

Background

- 2.1 This Chapter provides background material on issues that are relevant to immigration detention centres (IDCs) in Australia.

Immigration detention centres

- 2.2 There are currently six IDCs in Australia:
- Curtin Immigration Reception and Processing Centre (IRPC) at the RAAF Base, Derby, in Western Australia;
 - Port Hedland IRPC in Western Australia;
 - Perth Immigration Detention Centre (IDC), located within Perth Domestic Airport;
 - Woomera IRPC in South Australia;
 - Villawood IDC in Sydney; and
 - Maribyrnong IDC in Melbourne.

Migration legislation

- 2.3 Australian migration legislation has contained provisions for detention since colonial times. Australia's first significant immigration case, *Musgrove v Chung Toy*, 1891 A.C. 272, concerned the issue of migration detention. In this case, the Privy Council held that a non-citizen had no

right to recover damages for false imprisonment when he was detained and refused entry into Victoria.¹

- 2.4 Legislative control of entry into and exit from Australia is achieved through the *Migration Act 1958* (the Principal Act), as amended. Section 4 states that:

The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

- 2.5 Under the Principal Act, a prescribed authority can order the detention of a ‘prohibited immigrant’, defined as someone ‘not being the holder of an entry permit that is in force enters Australia’, for a period of up to seven days. This period can be extended.²

- 2.6 In addition to the above Act, the legislative basis for detention can be found in the *Immigration (Unauthorised Arrivals) Act 1980*. Section 12 (2) provides that passengers be brought before a prescribed authority within 48 hours of arrest, or ‘as soon as is practicable after that period.’ Sub-section (3) permits detention of the passenger until:

- conveyance from Australia;
- granting of an entry permit; or
- Ministerial direction determines otherwise.

Migration Amendment Act 1989

- 2.7 The *Migration Amendment Act 1989* was passed prior to the arrival of the first of the wave of Cambodian boats carrying prohibited immigrants in 1989. It introduced significant changes to the system of processing ‘boat people’ by providing a legal entitlement to a visa or entry permit, where the applicant met the legislative requirements. The intention was to provide fairer and clearer criteria for the granting of visas. Although this was never realised, it was also intended, by providing statutory merits review procedure, to remove the necessity for unsuccessful visa applicants to appeal to the judiciary.

1992 Amendments

- 2.8 Prior to 1994, provisions dealing with unauthorised arrivals were extremely complex. The influx of boat arrivals between 1989 and 1994,

1 Joint Standing Committee on Migration, **Asylum, Border Control and Detention**, February 1994, p. 49.

2 Further information on Australia’s system of visas is in the next section.

resulting in delays in processing and a number of court cases, prompted amendments to the Principal Act.

- 2.9 The *Migration Reform Act 1992* introduced fundamental changes, the last of which came into force on 1 September 1994. It provided a statutory code of procedures for most primary decisions and clarified the status of non-citizens who arrive in Australia more simply, as either lawful or unlawful non-citizens. Section 13(1) now states that:

A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.

- 2.10 DIMA stated that:

Since December 1992, the *Migration Act 1958* has required that all non-citizens who are unlawfully in Australia (unlawful non-citizens) must be detained and that, unless they are granted permission to remain in Australia, their removal be effected as soon as practicable. This is consistent with the fundamental legal principle, accepted in Australian and international law, that in terms of national sovereignty, the State determines which non-citizens are admitted or permitted to remain and the conditions under which they may be removed.³

Unlawful non-citizens fall broadly into two distinct categories. One category includes those persons who enter Australia legally with a valid visa, and whose visa subsequently expires or is cancelled, and who are not subsequently granted a further visa; these persons are more commonly referred to as 'overstayers'. The other category of unlawful non-citizens is those persons who arrive by air or boat without a valid visa. In recent times, detention facilities have had to cope with an influx of unauthorised boat and air arrivals, yet have retained sufficient capacity throughout this period to also manage overstayers.⁴

1999 Amendments

- 2.11 In October 1999, the Minister announced, as part of a series of measures designed to curb the increasing numbers of people attempting to enter Australia illegally, changes to legislation for visa arrangements for illegal arrivals. Prior to 20 October 1999, applicants could expect to receive a Permanent Protection Visa (PPV) if they were found to qualify for protection by Australia.

