A SANCTUARY UNDER REVIEW: WHERE TO FROM HERE FOR AUSTRALIA'S REFUGEE AND HUMANITARIAN PROGRAM?

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I. INTRODUCTION

Although predominantly a nation of immigrants, Australia shows a curious ambivalence in its attitude to migrants in general and one class of migrants in particular: refugees. We have a proud tradition of receiving and 'making our own' generous numbers of the world's politically oppressed and displaced persons. Over the last fifty years, Australia has admitted over 600 000 refugees and 'humanitarian' migrants[1] selected through processes operated by or under the auspices of the United Nations.[2] Selected by Australia as a matter of choice, these people are granted permanent residence and all the rights that attach to this status. They enjoy good press and political favour. On the other hand, 'on-shore' refugees or, more accurately, asylum seekers[3] who come to Australia under their

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1 See Department of Immigration and Multicultural Affairs (DIMA) Fact Sheet No 40: *Australia's Refugee and Humanitarian Program*, available through the DIMA website, <http://www.immi.gov.au.html>.

2 See *Migration Regulations* 1994 (Cth), Schedule 2, Parts 200-14 which set out criteria for the grant of a range of humanitarian visas for non-citizens outside of Australia. For a discussion of the program, see M Crock, *Immigration and Refugee Law in Australia*, Federation Press (1998) pp 124-5.

3 In this article the terms 'asylum seeker' and 'refugee claimant' are used interchangeably, unless otherwise indicated, to denote individuals who leave their country of origin and seek protection under international law.

own initiative *and without a visa* seeking protection from persecution, elicit quite a different response.[4] Banner headlines warning of invasions, scams and national disasters greet the arrival of boats bearing asylum seekers off the north coast of the country. With each wave of arrivals, changes have been made to Australia's immigration laws, generally with the aim of making it more difficult for unauthorised arrivals to gain a foothold in the country.

On-shore asylum seekers stand apart for the most obvious and simple reason – they come uninvited. In practical terms, they represent an exception of sorts to the sovereignty principle. With few exceptions, persons who gain official recognition as 'refugees' must be granted protection because of undertakings Australia has made in signing and ratifying various international legal instruments. As a party to the Convention Relating to the Status of Refugees ("Refugees Convention") and its attendant Protocol,[5] Australia has undertaken not to 'refoule' or return refugees to a place where they would face persecution on one of the five Convention grounds.[6] It has also promised not to punish refugees who enter the country illegally.[7] Herein lies the dilemma of on-shore refugee determinations. At a mechanical level, Australia complies with its international legal obligations through quite elaborate mechanisms for determining the 'refugee status' of non-citizens in Australia – irrespective of their mode of entry. At a political level – and in the minds of the general public – Australia is deeply conflicted.

Nowhere is Australia's ambivalent attitude to asylum seekers more apparent than in the regime of mandatory detention that applies to all but a select group of unauthorised arrivals. In theory, every non-citizen present in Australia who does not possess a valid visa is required by law to be both detained and removed from the country as soon as practicable. In practice, however, it is the unauthorised arrivals who feel the force of the regime.[8] The unauthorised arrivals who are most likely to spend a long time in detention are those who come to Australia

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4 Note that there are actually two very different categories of 'on-shore' asylum seekers: those who arrive on a valid visa and those who do not. The first of these groups is the most numerous but least controversial as members begin as lawful entrants and seek to change their status to permanent resident on refugee grounds. For a discussion of the media's response to the second category of asylum seekers – the 'unauthorised arrivals' - see D Corlett, "Politics, Symbolism and the Asylum Seeker Issue" (2000) 23(3) *UNSWLJ* 13-32 and P Mares, *Borderline: Asylum Seekers and Refugees in Australia*, UNSW Press (2000). See also D Cox and P Glenn, "Illegal Immigration and Refugee Claims" in H Adelman, M Burstein, L Foster & A Borowski (eds), *Immigration and Refugee Policy, Australia and Canada Compared* (Vol 1), MUP (1994) p 284.

5 The Refugees Convention was signed at Geneva on 28 July 1951. (See Aust TS 1954 No. 5, 189 UNTS No. 2545, 137). The Protocol was signed on 31 January 1967, and ratified on 13 December 1973. (See, Aust TS 1973 No. 37, 606 UNTS No 8791, 267). The Convention covers events causing a refugee problem before 1 January 1951, while the Protocol extends the definition to events occurring after that date.

6 See the Refugees Convention, Articles 1A(2) and 33; and the Protocol, Articles 1(A)(2). The Refugees Convention and Protocol combine to define a refugee as any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or 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".

7 See Refugees Convention, Article 31.

8 See s 72 of the *Migration Act* 1958 (Cth) and reg 220 *Migration Regulations* 1994 (Cth).

and seek our protection on the basis that they are refugees. This is so, in spite of exceptions being made for 'eligible non-citizens' – five classes of asylum seekers who are eligible for release on 'bail'.[9] The detention regime works against the interests of asylum seekers at virtually every level. The remoteness of the detention centres and the length of time people are held in custody are also constant irritants to the fairness of the system as a whole. While political and popular support for detention *in principle* is high, this has not stopped the Australian public from responding with some vigour when confronted with the pain of individual asylum seekers.

Australia's almost schizophrenic approach to these people is apparent in the concern generated by two high profile asylum seekers, both of whom came to Australia illegally. The first involved a Chinese woman identified only as Ms Z, whose claims for refugee status were rejected in 1997, and who was returned to China eight and a half months pregnant with her second child. It was alleged – and the Senate has now accepted[10] – that the woman was forced to undergo an abortion upon her return. The fact that the Australian authorities would expel any asylum seeker in the last weeks of a pregnancy is itself indicative of the low standing enjoyed by these people. That anyone would deport such a person to a country with the policies and reputation of the People's Republic of China ("PRC") is quite extraordinary. The plight of Ms Z was quite rightly a cause of outrage for the Australian public.[11] The second case received almost as much press coverage as that of Ms Z. It involved a Somali refugee claimant identified as Mr SE, who narrowly avoided removal from the country when a complaint was made to the United Nations Committee Against Torture ("UNCAT") alleging that the man would face death or torture if returned to his country of origin. Again, SE's predicament tested Australia's claims that it is an humanitarian country and a proud protector of human rights.

In May 1999, the cases of Ms Z and SE triggered a motion in the Australian Senate for what became the most extensive Senate inquiry ever to be conducted into the operation of Australia's refugee and humanitarian processes. While the Senate Legal and Constitutional References Committee[12] collected voluminous amounts of materials relating to the two asylum seekers, the reach of the inquiry was much greater than the sum of these claimants. The Senate Committee's 13

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9 Eligible non-citizens are defined as protection visa applicants who are: children for whom release from detention is 'in their best interests'; persons over 75 years of age; the spouses of Australian parties; and former victims of trauma or torture. The fifth category are non-citizens who have entered Australia without authorisation but who have managed to stay hidden for more than 45 days. In most cases, persons seeking release must show that adequate arrangements have been made to care for them upon release and that they will not abscond before the determination of their application. The problem in the case of the children is that it is rarely in their best interests to be separated from their parents. See D Hansen & M Le Sueur, "Separating Mothers and Children: Australia's Gendered Immigration Policy" (1996) 21 *Alternative Law Journal* 56.

