfortunate, he said, if refugees in similar circumstances were penalized for not having proceeded directly to the final country of asylum.'

26. While ALHR encourages burden sharing and international cooperation, the model implemented by Australia in 2001 created no such regime, nor provided for the necessary protections that *must* underpin any removal of asylum-seekers to another country. Such regimes, if they are to work, require a much broader agreement amongst countries of resettlement, flight and processing, including as a minimum, the existence of relevant infrastructure and expertise for the processing of claims, a verifiable (and enforceable) high standard of respect for the basic human rights of asylum-seekers, endorsement by and long-term support of the international community and UNHCR, and flexible mechanisms for ensuring that those who have a good reason to be in Australia are allowed to remain. None of these safeguards exist in the current legislation. Instead, we are faced once again with a blunt instrument – a Ministerial declaration under s198A that a country meets certain standards which need not even be tabled before Parliament, and cannot be challenged or scrutinized by any of the limbs of government to ensure accountability. A diplomatic assurance from a country such as Malaysia which is not a party to the Convention or indeed the ICCPR or the Convention against Torture hardly serves to remedy legislation that provides no protection.

27. We note in this regard that Australia remains accountable for a range of protection obligations that it accrues under the Refugee Convention as soon as a refugee is within Australia's territory and/or under its jurisdiction or effective control. These obligations remain on foot on removal of refugees to another country.

28. Consequently, ALHR also supports the repeal of s198A and related provisions.

Procedural Fairness and Judicial Review

29. ALHR supports the Bill's mainstreaming of the Migration Act by making it subject to the Administrative Decisions (Judicial Review) Act, and the repeal of the privative clause. We consider that this is both consistent with our international obligations not to discriminate against or penalize non-citizens with respect to their access to justice. It will also simplify a system that for the past 17 years has been plagued by attempts to limit judicial review, resulting in tensions between limbs of government and considerable confusion with respect to the operation and interpretation of basic principles of administrative law.

30. Access to justice for refugees is one of the most basic of all rights. Its appearance in the very earliest and minimal international refugee instruments (such as the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees, and the 1936 Provisional Arrangements concerning the Status of Refugees coming from Germany), alongside the fundamental prohibition on forcible return, reflects its centrality to international protection. This right is now codified in article 16 of the *Refugee Convention*, which guarantees that '[a] refugee shall have free access to the courts of law on the territory of all Contracting States' (free access not meaning access without payment). This right, as Grahl-Madsen put it in his commentary on the Convention, 'is of an absolute character'.[14] Because refugee status is a declaratory status, like the principle of *non-refoulement* and a range of other rights provided for

[14] See Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, republished online by UNHCR in 1997, VI.

under the Convention, it is a right that unquestionably applies to asylum seekers who have not yet had their status finally determined.

31. From a broader human rights perspective, article 16 is part of the right to due process reflected in article 14 of the ICCPR (which gives article 16 content), and the right to an effective remedy under article 2 ICCPR, most recently upheld as a fundamental right in the context of refugee determinations by the Grand Chamber of the European Court of Human Rights in *MSS v Greece* (Application no. 30696/09, 21 January 2011).

32. There are good reasons for elevating this right (some even consider it to be a norm of *jus cogens* in international law). The existence of an independent judicial body able to scrutinize the legality of administrative decisions is a cornerstone of the rule of law. This much is recognized in our own constitutional system, reflected in s75(v) of the *Constitution* and repeatedly affirmed by the High Court as one of the safeguards against the abuse of executive power. For government delegates and administrative tribunals, the oversight of the judiciary is perhaps the most important check on the legality, quality and credibility of their decisions. For the refugee, it is the final guarantee that a decision will be made that is legal and, in particular, fair and untainted by bias, and where they have had an opportunity to present their claim and be heard.

33. Despite its centrality to the rule of law and refugee protection, Australian migration law has been characterized by repeated efforts to narrow the grounds of review for asylum-seekers and migrants, including most recently a notorious attempt to exclude the courts altogether from anything but the narrowest grounds of review.