3 DIMA, *Immigration Detention*, p. 1.

4 *ibid.*

- 2.12 Under these arrangements, he also stated, people arriving in Australia unlawfully will, if eligible for protection, receive a Temporary Protection Visa (TPV) valid for three years. While they have the right to work and access to appropriate levels of publicly funded support, they will not be able to sponsor other family members to Australia during that period, nor the right to leave and re-enter Australia.
- 2.13 Other measures he announced included legislation introducing tests such as fingerprinting, face, palm and retinal recognition as well as voice testing to ascertain the true identity of asylum seekers, and to ensure that they do not already have protection elsewhere, and that they have not already been refused refugee status overseas.⁵

Border Protection Legislation Amendment Bill 1999

- 2.14 *The Border Protection Legislation Amendment Bill 1999* gave DIMA and Australian Customs Service officers powers to board and detain boats in international waters suspected of being involved in people smuggling. This Act strengthened the provisions of the *Customs Act 1901* (the Customs Act) and the Principal Act, relating to the interception and prevention of people-smuggling operations. The Bill also amended the principal Act and the *Fisheries Management Act 1991* to allow for the detention of Indonesian citizens who are arrested for fishing illegally in Australian waters, pending their prosecution.

The Migration Legislation Amendment Bill (No. 2) 2000

- 2.15 This Bill sought to amend the Principal Act to restrict access to the courts for judicial review of migration decisions.

Legislative Changes

- 2.16 Following riots at the Port Hedland IRPC on 20 January 2001, the Minister announced that legislation would be introduced in the Parliament, allowing for greater powers, including enhanced powers to search detainees and visitors to the centres.⁶
- 2.17 The Minister introduced this legislation to Parliament on 5 April 2001. In introducing the Bill, Mr Ruddock explained:

5 Minister's Press Release: MPS 143/99, **Ruddock Announces Tough New Initiatives.**

6 Senate Legal and Constitutional Legislation Committee, Consideration of Additional Estimates, 20 February, 2001, pp. 145-7; ABC News Online, 23 January 2001 (<http://www.abc.net.au/news/newslink/nat/newsnat-23jan2001-5.htm>).

While we are obliged to and do provide suitable accommodation and facilities for detainees, they in turn have a responsibility to behave appropriately...

We need enhanced powers to discourage and, where necessary, to more effectively manage this inappropriate behaviour in detention centres.⁷

2.18 The Migration Legislation Amendment (Immigration Detainees) Bill 2001 seeks to amend the Principal Act by:

- strengthening the punishment for escaping from a detention centre;
- introducing new offences relating to possession and manufacture of home-made weapons;
- allowing searches of detainees for weapons, including strip searches as a last resort; and
- ensuring that visitors would also undergo tougher security scrutiny, including searches, before being allowed to visit detainees.⁸

2.19 The Minister stated that there many safeguards were built into the new laws, and that a draft protocol would clearly set out the powers available to authorities.⁹

Categories of visas

2.20 Under the provisions of the *Migration Act 1958*, there are three classes of visas for entry into Australia:

- Permanent.
- Temporary (other than Bridging visas).
- Protection.

2.21 Below these classes, there are seven sub-classes of Bridging visas and a further 121 sub-classes of other visas. The latter include two sub-classes for carers (116 and 836), two for spouses (100 and 820), two for children (101 and 802), and categories for refugees (200), Temporary Protection (785) and Temporary (Humanitarian Concern) (786).

7 See House of Representatives *Hansard*, 5 April 2001, p. 26530.

8 *ibid.* When this report was finalised, this Bill had not proceeded beyond the Second Reading stage of consideration.

9 *ibid.*, p. 26532. AAP Report: **Gov't moves to beef up immigration security with new laws**, 5 April 2001.

- 2.22 Section 36 of the Act deals with Protection Visas, and refers to Australia's protection obligations under the United Nations' 1951 *Convention relating to the Status of Refugees*.