10 See Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Processes*, June 2000 ("the Senate Report") at 269, para 9.3 and 296, para 9.123.

11 See, for example, the coverage of the case by Channel 9's '60 Minutes' television program, discussed in the Senate Report, *ibid* at 271 and 293 ff.

12 Hereafter the "Senate Committee".

terms of reference[13] were couched in general terms so as to touch on the overall operation of the refugee and humanitarian system. Its investigation of the individual cases constituted an investigation of both the extent to which the system failed these refugee claimants *and* the tales these cases tell of generalised shortcomings in Australia's refugee determination regime. At the very least the Senate Report looks askance at the claims so frequently made by immigration ministers past and present that Australia has a 'Rolls Royce' system for determining refugee claims.[14]

The most remarkable aspect of the Senate Report released on Wednesday 28 June 2000 is the unanimity of the recommendations made. There were no dissents: the raft of suggested changes to the existing system was made without reference to political or other affiliations. In producing a unanimous report, it goes without saying that the Committee's findings are 'political' in the sense that clear choices were made about the matters that would and would not be

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13 On 13 May 1999, the Senate agreed that the following matter be referred to the Legal and Constitutional References Committee for inquiry and report by 18 October 1999:
The operation of Australia's refugee and humanitarian program, with particular reference to:
(a) the adequacy of legal assistance provided to asylum seekers under the Federal Government's Immigration Advice and Application Assistance Scheme;
(b) the adequacy of a non-compellable, non-reviewable ministerial discretion to ensure that no person is forcibly returned to a country where they face torture or death;
(c) whether Australia's treaty commitments to, and obligations under, the 1951 Convention relating to the Status of Refugees, the 1984 United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1966 International Covenant on Civil and Political Rights are capable of being met given that the fundamental principle of non-return to face torture or death is not present in domestic law nor subject to the rule of law;
(d) the adequacy of current refugee determination procedures having regard to the role and function of the Refugee Review Tribunal in investigating asylum claims;
(e) the importance of maintaining full judicial oversight of any administrative process that directly affects Australia's compliance with its international legal obligations;
(f) the potential implications for the future operation of Australia's refugee policy and program following the enactment of the principle of providing temporary haven;
(g) the recent case of the Chinese woman allegedly deported to China, despite pleas for protection, to face a forced abortion when 8 months pregnant;
(h) the responsibility of Australia under international law for the very serious human rights violation of forced abortion which is claimed in this case;
(i) the circumstances in which the Australian Government decided to proceed with the deportation of Mr SE, despite being on notice that an application had been sent to the UN Committee Against Torture, and the circumstances in which the Australian Government decided to suspend the deportation proceedings in the case of Mr SE;
(j) why cases such as the Chinese woman and that of Mr SE are not being picked up early enough by the Department of Immigration and Multicultural Affairs and the Refugee Review Tribunal;
(k) the accessibility of judicial review for impecunious asylum seekers, particularly since 1 July 1998 when the Commonwealth Legal Aid guidelines were amended to remove grants of aid for asylum seekers except in extremely limited circumstances;
(l) the role and involvement of private contractors in removal processes; and
(m) the processes which are in place for monitoring deportation cases once they have been returned to their country of origin.

14 See, for example, the comments of then Minister Gerry Hand during the Third Reading Speech of the Migration Amendment Bill No 2 1991 (Cth): Australia, House of Representatives 1991, Debates., p 2689. Mr Hand acknowledged the agreement of the current Minister, The Hon Philip Ruddock.

considered in the report.[15] The most obvious omission is the Committee's refusal to re-open consideration of the mandatory detention policy. It will be my argument that many of the problems identified by the Committee either have their origin in or are exacerbated by the detention policy. Even with its limitations, the Senate Report provides rare insight into an area of law and administration that is a source of seemingly continuous controversy.

This article cannot hope to cover every aspect of the Senate's inquiry. Its objective, rather, is to provide a conceptual overview of some of the key issues raised, to identify the main fault lines in the system and begin an evaluation of the recommendations for reform.[16] To this end, the article begins by outlining some of the problems and dilemmas posed by the phenomenon of on-shore refugee claimants. Part III examines the issues raised by the two cases of Ms Z and SE as a prelude to a more detailed evaluation of Australia's refugee determination processes in Part IV. I then examine in turn: the objectives of asylum adjudication; legal assistance and the articulation of asylum claims; determinations made at departmental level; the procedures for reviewing the merits of (adverse) refugee determinations; and the adequacy of safeguards for persons with genuine safety fears who do not meet the definition of refugee. The paper concludes with some reflections on the importance of accountability in administrative decision-making and on the special merit of openness in adjudications involving the protection of human rights. One important aspect of the Report that is not canvassed here is the judicial review of failed asylum rulings. Although very important in the context of refugee processing, the topic is one that deserves treatment in a separate article.

II. THE ASYLUM DILEMMA

In instituting its inquiry in May 1999, the Australian Senate joined a long list of countries that have engaged in the soul-searching process of examining the adequacy of domestic laws and procedures governing the grant of refugee status.[17] These inquiries have been sparked either by cases of apparent injustice

15 The matters not canvassed in the Report are discussed further below, Part V.

16 Matters canvassed by the Senate Committee that are not considered in this article include the judicial review of adverse refugee decisions; the new regime offering temporary protection to asylum seekers who come to Australia without a valid visa; the processes for the removal of failed asylum seekers; and the monitoring of failed asylum seekers after removal.

17 For a selection of reviews undertaken see:
Canada: WG Plaut, *Refugee Determination in Canada: a report to the Honourable Flora MacDonald, Minister of Employment and Immigration*, Minister of Supply and Services Canada (1985); Law Reform Commission of Canada, *The Determination of Refugee Status in Canada: A Review of the Procedure*, 1992; JC Hathaway, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada*, Osgoode Hall Law School, York University (1993).
England: Justice, Immigration Law Practitioners Association and Asylum Rights Campaign, *Providing Protection: Towards Fair and Effective Asylum Procedures*, July 1997;

– as in Australia's case – or by the pressures of a sudden increase in the number of people seeking to access local refugee determination procedures. As Professor David Martin noted in his 1989 study of the American system, the refugee determination regimes used in many Western countries were "cobbled together in an era that permitted leisurely consideration of modest caseloads".[18] While the experience of each refugee receiving country has been different, there is a resounding sameness about the struggles past and present in reconciling an international protection regime with the dictates of sovereignty, border control and the domestic politics of fear and xenophobia.

The leading academic commentators argue with some conviction that the refugee protection regime established in 1951 was a product in large part of the politics of the Cold War.[19] The five enumerated grounds for persecution – race, religion, nationality, membership of a particular social group and political opinion – privileged individuals fleeing the excesses of communist dictatorships and provided scope for celebrating the freedoms of the Western democracies. The definition continues to offer most protective scope to 'targeted' individuals with a prominent political or social profile in their country of origin – and least assistance to women and others who tend to suffer harm in 'private' capacities.[20] Whatever the provenance of the regime, there can be little doubt that the signatories to the Refugees Convention are much less comfortable with its provisions today than they were 50 years ago. Where the instrument was intended originally as a soft landing for politically attractive fugitives, its operation today is much broader and more confronting.