34. A particular target has been the right to procedural fairness / natural justice. The result, however, has been recourse by litigants and the courts to the constitutional writs and the common law rules of procedural fairness. For instance, the old Part 8 of the Migration Act excluded the Federal Court from exercising its broad judicial review function to review decisions on these (amongst other) grounds. Although the constitutionality of this provision was narrowly upheld in the case of *Abebe*, the High Court's decision in *Re RRT; Ex parte Aala* confirmed that the common law rules of natural justice continued to apply in migration cases, leading to more cases being taken directly to the High Court in its original jurisdiction.[15]

35. Most egregiously, the privative clause that currently exists in s474 was designed to oust the jurisdiction of the High Court itself through the fiction of 'expanding' the jurisdiction of the Tribunals. In *Plaintiff S157/2002*,[16] the High Court read down this provision so as not to apply to decisions infected by jurisdictional error – which includes those made in breach of the rules of procedural fairness; this resulted in more draconian legislative amendments (with respect to 'purported' decisions),[17] and in turn more litigation. More recently, the High Court rejected an interpretation of the

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[15] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82

[16] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476

[17] As Matthew Groves and HP Lee note of the *Migration Litigation Reform Act 2005* (Cth) and earlier attempts to protect 'purported' decisions, '[i]t is more draconian than anything previously proposed, in the sense that it seems intended to hive off entire categories of administrative action from judicial supervision in respect of almost every conceivable administrative error.' See Graves and Lee, *Australian administrative law: fundamentals, principles, and doctrines* (CUP, 2007) 364.

legislation that would quarantine offshore entry persons from the basic protection of a procedural fairness review by the federal court.[18]

36. This experiment in ousting the jurisdiction of the federal judiciary has thus lead to several setbacks and failures for the government in the face of a judiciary that jealously (and properly) guards its jurisdiction and continues to assert the centrality of procedural fairness to any consideration of the legality of an executive decision. It is, moreover, inconsistent with international human rights and refugee law protections. As eminent jurist Professor James Hathaway has pointed out, efforts to deny access of refugees to courts seeking the review of a negative assessment 'are *prima facie* incompatible' with article 16 of the Convention.[19] Similarly, it is generally acknowledged that access to the courts is inherent in the duty in article 14 ICCPR to ensure equality before the courts and tribunals. Professor Hathaway has noted, 'the Australian attempt to avoid due process rights by the fictitious 'excision' of parts of its territory is in breach of its duties under the Covenant.'[20]

37. ALHR opposes the attempts that have been made to date to narrow the grounds of review and oust the jurisdiction of the federal judiciary, and therefore supports the repeal of the privative clause in s474 and its replacement with review under the AD(JR) Act. The mechanisms currently in place are constitutionally problematic, creating more confusion than clarity, and have ultimately failed in their attempts to interfere with the exercise of federal judicial power. Moreover, alternatives can be put in place to prevent attempts to abuse judicial process which do not involve removing this most basic of rights.

Part 4 — Concluding Submission

38. By way of concluding submission, ALHR recalls that the highly racialised legacy of nineteenth century history with which the aliens and immigration powers remain imbued is one that does not *require* the legislature to paper over its continuing effects. On the contrary, just as the High Court and in turn the legislature have shown a preparedness to unseat the doctrine of *terra nullius* on account not only of developments in international law but also because the common law 'should neither be

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[18] *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41. As the Court unanimously said: 'Because making the inquiries prolonged the plaintiffs' detention, the rights and interests of the plaintiffs to freedom from detention at the behest of the Australian Executive were directly affected, and those who made the inquiries were bound to act according to law, affording procedural fairness to the plaintiffs whose liberty was thus constrained.' (at 9).

[19] James Hathaway, *The Rights of Refugees under International Law* (2005) 645.

[20] Ibid. Hathaway notes the analogous case of *Amuur v France* [1996] ECHR 25, in which the European Court of Human Rights ruled against the validity of a French law that purported to deny refugees access to judicial protection in 'international zones'.

nor be seen to be frozen in an age of racial discrimination',[21] it behoves the Australian Parliament in the twenty-first century to reconsider the position it has taken in relation to these fundamental issues as they affect those who seek this country's protection.

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[21] See *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1 [41] (Brennan J)