Recent influx of unauthorised arrivals

- 2.23 In the 1999/2000 Financial Year, there was an unprecedented number of unauthorised arrivals in Australia: 1695 people were refused entry at airports, and 4174 people arrived without authority on 75 boats. This was consistent with a world-wide trend: in 2000, as well as the 1570 people who arrived illegally by air, 2688 people arrived in Australia illegally by boat, mainly from Middle Eastern countries. The distribution of the latter by nationality can be found at Appendix C.¹⁰
- 2.24 In response to the surge in unauthorised arrivals in the latter half of 1999, two new detention facilities were opened. The IRPC at Curtin RAAF Base, near Derby in WA, was recommissioned in September 1999, and the Woomera IRPC was opened in November 1999.
- 2.25 New buildings are being constructed at the Woomera IRPC site to ensure facilities are adequate for the needs of the detainees and to increase capacity, while also providing flexibility to manage detainees as necessary.¹¹

Previous waves of 'boat people'

- 2.26 Australia's detention policy has evolved over the past twenty five years in response to successive waves of unauthorised arrivals. The term 'boat people' has been used since the mid-1970s to describe those who seek refuge in Australia, and often arriving by boat, from persecution in other countries. More recently, they do not come from South-East Asia but from Middle Eastern countries. It will be used in this general sense in this report.¹²

10 In 1998/1999, the figures were 2106 and 926 on 42 boats respectively: see DIMA Fact Sheet 81, **Unauthorised Arrivals by Air and Sea**. From 1 January to early May 2001, 32 boats with 1991 people on board had arrived off Australia. In the same period, 510 people arrived illegally by air. Some indication of world-wide numbers of refugees is in Appendix D.

11 See paragraph 2.61.

12 **The Detention of Boat People**, Department of the Parliamentary Library, Current Issues Brief No 8 2000-2001, 27 February 2001, p. 2.

Vietnamese

- 2.27 The initial wave of 'boat people' arrived from Vietnam in the late 1970's, an estimated 2100 people in fifty six boats. The first boat arrived in Northern Australia in April 1975 and the last in August 1981. There was little concern within Government or the then Department of Immigration, Local Government and Ethnic Affairs (DILGEA) about the *bona fides* of these people and they were processed immediately on arrival.
- 2.28 These mainly Vietnamese 'boat people' were held in 'loose detention' in an open part of Westbridge (now Villawood) Migrant Centre in Sydney, together with migrants who had been granted visas under the humanitarian and refugee programs. They were not permitted to leave the Centre and were required to report for roll call daily.
- 2.29 With the last of these arrivals, in the early 1980s, there was increasing doubt regarding the *bona fides* of the 'boat people'. Passengers from the final Vietnamese boat were detained in the former East Arm Quarantine Station in Darwin.

Cambodians

- 2.30 The next wave of 'boat people', mainly from Cambodia, China and Vietnam, began to arrive in Australia in late 1989. Between November 1989 and January 1994, 18 boats arrived carrying a total of 735 people. Most of these people sought refugee status and were detained awaiting determination of their claims. Passengers from the first of these boats were initially held for three weeks at the Willie Creek Holding Centre, north of Broome, WA, normally used for illegal fishers awaiting trial.
- 2.31 Subsequently, these people were moved to the Westbridge Migrant Centre, Sydney. They were held in an unfenced area but were not permitted to leave, and were required to report daily to the Australian Protective Services (APS). A number of 'boat people' illegally left the Centre.

Chinese

- 2.32 The number of on-shore refugee applications lodged in Australia rose from 1148 in 1989 to 11,335 in 1990 and 13,045 in 1991. This increase was due in part to a large number of refugee applications lodged by citizens of the People's Republic of China (PRC) present in Australia during and immediately following the Tiananmen Square incident of June 1989.
- 2.33 The dramatic increase in refugee applications from Chinese nationals led to lengthy delays in processing and increased lengths of detention, in some cases of up to four years.