Without denying the misery either producing the refugee flows or generated by the determination procedures themselves, there are inherent dilemmas in the international regime that are incapable of easy answers. In Australia, as in other countries around the world, the refugee debate typically generates more heat than light. As Martin noted in 1990, it is an area replete with stereotypical ideology and unhelpful dichotomies manifest in the tendency to class refugees and illegal migrants in mutually exclusive camps. The illegal migrant is portrayed as one

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USA: DA Martin, *Report to the Administrative Conference of the United States*, 1989. See DA Martin, "Reforming Asylum Adjudication: On Navigating the Coast of Bohemia" (1990) 138 *U Penn L Rev* 1247. See also the comparative work in J-Y Carlier et al (eds), *Who is a Refugee?: A Comparative Case Law Study*, Kluwer Law International (1997). At time of writing, Germany was about to embark on an inquiry into asylum processes in that country.

18 See DA Martin, "Reforming Asylum Adjudication", *ibid* at 1252.

19 See JC Hathaway, *The Law of Refugee Status*, Butterworths (1991) pp 8-9; A Shacknove, "From Asylum to Containment" (1993) 5(4) *IJRL* 516 at 520-1; and G Goodwin-Gill, *The Refugee in International Law*, Clarendon Press (2nd ed, 1996) Chapter 1.

20 The political aspect of refugee protection is very poorly understood in Australia where the media has been wont to assume that any well dressed person claiming refugee status must be abusing the system. See D Corlett, note 4 *supra*. On the political and gender bias implicit in the definition, see R Fincher, L Foster & R Wilmot, *Gender Equity and Australian Immigration Policy*, AGPS (1994). There is a great deal of academic writing on the issue of gender bias in refugee law and policy. See, for example: J Greatbach, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989) 1(4) *International Journal of Refugee Law* 518; N Kelly, "Gender-related Persecution: Assessing Asylum Claims of Women" (1993) 26 *Cornell International Law Journal* 625; UNHCR Division of International Protection, "Gender-Related Persecution: An Analysis of Recent Trends" (1997) *IJRL* (Special Issue – August 1997) 79; and other articles in this special issue.

drawn to a new life in another country for personal or economic reasons, while the refugee is *driven* out of necessity to find protection in a foreign land. Martin writes:

> [This view] does not offer a helpful approach to today's asylum caseload. Today's dilemma is both tragic and surpassingly difficult because, among current asylum applicants, refugees are so much like illegal migrants. Only an indistinct and difficult line separates those who should succeed on their asylum applications from those who should not. That is, most of those applying in the United States today were both drawn and driven, and they chose to come in response to a complex mix of political and economic considerations. Asylum seekers are not so different from the rest of us. We have a hard time deciding, particularly when we make difficult, life altering decisions, and when we finally do choose a course of action, we act from a mix of motives.[21]

This reality only begins to explain the complexity of the task facing the legislators and the decision-makers who are confronted with the duty of respectively creating the sieve and sifting out the refugee from the 'other migrant'. It is a fact of life that more people are on the move today than in any other period in history. The 'push' factors of oppression, ethnic conflict and simple economic inequity seem to have no end. Mass communications and the ease of international travel facilitate both movement and choice of destination, with a new breed of entrepreneur – the 'people smugglers' or 'snake heads' – emerging as loathsome intermediaries. No government can be seen to tolerate or encourage the trafficking in human lives that has become a business that some assert is now more lucrative than the illegal trade in narcotics.[22]

The intractable problem is that the traffickers are proving much more efficient at moving people who are in genuine need of protection than are the 'official' protective agencies. Australia's most recent experience of fugitives from Afghanistan and Iraq are examples in point. The traffickers can convey a person to Australia in a matter of days. The waiting time for the processing of a refugee or humanitarian resettlement application on average is well over a year. For a person who has no authority to remain in a country of first refuge, the choice is plain.[23]

In truth, the Refugees Convention regime is ill-equipped to deal with the reality of modern refugee flows. To begin with, it is predicated on focussed, individualised claims for protection – an arrangement that is spectacularly unsuited to situations of mass population movements or outflows due to

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21 See DA Martin, note 17 *supra* at 1275.

22 See W Maley, "Approaches to Transnational Security Issues in the Asia Pacific" in A Baginda and A Bergin (eds), *Asia Pacific's Security Dilemma: Multilateral Relations Amidst Political, Social and Economic Changes*, ASEAN Academic Press (1998) pp 109-22; A Schloenhardt, "The Business of Migration: Organised Crime and Illegal Migration in Australia and the Asia Pacific Region" (1999) 21(1) *Adel LR* 81-113; A Schloenhardt, "International Migration, Migrant Trafficking and Regional Security" (2000) 15(2) *FORUM for Applied Research and Public Policy*; and *Perspectives on Trafficking of Migrants* (2000) 38 *International Migration.*

23 See W Maley, "Australia's New Afghan Refugees: Context and Challenges" unpublished paper prepared for *The Integrity of Our Shores: Asylum Seekers and Refugees in Australia,* Centre for Cultural Research into Risk, Charles Sturt University, 20 October 2000.

generalised violence or civil unrest.[24] Even in the Australian context, where the experience of such mass movements has been modest, the system has faltered under the weight of processing claims. There can be little doubt that an increasing number of people are aware of the refugee 'option' in making their choice to leave their country of origin. It is not only the academics and advocates who access the wealth of data available through the internet. In my experience, refugee claimants in Australia sometimes have a quite developed sense of what is involved in making an asylum application both in Australia and in other refugee receiving countries.[25]

From the perspective of both the refugee claimant and the determining authority, the most pressing problems are juridical and evidentiary in nature. The definition of refugee falls a long way short of providing a simple, universal standard for separating the refugee from the economic migrant. The interpretation of the definition – and the representation of refugee claimants – has become a worldwide industry with its own literature and internationalised jurisprudence.[26] A gold-mine for both theorists and lawyers, the penetration of the law can be a nightmare for the unrepresented claimant who is unaware of the importance assumed by language and the characterisation of events. Again, in my experience, few asylum seekers are prepared for either the procedural hurdles they have to negotiate or the time that it takes to process a refugee claim. Their assumption – too often sadly misplaced is that if they tell their story, protection will be granted in due course and without too much delay.[27]

Once asylum seekers enter Australia and lodge an application, they pass inexorably into a multi-dimensional maze of law and administration.[28] Marked firmly as outsiders, asylum seekers are entitled to none of the rights implied for citizens under the Australian Constitution.[29] Nevertheless, they are both subject to and beneficiaries of Australian administrative law. Absent legislative provisions to the contrary, they are entitled to a fair hearing of their asylum claims. They have rights to insist that decision-makers follow the procedures

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24 On this point, compare later regional refugee instruments such as the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugees in Africa (UNTS 14 691, entered into force 20 June 1974) and the 1984 Cartagena Declaration which covers Latin America. See *Annual Report of Inter-American Commission on Human Rights 1984-85*, OEA/Ser L/II 66, Doc10, rev 1 at 190-3. These instruments recognise generalised harm in varying degrees: See JC Hathaway, note 19 *supra*, pp 6-21. In the Australian context see *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 175 ALR 585.

25 Those with detailed knowledge are the exception rather than the rule. However, detainees I have interviewed have proffered comments comparing their treatment in Australia with the experience of friends or colleagues who have sought protection in other countries.

26 See, for example, D Steinbock, "Interpreting the Refugee Definition" (1998) 45 *UCLA L Rev* 733; DA Martin "The Refugee Concept: On Definitions, Politics and the Careful Use of a Scarce Resource" in H Adelman (ed), *Refugee Policy: Canada and the United States* (1991) 30; and E Arboleda & I Hoy, "The Convention Definition in the West: Disharmony of Interpretation and Application" (1993) 5 *IJRL* 66.

27 See, for example, the comments made by detainees interviewed by the Human Rights and Equal Opportunity Commission ("HREOC") on reviewing the Curtin Immigration Processing and Detention Centre, north of Broome in Western Australia. See HREOC Human Rights Commissioner's July 2000 Review of Curtin IRPC, available at <http://www.hreoc.gov.au/human_rights/asylum/ index.html>.

28 See Appendix 1, *infra*.

29 On this point, see M Crock, note 2 *supra*, pp 20-5.

laid down for them by law and in all other respects adhere to the rule of law. Failed claimants are given a right to appeal to an administrative body – the Refugee Review Tribunal ("RRT"); adverse decisions are subject to limited judicial review; and an ultimate avenue of appeal lies to the Minister for Immigration and Multicultural Affairs.[30]

The tiered nature of Australia's refugee determination and appeal procedures is unexceptional in the context of comparable refugee receiving countries. The dilemma of these processes lies in their cost and inefficiency. Peter Mares cites Minister Ruddock:[31]

> We spend along with other developed countries something like ten billion dollars a year dealing with half a million asylum seekers, most of whom will not sustain refugee status claims. The United Nations High Commissioner for Refugees has one billion dollars to look after the world's 21.7 million people who are refugees and people of concern.

In addition to the operating budget of the RRT and the program costs associated with the processing of refugee claims within the Department of Immigration and Multicultural Affairs ("DIMA"),[32] in 1998-99, the Australian Government spent approximately $115 million on compliance.[33] According to DIMA, it costs the Government on average $50 000 for every unauthorised arrival from the time of arrival to the time of their departure.[34] The Government expects the illegal movement of people to cost Australia about $300 million in 1999-2000.

How should Australia deal with these dilemmas so as to construct a fresh blueprint for its refugee and humanitarian program? In my view, the answer lies in recognising and accepting some of the more immutable features of the asylum phenomenon and of the Australian system, and also in acknowledging those aspects of the current dilemma that are incapable of immediate resolution. The starting point must be recognition that the refugee phenomenon is not an abstract 'problem', but one that involves human beings, many of whose lives are in crisis. The failure to respond to people in situations of genuine need, whatever their official legal status, diminishes us all. Every human being's right to dignity and

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30 See *Migration Act* 1958 (Cth), s 417.

31 P Mares, note 4 *supra* chapter 8 'Compassion is a Vice'.

32 The operating budget of the RRT in 1998-99 was $15.5 million. In the same year DIMA spent $19.4 million on its on-shore protection sub-program. See DIMA, *Annual Report 1998-99* (1999) at 149 and 84 respectively.

33 The figures relate to the location, removal and detention of 3 032 illegal arrivals and illegal workers located from among 53 143 visa over-stayers. This figure is expected to rise by $68 million in the 1999-2000 year to $196 million, with 4 021 illegal arrivals, together with those located from among the estimated 50 000 visa over-stayers. See DIMA, Fact Sheet 83: *People Smuggling*: <http://www.immi.gov.au/ facts/83people.htm>; and DIMA, *ibid* at 57.

34 According to DIMA, the average daily cost per capita of detention is $115. Detention costs from 1 July 1999 to 31 October 1999 were $9.57 million. To show its determination to combat the problem of the growing number of people entering Australia illegally, the Government allocated $64.7 million in the May 2000 Budget, to be spent over the next four years as part of its campaign to tackle illegal arrivals head on. The budget also provides $52.1 million to build two new immigration detention centres and upgrade existing centres. DIMA, Fact Sheet 85: *Border Control*: <http://www.immi.gov.au/facts/85border.htm>.

security of person underpins the international legal regime that in turn sets the framework for the protection of refugees and other people at risk.

In the debate over the reform of asylum law, it is a mistake to focus too narrowly on the Refugees Convention. The obligation not to *refoule* or return non-citizens to a place where they face persecution *as refugees*, also extends to non-refugees who face torture or other gross abuse of their human rights.

Australia has assumed these greater protection obligations with its signature and ratification of a raft of international instruments. It is party to the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention" or "CAT")[35] and the 1966 International Covenant on Civil and Political Rights ("ICCPR"),[36] both of which contain *non-refoulement* obligations.[37] These provisions complement and to some extent extend those of the refugee instruments.[38] However imperfect the international legal regime, and however anxious Australia is to see it changed,[39] the Refugees Convention and Protocol; the ICCPR, the Torture Convention and related human rights instruments – 'hard' and 'soft' international law – all combine to provide a framework for the treatment of persons in need of substitute state protection.[40]

At one level, this is a framework that Australia has accepted somewhat grudgingly. Apart from an overarching undertaking to comply with its

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35 ATS 1989 No 21. Australia signed this treaty on 10 December 1985, and it came into force on 26 June 1987 ("Torture Convention").

36 16 December 1966, 999 UNTS 171. Australia ratified this treaty on 13 November 1980 with some reservations ("ICCPR").

37 The Torture Convention operates to require the protection of individuals where there are 'substantial grounds' for believing that they will be subjected to 'torture', defined broadly to cover extra-legal sanctions by government officials involving the intentional infliction of severe pain and suffering. See Article 1(1) of the Torture Convention. The duty not to refoule is also implicit in Articles 6 and 7 of the ICCPR. The first upholds the inherent right of every person to life, which should not be taken away arbitrarily. Article 7 provides that no one shall be subjected to "torture or cruel, inhuman or degrading treatment or punishment". On the operation of the Torture Convention, see S Taylor, "Australia's Implementation of Its Non-Refoulement Obligations under the Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights" (1994) 17 *UNSWLJ* 432; and D Anker, *Law of Asylum in the United States*, Refugee Law Centre (3rd ed, 1999), Ch 7.

38 For example, neither the Torture Convention nor the ICCPR constrain the obligations of states to the five civil and political grounds required in the Refugees Convention. The ICCPR makes no mention of 'persecution', and does not appear to require the targeting or directed harm envisaged in the Refugees Convention. The reference to "cruel, inhuman or degrading treatment or punishment" in Article 7 of the ICCPR is wider than Torture Convention's definition of torture, although both instruments are more restrictive than the Refugees Convention insofar as they apply an objective standard only. In contrast, the test for refugee status includes consideration of the subjective (albeit objectively 'well founded') fear of persecution held by the claimant.