The condition of the centres

DIMA's views

- 2.34 In April 2001, DIMA said that it was 'in the process of' commissioning a full physical audit of the detention centres, including compliance with relevant legislation. It provided the following information on the condition of the centres. In all cases, it 'expected' that the building standards at the time of construction were met. All new work was required to meet applicable Building Council of Australia (BCA) standards.
- 2.35 Stage 1 of Villawood IDC was purpose-built in 1976. As announced in the 2000/2001 Budget, replacement of Stage 1 is an early priority.
- 2.36 Stage 2 of Villawood was also constructed as migrant accommodation between 1966 and 1970. Some blocks were refurbished in 1991 and some demountable buildings installed to create a detention facility with 200 beds.
- 2.37 An expansion project nearing completion in April 2001 involved:
- refurbishment of existing permanent structures near Stage 2 to create Stage 3, and
 - installation of demountable buildings in Stage 2 and Stage 3.
- 2.38 DIMA stated that there had been consultation about this project with the local council and residents. Stage 3 is now being used. It has refurbished two-storey buildings and several demountable buildings.
- 2.39 Maribyrnong IDC is a purpose-built structure dating from 1981 to 1983. DIMA's long term strategy involves refurbishment of the facility to increase accommodation and improve facilities.
- 2.40 Woomera IRPC comprises permanent buildings in the administration compound and the original accommodation compound, and a combination of new and second-hand demountable buildings. The permanent buildings were built in the late-1950s and early 1960s.
- 2.41 Prior to commissioning the Centre in 1999, the site was rewired, some minor refurbishment undertaken and demountables installed.
- 2.42 Second-hand demountables were bought to meet the urgent need to provide accommodation for increased numbers of detainees in late-1999 and early 2000. As part of the recent construction program, purpose-built accommodation demountables have been installed in the two new compounds.

- 2.43 DIMA stated that a major refurbishment of the kitchen to meet the facility's needs was underway, in accordance with the BCA. It noted that the SA Health Department would inspect the kitchen on its completion.
- 2.44 Perth IDC was originally used by the Australian Federal Police and was constructed in 1981. DIMA advised that an architect has been commissioned to assess the increased area now available:
- to determine what changes can be made to improve its capacity, and
 - to improve the amenity for staff and detainees.
- 2.45 The site for the Port Hedland IRPC was bought in 1991. It was then refurbished to adapt it for use by detainees, and asbestos was removed. A further major refurbishment was undertaken in 1996/97, including:
- cyclone proofing;
 - construction of family rooms; and
 - rooms for unaccompanied minors.
- 2.46 Because of budgetary constraints, Juliet Block had remained in its original condition. Following damage to India Block in 2000, DIMA noted that there had been no alternative but to use Juliet until that damage could be repaired. Demountable buildings installed in 2000 met the applicable BCA standards.¹³
- 2.47 Curtin IRPC was first commissioned in March 1995, comprising demountable buildings and one 'fixed building' for recreation purposes. It was decommissioned, and handed back to Defence from December 1995 to September 1999. It has been operational since then.
- 2.48 Since it was recommissioned, additional demountable buildings had been installed.

Compliance with State/Territory/Local Government laws

- 2.49 Information provided by DIMA after meeting the Committee stated that detention centres are located on Commonwealth land that is part of :
- the Special Purpose Estate, managed by the Department of Finance and Administration – Villawood, Maribyrnong, Port Hedland and Perth Airport, or
 - the Special Purpose Defence Estate, managed by the Department of Defence – Curtin and Woomera.

13 See paragraph 6.15.

- 2.50 DIMA has responsibility for the ongoing management, maintenance and upkeep of the centres under Memoranda of Understanding with those Departments. It advised that the Commonwealth is not required to seek planning approval from local councils for construction authority on Commonwealth land. As good neighbours, the Commonwealth consults councils in the planning of construction works. DIMA 'has endeavoured' to comply with the BCA and any specific State supplements.
- 2.51 All construction and maintenance work carried out at the centres is undertaken by licensed contractors consistent with the requirements of the relevant building codes and standards for the specific State/Territory. All building works are required to have certificates of compliance issued.
- 2.52 DIMA stated that, at the commencement of its contract in 1997, Australian Correctional Services (ACS) undertook a commercial due diligence evaluation of the condition of all the centres. Some 'minor deficiencies' with their fabric and structure were identified and subsequently corrected.
- 2.53 As the service provider, DIMA noted that ACS is responsible for meeting Occupational Health and Safety obligations for its employees. Under the contract with DIMA, ACS must comply with the relevant 1991 Commonwealth Act. The contract also requires ACS to accept responsibility for the physical safety and security of detainees, staff and visitors.

Comment

- 2.54 During its program of visits, the Committee was concerned at the conditions in which some detainees were living. It notes that conformity to local government/State/Territory standards was not always met, but it is aware of DIMA's plans to upgrade the centres.