39 See Minister for Immigration, P Ruddock, "Minister Pursues Reform in UN Refugee Arrangements", Media Release, 30 September 2000.

40 The nations of the world have long expressed the conviction that where a state fails in its natural duty to protect the rights of its nationals, international law should step in to make up the deficit. After the horrors of the Second World War, this conviction was strong enough in Europe to support the creation of a 'substitute protection' regime that still prevails today. See, generally, G Goodwin-Gill, note 19 *supra*, p 207.

international legal commitments,[41] Australia's signature and ratification of international instruments have little domestic effect without incorporation into domestic legislation.[42] The Refugees Convention does not expressly require the domestic implementation of its provisions, providing only that states 'may' adopt relevant laws and regulations.[43] Unlike many state parties to the Refugees Convention,[44] Australia has chosen not to translate anything but the definition of refugee into domestic law – and even this is done indirectly.[45] Neither the ICCPR nor the Torture Convention has been legislated directly.[46] In 2000, the Federal Parliament passed legislation stating that the signature and ratification of international instruments such as the Torture Convention and the ICCPR do not create any procedural or other entitlements in individuals to be treated in accordance with the terms of the instruments.[47] In practical terms, the obligations assumed by Australia have no more or less force than the sanctions of domestic and international politics. Having said this, Australia has taken its non-refoulement obligations under the Refugees Convention very seriously. The commitment underpins the quite elaborate decision and review structures set up to determine refugee status. It has demonstrated its willingness to comply with its obligations under the ICCPR and the Torture Convention following its accession to the optional protocols to those instruments under the Labor

41 See Articles 26 and 31 of the 1969 Vienna Convention on the Law of Treaties. Article 26 states that parties must perform treaty obligations in good faith while Article 31 provides for the interpretation of treaties "in good faith in accordance with (their) ordinary meaning and object and purpose": 1155 UNTS 331, 23 May 1969. Australia acceded to this treaty on the 13 June 1974 and it came into force on 27 January 1980.

42 See, for example, *Chow Hung Ching v Commonwealth* (1949) 77 CLR 449; and *Simsek v Macphee* (1982) 148 CLR 636. Compare *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. In *Teoh*, the High Court recognised that such action could create procedural or hearing rights by generating a "legitimate expectation" that Australia will comply with the terms of obligations assumed at international law. See M Allars, "One small step for legal doctrine, one giant leap towards integrity in Government: Teoh's case and the internationalisation of administrative law" (1995) 17(2) *SLR* 204; and M Allars, "International Law and Administrative Discretion" in B Opeskin and D Rothwell (eds), *International Law and Australian Federalism*, Melbourne University Press (1997) 236.

43 Goodwin-Gill, note 19 *supra*, pp 234-5.

44 For example, the *Refugee Act* 1981, Pub L No 96-212, 94 Stat 102 (1980) (codified as amended in 8 USC) in the United States. Under the constitutional arrangements of countries such as the Netherlands, the Federal Republic of Germany, and France, self-executing treaties have the force of domestic law from the time of their publication, taking priority over existing and future statutes, although more specific measures of incorporation may still be necessary: *ibid*, p 369.

45 See Crock, note 2 *supra*, Chapter 7.

46 The ICCPR is included in Schedule 2 of the *Human Rights and Equal Opportunity Commission Act* 1988 (Cth), but this does not constitute incorporation. The terms of the Torture Convention have received some attention from the Federal legislature, but only to give the instrument limited and largely extra-territorial effect: see *Crimes (Torture) Act* 1988 (Cth). Article 3 has been given legal effect in s 22(3) of the *Extradition Act* 1988 (Cth) but only with respect to extraditions.

47 See the *Administrative Decisions (Effect of International Instruments) Act* 2000 (Cth).

Government of Paul Keating.[48] In simple terms, there is much in the refugee framework to serve as a guide to international best practice in the observance of human rights.

The other 'given' in the equation is the Westminster system of law and government that Australia inherited from England and that it has since shaped and made uniquely its own. This is a system that values the rights and interests of individuals over those of the group, even where the recognition and enforcement of those rights often results in financial cost and even the disapprobation of the majority. Much has been written on the deep-seated culture of decency and fair play in Australia; of the larrikin disrespect for authority and rules. Although a distant echo in the heat of media scare mongering that plagues the discourse on asylum seekers, there is still an interesting tendency in the Australian public to recoil in the face of apparent administrative injustice or brutality.[49] With less scare-mongering and greater understanding of the totality of refugee protection, it may yet be possible to work within the present framework to deliver a system that is at once fairer and more efficient.

Before turning to examine Australia's asylum adjudication system in detail, it is instructive to look briefly at the two cases that lead to the establishment of the Senate inquiry.

III. SPECIAL CASES OR FLAWS IN THE SYSTEM? THE CASES THAT SPAWNED THE SENATE INQUIRY

A. The Case of the Chinese Woman

If ever there were a case that pointed to shortcomings in Australia's protection regime, it would have to be that of Ms Z. A national of the People's Republic of China, Ms Z came to Australia by boat on 22 November 1994 without a visa. She was taken into detention as a 'designated person' and remained in custody at Port Hedland until her deportation to China on 14 July 1997. By that date, Ms Z had lodged two applications for refugee status and sought in vain for an exercise of the Minister's residual discretion to grant residence on humanitarian grounds. She had formed a de facto relationship with another detainee, given birth to a daughter and was in the last stages of a pregnancy with a second child.

48 These protocols allow for the lodging of complaints by individuals asserting breaches of either the ICCPR or the Torture Convention before the UN Human Rights Committee and the UN Committee Against Torture, respectively. Indeed, it was the Torture Convention complaint mechanism that saved SE from immediate deportation and made his case a cause célèbre. While the UN committees have no authority to dictate the action taken by a state party, an adverse finding on a complaint can be politically embarrassing and generally lead to some form of response from the government. See further, below, Part III.B. See also S Taylor, note 37 *supra*; and N Poynder, "Recent Implementation of the Refugees Convention in Australia and the Law of Accommodations to International Human Rights Have We Gone Too Far?" (1995) 2 *AJHR* 75.

49 See the discussion Part III.B *infra*.

Notwithstanding the fact that her child was virtually at term, Ms Z underwent an abortion upon her return.

The system failed Ms Z not because it declined recognition of her refugee claims; her case was at the cutting edge of the evolving refugee jurisprudence.[50] The system failed for the simple reason that it failed to protect Ms Z and her unborn child from catastrophic harm. Ms Z claimed later that the abortion was forced. The PRC government alleged that it was procured by agreement, citing a consent form 'signed' with the thumb imprint of the mother of Ms Z's de facto husband.[51] Whichever version of events is correct, there is abundant evidence that Ms Z pleaded with immigration officials in Australia to be permitted to have her child in this country on grounds that Ms Z feared that she would lose her baby if returned.[52] Given the time the woman had already spent in Australia, it is equally plain that there was no practical impediment to allowing this to occur. The abortion of Ms Z's child was preventable.

Ms Z's fate, allegations that she was sedated during the removal process and her on-going plight after her return to China provided a dramatic impetus for the Senate's inquiry in more than one respect. The case prompted the Minister for Immigration and Multicultural Affairs to institute his own inquiry.[53] As this was under way by the time the Senate Committee began its hearings, both Minister Ruddock and the Minister for Foreign Affairs and Trade instructed their respective Departments not to answer questions put to it by the Senate Committee. The matter was resolved when the Committee issued subpoenas requiring the attendance of the officials and the two Ministers reversed their instructions. The back-down obviated tantalising prospects of the Senate Committee taking steps to initiate actions for contempt of the Senate.[54]

The drama continued with the release to the Committee of the report commissioned by the Minister. Mr Ayres was asked to investigate allegations that a pregnant national of the PRC was removed from Australia to the PRC and was forced to undergo an abortion on her return. Neither Mr Ayres nor the Senate Committee were able to travel to the PRC to interview Ms Z: Mr Ayres was refused a visa to enter the PRC and the Senate Committee did not have the resources for such travel even if permission from the PRC government had been forthcoming. The Ayres report has never been made public. However, the Minister's Press Release suggests that Mr Ayres largely absolved the Australian authorities of any wrongdoing. There is even a hinted suggestion that Ms Z

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50 See the discussion at note 60 ff *infra*.

51 Senate Report, note 10 *supra* at 294, para 9.108. Ms Z's de facto husband abandoned her upon their return to the PRC.

52 *Ibid* at 289, 298.

53 The Minister originally requested Mr David Sadleir, a former ambassador to China and former Director General of ASIO, member of the Australia China Council and adviser to the AMP on China to undertake the inquiry. A report was eventually prepared by Mr Tony Ayres, former Secretary of the Department of Defence. See Senate Report, note 10 *supra* at 271, para 9.10.

54 The Senate Report records: "relevant officers did duly appear and the Committee is pleased to record its appreciation of the eventual co-operation of the Departments". See note 10 *supra* at 271, para 9.9.

herself might deserve opprobrium for seeking or consenting to the abortion of her baby.[55] The Ministerial Press Release of 14 September 1999 stated: [56]

> An independent inquiry into the case of a Chinese woman allegedly returned to China to face a forced abortion has found that all actions taken by the Department of Immigration and Multicultural Affairs were lawful, and that the woman's treatment in Australia was humane ... Mr Ayers found that the Chinese woman had an abortion in the PRC when she was eight and a half months pregnant. However, he was unable to reach a conclusion about whether or not that abortion was forced ... The report also provided a number of recommendations about general procedural improvements. Officers of my Department are examining Mr Ayers' findings closely and will carefully consider the recommendations he has made.

After amassing many hundreds of pages of documents and transcripts of evidence, the conclusions reached by the Senate Committee were not so anodyne. The Committee was not afraid to make findings both potentially damaging to Australia's relationship with the PRC government and damaging to the immigration bureaucracy. Its conclusions are summed up in its final recommendation that "all steps be taken and put in place to ensure that the situation of [Ms Z] never occurs again in Australia".[57]

The Committee examined in close detail the procedures followed in processing Ms Z's case from the moment she arrived in Australia. The Committee noted that no issue arose concerning the rejection of her first application for refugee status, which was taken on appeal to the RRT.[58] Ms Z lodged a second refugee claim in June 1995 after falling pregnant with her first child. Second applications for refugee status can only be made with the permission of the Minister.[59] The second application was rejected summarily as invalid on the grounds that she failed to disclose new evidence on which to base a claim for refugee status. This application was made on the basis that she feared forced abortion if returned to the PRC. Invoking the terms of the Convention definition of refugee, she alleged that forced abortion is a persecutory act and that she would suffer this persecution as a member of the 'particular social group' constituted by women who fell pregnant without state authorisation. As the Senate Committee acknowledged, Ms Z faced the

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55 If the abortion was not forced, the implication was that it was procured with the consent of Ms Z. To the cynic, the political attractiveness of this line of reasoning is patent. The woman is portrayed as a conniving witch who seeks the termination of her pregnancy when it ceases to be useful as a tool to gain her desired 'immigration outcome' (residency in Australia). By blaming the woman, the Chinese authorities are absolved of any blame in what occurred. There is also a subtle implication that the Australian authorities could not have been expected to foresee what then becomes aberrant behaviour from the woman. In this way, the Minister's account of Ayres' findings removes the political embarrassment for both the Chinese and the Australian governments engendered by the case. Note also that the Minister's statement conveniently glosses over the question of coercion. In China, the birth would have left Ms Z with not one, but two 'black' children. Given the fines and other penalties attaching to such children – and to the state of unmarried motherhood – the 'choice' made by women in Ms Z's position (were she in fact given a choice) is also to be questioned.

56 See Minister for Immigration, P Ruddock, "Ayers Report Complete", Media Release, 14 September 1999.

57 Senate Report, note 10 *supra* at 299, Recommendation 9.5.

58 See *ibid*, at 275-6.

59 See *Migration Act* 1958 (Cth), s 48B.

insurmountable problem in 1995 of Full Federal Court authority in *Minister for Immigration and Ethnic Affairs v A* to the effect that women in precisely her position were not refugees.[60]

Notwithstanding the refusal to entertain another refugee claim, Ms Z remained in custody and gave birth to a daughter. It is one of the many ironies in her case that another child born around this time to PRC asylum seekers from the same boat as Ms Z was ultimately recognised by the Australian High Court to be a refugee.[61] This is cold comfort for Ms Z, who was incarcerated for a further two years, during which time she conceived her ill-fated second child. Although no explanation is offered by the Senate Committee, it would appear that the delay was engendered by difficulties in securing the return of the failed asylum seekers to the PRC in what came to be termed 'Operation Ox'.

The Senate Committee collected and accepted as probative a considerable amount of evidence on the practice of forced and late term abortions in the PRC. One issue that emerged for consideration related to the nature of the 'Country Information Service' material relied upon by DIMA in dismissing the fears of forced abortion expressed repeatedly by Ms Z prior to her return to the PRC.[62] In its conclusions, the Committee looked askance at assertions by DIMA officers involved in Ms Z's removal that information held by DIMA gave no reason for concern that Ms Z would be harmed upon her return. It accepted without reservation that the practice of forced or coerced abortion[63] constitutes a gross abuse of human rights and that it may amount to 'torture' for the purposes of the Torture Convention. In a departure from the cautious approach adopted in other parts of its report, the Senate Committee "found that the circumstances of Ms Z's removal from Australia and the subsequent abortion that she suffered in the PRC could put Australia in breach of our obligations under the Torture Convention".[64] Given the recent decision of the High Court in *Chen's* case, it might also have commented on the concurrent removal of Ms Z's daughter. This almost certainly placed the country in breach of various obligations under the

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60 See Senate Report, note 10 *supra* at 277 ff and *Minister for Immigration and Ethnic Affairs v A and Anor* (1995) FCR 309. For a discussion of this case and its High Court sequel, see M Crock, "Apart from Us or a Part of Us? Immigrants Rights, Public Opinion and the Rule of Law" (1998) 10 *IJRL* 49 at 65ff; C Dauvergne, "Chinese Fleeing Sterilisation: Australia's Response Against a Canadian Backdrop" (1998) 10 *IJRL* 77; P Mathew, "*Applicant A v Minister for Immigration and Ethnic Affairs*: The High Court and 'particular social groups' : lessons for the future" (1997) 21(1) *MULR* 277; and P Mathew "Conformity or Persecution: China's One Child Policy and Refugee Status" (2000) 23(3) *UNSWLJ* 103-134.