DIMA's plans for the centres

- 2.55 In anticipation of increased numbers of boat arrivals, the Government has announced a long-term strategy that will see new centres established and older facilities upgraded to relieve the pressure on existing facilities. Additional resources, \$52.1m over four years, were allocated in the 2000/2001 Budget to establish new immigration detention facilities in Darwin and Brisbane and to upgrade existing facilities.¹⁴

14 Information provided by DIMA on work to be undertaken at some of the centres is at Appendix E.

- 2.56 The Government has enhanced existing plans to refurbish and expand facilities at the Villawood IDC in Sydney. Planning will commence for the establishment of a 200-bed detention centre in Brisbane to be opened in 2002/2003. This will primarily accommodate unauthorised arrivals by air and those who overstay their visas.
- 2.57 In addition, the Government has agreed to a draft plan for the redevelopment of the Maribyrnong IDC (in 2005/2006), the relocation and expansion of the Perth IDC and the establishment of transit centres at some airports. These plans will be reviewed prior to the commencement of each project, to ensure that the capacity is still required.
- 2.58 As well as reviewing long term detention requirements, DIMA has also considered a package of measures for addressing the unprecedented increase in unauthorised arrivals by boat. These measures include establishing a 500-bed facility in Darwin, with flexibility to expand the capacity to 2000 beds if necessary.
- 2.59 Implementation of this planned course of action has commenced, with preliminary work being undertaken on design requirements and specialist advice engaged. The current plan is for the centre to be operational in mid-2002.
- 2.60 Darwin was chosen as the most appropriate site for this facility because of its proximity to the point of arrival for 'boat people' located offshore and transported to the mainland.
- 2.61 It is intended that the Curtin facility be closed as soon as the expansion of other facilities is completed. The facility at Woomera is to be consolidated and retained for the long term.
- 2.62 At the same time as developing these infrastructure proposals, DIMA is working to reduce the overall cost of detention through a reduction in the period of time it takes to determine an individual's status.¹⁵

DIMA's initiatives

- 2.63 To complement the above measures, the Government has also allocated an additional \$116.8m to combat people smuggling and thereby reduce the numbers of asylum seekers reaching Australia. In the May 2000 Budget, the Minister for Immigration announced several new Government initiatives including:

15 Material in this section was drawn from DIMA's 2000/2001 Budget Fact Sheet 2 dated 9 May 2000, and from the Minister's Press Release: MPS 048/2000: **Budget Media Release 3**.

- \$12.4m over four years to expand DIMA's network of compliance officers to assist Australia's posts, initially in Islamabad, Belgrade, Moscow, Amman, Tehran, Suva and Cairo, to combat document and identity fraud and people smuggling. The new staff will complement existing DIMA staff in Asia and the Middle East;
- \$3.1m over four years to place additional airline liaison officers in airports known to be key transit routes for unauthorised arrivals;
- \$5.3m over four years for additional off-shore resources directed at speeding up humanitarian processing, to combat the false perception that unauthorised arrival is the easiest way to take advantage of Australia's protection obligations;
- \$5m each year, in the form of targeted aid contributions and resettlement support, as part of Australia's efforts to build a coordinated international approach to develop a long-term solution for Afghan and Iraqi refugees; and
- \$2m in 2000 / 2001 to develop a pilot program for the use of targeted reintegration assistance for unauthorised arrivals returned to their home country; and funding to support the development of technical and physical assistance to border control agencies in transit countries to help them combat people smuggling.¹⁶

2.64 These measures followed major initiatives that were introduced in June 1999, including:

- improving Coastwatch, Customs and Navy capabilities to detect, pursue, intercept and search boats carrying unauthorised arrivals;
- prosecuting smugglers under an increased penalties provision and seizing, selling or destroying their boats;
- conducting an international information strategy directed at both the smugglers and those they seek to exploit; and
- addressing the factors that encourage those who select Australia as a target.¹⁷

2.65 People smuggling is a trans-national crime, and the subject of a growing amount of international cooperation. DIMA is also working in cooperation with domestic and other international law enforcement agencies with the aims of:

16 Minister's Media Releases: MPS 047 / 2000, **Government Tackles Illegal Arrivals Head On** and MPS 046 / 2000, **Ruddock Introduces Tough New Measures to Reduce Illegal Entrants**.

17 DIMA, **Illegal Migration Issues Protecting the Border: Immigration Compliance: Chapter 1, People Smuggling to Australia – Overview**.