61 See *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 170 ALR 553 ("*Chen*"), discussed in the Senate Report, note 10 *supra* at 282 ff.

62 On the operation adequacy of the Country Information Service, see further below, Part IVC(iii).

63 Coerced abortion is distinguished from forced abortion on the basis that a woman may feel induced to consent to a procedure due to threats of fines and other penalties. For a discussion of the sanctions imposed on persons found to be in breach of the PRC's one child policy, see P Mathew, "Conformity or Persecution", note 60 *supra*; J Aird, *Slaughter of the Innocents: Coercive Birth Control in China*, American Enterprise Institute for Public Policy Research (1990) p 74.

64 See Senate Report, note 10 *supra* at 296, para 9.124.

Refugees Convention, the ICCPR and under the UN Convention on the Rights of the Child.[65]

A source of major concern for the Committee in the cases of both Ms Z and SE was the adequacy of the safety nets built into Australia's refugee and humanitarian processes. These are the procedures put in place for identifying and responding to cases involving persons who fall outside of the Refugees Convention, but who engage Australia's protection obligations under other human rights instruments. In fact, the only vehicle for considering humanitarian claims is the Minister's 'non-compellable, non-reviewable' discretion to intervene pursuant to s 417 of the *Migration Act* 1958 (Cth) when a refugee claim is rejected.[66] In the case of Ms Z, the Committee found that the systems in place failed badly. It found that Ms Z's repeated requests to be allowed to stay in Australia were not recognised as s 417 requests; and that she was never advised to put her concerns in writing. It also found that DIMA may have imposed limits on Ms Z's rights to access to s 417. This was done in advising the Minister on 10 July 1997 that none of the members of the group to be returned to the PRC under Operation Ox had claims that fell within the ambit of the Ministerial Guidelines for s 417 cases.[67]

Most importantly, at the time of Ms Z's removal from Australia, the Senate Committee found that DIMA did not inform the then Acting Minister, Senator Vanstone, that there were any pregnancies amongst the passengers to be removed. The central office of DIMA was adamant that it did not consider this to be in error. The Committee disagreed, concluding that the Acting Minister should have been told. The Committee made no finding about the allegations about the sedation of Ms Z prior to removal.[68] However, it expressed concern that a woman at Ms Z's stage of pregnancy should have been permitted to fly at all, especially as DIMA files contained no evidence that the woman had been certified by a medical officer as being fit to travel. The Committee urged the creation of a protocol for dealing with pregnant women subject to removal. More fundamentally, it recommended that special consideration be given by the Minister or a senior delegate of the Department to allow pregnant detainees to remain in Australia until after the birth of any child. Again, the Senate Committee's overwhelming conclusion was that what happened to Ms Z and of her unborn child was abhorrent and that Australia's role in facilitating the tragedy must never be repeated.

B. SE's Case

Mr SE's case also raised serious issues about the operation of Australia's refugee protection regime, although the Senate Committee was unable to reach

65 For a description of the obligations imposed by these instruments, see *ibid* at 273-4.

66 See the discussion below, Part IV.E.

67 See Senate Report, note 10 *supra* at 290, para 9.91.

68 See, however, the comments, *ibid* at 293, para 9.103. The Committee refers to the finding of Mr Tony Ayres that there was no substance to the sedation allegations and notes that evidence from staff at Port Hedland supports this conclusion. The Committee refers also to the allegations of sedation by former removees raised by Chris Masters in the ABC television program 'Four Corners' on 13 March 2000.

conclusions as compelling as those made in relation to Ms Z. SE came to Australia by plane, arriving without a valid visa at Melbourne airport on 2 October 1997. He claimed to be a 37 year-old goldsmith from Mogadishu in Somalia where his father was an elder in the Shikal clan, a group known for its relative wealth and its religious leadership. He asserted that the civil war in Somalia had brought persecution for members of the Shikal Clan, most particularly at the hands of the Hawiye Clan. He said that his father and one brother had been killed by Hawiye militia in 1991 and that his sister had committed suicide after being raped repeatedly. SE claimed to have married in 1995 and to have fled Somalia in 1997.[69] He sought asylum on the ground that his life would be at risk if returned to Somalia.

Like many asylum seekers, SE presented challenges for the Australian authorities charged with ascertaining his identity and provenance. In the end, serious issues remained about the man's credibility.[70] Leaving to one side the (still unresolved) merit of his asylum claim,[71] the Senate Committee's concerns related to the process involved in determining SE's initial refugee claim.

Upon signalling his desire to claim refugee status, Mr SE was allocated a lawyer under the Immigration Advice and Application Assistance Scheme ("IAAAS") administered by DIMA. According to the lawyers who later took over his case, this first application was 'woefully inadequate', containing no more than a two paragraph statement in support of the application.[72] SE's application was rejected and he appealed to the RRT. Mr SE was not represented before the Tribunal, no further submissions were made on his behalf and again he was rejected. The Tribunal did not accept SE's assertion that members of the Shikal Clan were targeted for persecution. The RRT reasoned further that SE's fears for his security in a situation of civil war and generalised anarchy did not qualify him as a refugee. He was not advised of the possibility of seeking review of the RRT in the Federal Court.[73]

SE's representation was eventually taken up by solicitor Carolyn Graydon, then of the Refugee and Immigration Legal Centre ("RILC") in Melbourne. RILC took the only action available to SE: it lodged an application for judicial review of the RRT's ruling in the High Court pursuant to s 75(v) of the Constitution. The application failed on the ground that the RRT's ruling and decision-making process revealed no error of law.[74] The organisation then applied under s 417 of the *Migration Act* 1958 (Cth) ("*Migration Act*") for an exercise of the Minister's discretionary power, also without success. Thereafter, repeated requests were made both for humanitarian intervention under s 417 and for permission to lodge a fresh refugee claim.

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69 Senate Report, note 10 *supra* at 201, para 7.2.

70 *Ibid* at 209, para 7.17.

71 Mr SE was permitted to lodge a fresh application for refugee status under s 48B of the *Migration Act* 1958 (Cth). In late 2000, this second claim had been rejected at first instance. An appeal to the RRT was pending.

72 Senate Report, note 10 *supra* at 214, para 7.29.

73 *ibid* at 212-15.

74 See *Re Minister for Immigration and Multicultural Affairs; Ex parte SE* (1998) 158 ALR 735 and the discussion *ibid* at 215-16.