- improving information-sharing;
 - cooperation among regional neighbours;
 - developing safe third country agreements;
 - developing bilateral agreements; and
 - investigating people smuggling rackets.¹⁸
- 2.66 There has been considerable success in these areas, resulting in a number of smuggling rings being broken. As of February 2001, a total of 291 people had been charged in Australia for their involvement in people trafficking activities.¹⁹

Recent inquiries

- 2.67 There has been a number of recent inquiries conducted into aspects of detention centres. The Committee has considered these reports and noted their conclusions and recommendations relating to the treatment of detainees in the context of human rights.²⁰

FAYS Inquiry

- 2.68 The South Australian Family and Youth Services Department (FAYS) investigated a specific allegation of child abuse concerning a 12-year-old boy at Woomera. On 18 December 2000, this inquiry found that the allegations could not be sustained.

Flood Inquiry - Inquiry Into Detention Procedures

- 2.69 Following allegations of child abuse at Woomera, on 22 November 2000, the Minister for Immigration and Multicultural Affairs announced that an independent inquiry would be set up to examine and report to the Government on detention procedures. This inquiry was conducted by Mr Philip Flood AO.
- 2.70 The inquiry was asked to make recommendations where it believed processes need to be improved. It was fully independent of DIMA and reported directly to the Minister.

18 *ibid.*

19 AAP, 'Arrests a big breakthrough in people smuggling crackdown', 14 March 2001; ABC, 'People Smuggling Ring Disrupted,' 24 January 2001; DIMA: Answer to Question Taken on Notice, Additional Budget Estimates Hearing, 20 February 2001.

20 A list of reports related to detention centres is at Appendix B.

- 2.71 The Flood Report was tabled on 27 February 2001. While the South Australian Family and Youth Services Department and the South Australian Police found no evidence to substantiate the allegations involving the 12 year old boy, Mr Flood found that the processes set down in the legislation and DIMA's administrative requirements and those of ACM were not followed. His report was also critical of ACM's management of Woomera IDC.
- 2.72 The Flood Report contained 16 recommendations. The Minister responded to that report in the Parliament, and is currently acting on a number of these recommendations:
- An Immigration Detention Advisory Group will be formed to provide the Minister with advice on the appropriateness and adequacy of services, accommodation and facilities at immigration detention centres around Australia.²¹
 - Alternative detention arrangements are to be trialed for women and children.²²
 - ACM is revising its policy instructions on managing child protection issues.
 - Training for ACM staff is being reviewed.
 - Negotiation of protocols with State authorities involved with immigration detention is a priority.
 - DIMA's management arrangements in the Woomera, Port Hedland and Curtin centres are being strengthened by the appointment of Assistant Business Managers.
 - Attention is focused on refining case management of detainees and improving the performance management of the DIMA contract with ACM.
 - There have also been significant changes to processing of protection visa applications to expedite the process.²³

21 Minister's Media Release: MPS 022 / 2001, **Minister Announces New Detention Advisory Group**, 27 February 2001.

22 Minister's Media Release: MPS 021 / 2001, **Immigration Detention Trial Being Considered for Woomera**, 27 February 2001. See also paragraph 5.85. Some discussion of other methods of detention can be found in Chapter 5.

23 Minister's Media Release: MPS 023 / 2001, **Immigration Minister Tables Flood Report**, 27 February, p. 1.

Commonwealth Ombudsman's Report of an own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres, March 2001

2.73 This investigation into IDCs commenced in September 1999, following complaints to the Ombudsman's office, as well as a number of reported incidents including escapes and allegations of assault on detainees.

2.74 The Acting Ombudsman, Mr Oliver Winder, said:

My investigation revealed evidence at every IDC of self-harm, damage to property, fights and assaults, which suggested that there were systemic deficiencies in the management of detainees.²⁴

2.75 The report made several recommendations designed to improve the standard of care in IDCs, particularly for women and children, and also included recommendations about the culture and training of ACM staff.

Commonwealth Ombudsman's Report of an Own Motion Investigation into Immigration Detainees held in State correctional facilities, March 2001

2.76 This report examined the administrative detention of individuals in prisons under the *Migration Act 1958*. The main issues considered were the grounds for holding immigration detainees in prisons and whether the policies and procedures established by DIMA were being followed in practice. These policies were at least partly in response to the Ombudsman's 1995 report concerning the transfer of detainees to State prisons.

2.77 The report also focused on:

- asylum seekers transferred by DIMA to prisons because of behaviour in detention centres, and
- detainees held in prisons following completion of custodial sentences, pending deportation from Australia.

2.78 The investigation raised concerns about the use of penal institutions as places for detention, other than where serious criminal behaviour was involved. It also found that detainees' welfare had not always been adequately monitored by DIMA.

2.79 The Ombudsman's Report made recommendations about the administration of detainees in State jails. It suggested that formal agreements with State authorities should be finalised as soon as possible to ensure that appropriate accountability, processes and standards of care were in place.

24 Commonwealth Ombudsman, Press Release, **Ombudsman Releases Immigration Detention Reports**, 2 March 2001.

- 2.80 DIMA is currently negotiating a number of Memoranda of Understanding (MOUs) with States/Territories in a number of areas, including the holding of detainees in State/Territory jails.

Commonwealth Ombudsman's own motion inquiry into incident reporting

- 2.81 At the time this report was finalised, the Ombudsman's investigation was not complete.

International instruments

- 2.82 A number of United Nations' international instruments deal with issues relating to international detention arrangements:
- the *Convention Relating to the Status of Refugees* of 1951 (the Convention), ratified by Australia on 22 January 1954;
 - the *Protocol Relating to the Status of Refugees* of 1967 (the Protocol), ratified by Australia on 13 December 1973;
 - the *Convention on the Rights of the Child* of 1989, ratified by Australia on 17 December 1990;
 - the *International Covenant on Civil and Political Rights* of 1966, ratified by Australia on 13 August 1980; and
 - the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 1984 (Convention Against Torture), ratified by Australia on 8 August 1989.

Human Rights and detainees

- 2.83 The standards governing the rights of detainees are embodied in the above instruments, as well as in the following non-binding international instruments:
- the *Declaration on the Rights of Disabled Persons* (1975);
 - the *Standard Minimum Rules for the Treatment of Prisoners* (1955);
 - the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981);
 - the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988);

- *Rules for the Protection of Juveniles Deprived of their Liberty* (1990); and
- the various guidelines issued by the United Nations High Commissioner for Refugees (UNHCR), including the 1999 *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*.

2.84 According to the principles outlined in these documents, detainees can expect to be accorded basic human rights, including:

- to be treated in a humane manner and with respect for their inherent dignity as human beings;
- not to suffer discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
- not be subject to torture, or cruel, inhuman or degrading punishment;
- to be informed of the reasons for their detention, their legal rights and their right to seek asylum;
- the right to legal assistance and advice and an interpreter when needed;
- the right to communicate in confidence with bodies and individuals such as the Commonwealth Ombudsman, HREOC, their legal counsel and consular representatives of their nation of origin;
- to have their individual needs met, taking into account their history, experiences, age, gender, and cultural, religious and linguistic identity;
- the right to practise the religion of their choice;
- the right to medical and dental care which is culturally appropriate and commensurate with that provided in the general community;
- the right to be heard in judicial and administrative proceedings affecting them; and
- the right to appeal the outcomes of the above processes.

2.85 The rights that should be afforded to detainees are also in such documents as:

- UNHCR's *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*; and
- UNHCR's *Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers*;²⁵ and

25 See Appendix F for UNHCR's *Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers*.

- HREOC's proposed *Immigration Detention Guidelines*.

2.86 HREOC's Guidelines are referred to in more detail in Chapter 3, in relation to DIMA's Immigration Detention Standards (IDS).²⁶

The Convention

2.87 The *Convention relating to the Status of Refugees* of 1951 was a response to refugee problems encountered before and after the Second World War, and during the early years of the Cold War.

2.88 Article 1A of this Convention defines a 'refugee' 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 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.²⁷

2.89 While this definition referred to events that had occurred before 1 January 1951, the 1967 Protocol to the Convention extended these protections to refugees throughout the world, whatever date they had been forced to leave their home country.

2.90 The Convention, the Protocol and other documents that apply in particular regions of the world remain the foundation for the work of protecting refugees. While there may be problems with its operation, there is no indication that the Convention will be re-negotiated or replaced.²⁸

26 See paragraph 3.22.

27 The text of the Convention can be found at Appendix G.

28 See the Cover Story, **Refugees**, Volume 3, No 120, 2000, p. 14; National Population Council's **Refugee Review**, July 1991, (Australian Government Publishing Service), p 68.