The drama in Mr SE's case arose thereafter with two attempts to remove him from Australia. On the first occasion, 29 October 1998, arrangements were made through British Airlines,[75] Australian Corrective Services and a private company, Protection & Indemnity Associates ("P&I") to effect his removal. Mr SE avoided removal when he refused to board the aircraft and the captain of the airliner in question declined to carry him. SE's case gained some coverage in the press. However, he became a cause célèbre when the Department tried again to remove him on 19 November 1998. By that stage, RILC had sought an injunction in the Federal Court on the basis of a new court ruling on refugees and civil wars,[76] and had lodged a complaint with the UNCAT in Geneva. The essence of the complaint was that even if Mr SE did not meet the definition of 'refugee' under the Refugees Convention, he was a man who engaged Australia's protection obligations under the Torture Convention. The drama was played out on 18 November when the Australian mission in Geneva was advised of the complaint and requested by UNCAT not to remove SE while the communication was under consideration. With DIMA determined to proceed with the removal, Amnesty International invoked an 'Urgent Action' against the Minister, provoking floods of emails to DIMA and the picketing of Perth Airport by transport unionists. At 8.35 am on 19 November, SE was placed on board a flight to Perth. Barely five minutes later the Attorney-General's Department telephoned and faxed notification of the request made by the UN High Commissioner Against Torture. The removal action was halted in Perth on arrival of SE's plane.[77]

When his case was considered by the UNCAT in May 1999, it agreed with his assessment of the potential dangers facing him should he be returned to Somalia. The Committee ruled that should Australia persist with its decision to deport Mr SE, it would be in breach of its obligations not to refoule or return a person to a country where that person faced torture or inhuman treatment.[78]

In the final analysis of SE's case by the Senate Committee, a major issue was the adequacy of the ministerial discretion as a vehicle for ensuring compliance with Australia's broader protection obligations. The Committee did not condemn the Minister outright. It found, for example, that SE had enjoyed good access to Australia's legal system. However, it also concluded that the broader non-refoulement obligations contained in the Torture Convention and other human rights instruments should not be left without a firmer foundation in domestic legislation. One of the more interesting recommendations made by the Committee is the suggestion that the Attorney-General investigate ways for legislating the provisions of these instruments.[79]

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75 This was the carrier which brought SE to Australia and which therefore had responsibility for paying for his removal. See *Migration Act* 1958 (Cth), ss 213-15.

76 See *Abdalla v Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 11.

77 Senate Report, note 10 *supra* at 225-6.

78 The Torture Convention, Article 3. See *SE v Australia*, Communication No 120/1998, 20 May 1999.

79 See Senate Report, note 10 *supra* at 60, Recommendation 2.2 and the discussion that precedes this recommendation.

It is not possible to canvass all the issues raised by SE's case. The real question for the Senate Committee, as it acknowledged, was not the accuracy or otherwise of the assessment made of SE's claims. Rather, the Committee was concerned to ascertain the extent to which this case – and that of Ms Z – reflected on Australia's refugee and humanitarian program as a whole. It is to the broader operation of the program that we now turn.

IV. JUDGING THE PROCESS

A. The Objectives of Asylum Adjudication

Refugee determination is at heart an administrative process, with some special features. These include: the international legal dimension of decision-making – in particular the obligation not to *refoule* refugees – and the changing nature and needs of refugee populations.[80] The Senate Committee argued that to achieve 'high standards of administration', the processing of refugee claims must be quick, impartial and structured in such a way as to ensure there is proper consideration of an application without facilitating abuse of the system.[81]

In his search for procedural paradigms for asylum determinations in the United States, Legomsky articulates broader objectives for the bureaucratic process: accuracy, efficiency, acceptability and consistency.[82] His analysis, like that of the Senate Committee, conveys the importance of balance in good administration. However they are expressed, the objectives for any administrative process must be aspirational rather than absolute; the values can quite frequently be in conflict. For example, accuracy or the 'proper consideration' of an application implies compliance with the rule of law including the dictates of procedural fairness, the making of 'correct' findings of fact and 'correct' application of the law to the facts. Both fairness and observance of statutory requirements require considered decision-making, which in itself can conflict with the dictates of speed and efficiency. Moreover, few people today accept the notion of absolute right and wrong in the identification and interpretation of either fact or legal precept. As Legomsky notes, accuracy must be a relative concept, a question of degree:

> Assessing the accuracy of a process is not simply a matter of estimating the error rate. Not all errors are of equal import. Depending on the context, false negatives and false positives might produce systematically different magnitudes of harm.[83]

The extent to which a system is designed to either ensure or avoid certain outcomes is reflective of cultural choices made in assessing the social utility or disutility of those outcomes. Legomsky[84] cites by way of example the adoption

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80 On this point, see *ibid*, at 114-15, para 4.19.

81 *Ibid*, at 114, para 4.17.

82 SH Legomsky "An Asylum Seeker's Bill of Rights in a Non-Utopian World" (2000) 14 *Geo Imm LJ* 619. Legomsky draws on the work of Roger Cramton "Administrative Procedure Reform: The Effects of S.1663 on the Conduct of Federal Rate Proceedings" (1964) 16 *Admin L Rev* 108 at 111-12.

83 See Legomsky, *ibid*, at 622-3.

84 *Ibid.*

of different standards of proof for the prosecution of civil and criminal offences which has the effect of widening or narrowing the margin of allowable error in the adjudicative process. As noted earlier,[85] the process of determining refugee claims is notoriously difficult. Under the Refugees Convention, decision-makers must work within an indeterminate textual framework and face multiple hurdles to establish reliable narratives from claimants.

The goal of efficiency recognises the reality of finite public resources and the need to balance expenditure both in financial terms and in terms of the time and effort allocated by the bureaucracy to complete a given task. The Senate Committee refers to the need to be quick "in order to avoid unnecessary stress"; to maintain the integrity of the system and to secure the well-being of applicants.[86] In the asylum context, time delays can benefit dishonest applicants wishing to avoid removal from the country. Yet delays can be harmful too – for instance, to persons for whom the resolution of their asylum claim is a necessary precursor to effective rehabilitation after torture or trauma.

The goals of acceptability, consistency and impartiality recognise the importance of both internal and external rationality in administrative procedures. The public and the litigants must feel confident about the process, even where they disagree with a particular result. As the Senate Committee acknowledged,[87] dissatisfaction with the administrative processes in asylum determinations may be one factor explaining the number of costly and time-consuming applications made for the judicial review of refugee decisions. For the litigant, acceptability implies a sense that they have been treated fairly; that they have had a full and proper opportunity to put their case. Finally, without consistency and impartiality in decision-making, it is difficult to envisage a system that produces decisions that are accurate, efficient or acceptable.

The Senate Committee's evaluation of the system for determining refugee applications at both the primary stage and at the level of appeals to the RRT, suggests that more could be done to meet the objectives for good administration.

B. Legal Assistance and the Articulation of Asylum Claims

For those who are admitted into Australia's on-shore refugee determination program, provision is made for legal assistance in the preparation of their cases. The process is a curious one that reveals much of the country's ambivalent attitude towards both asylum seekers and the lawyers and other advisers who assist them.

Assistance is given to refugee claimants under two federally funded schemes. The Immigration Advice and Application Assistance Scheme is a service administered by DIMA which allows for the funding of private advisers to assist both protection visa applicants and general immigration applicants in preparing initial applications. Advisers are selected through a competitive tender process and are allocated cases by DIMA. Priority in both funding and in the allocation

85 See above, Part II.

86 Senate Report, note 10 *supra* at 114.

87 See *ibid*, at 162 and the discussion below at Part IV.E.

of cases is given to protection visa applicants (asylum seekers) in detention.[88] Service providers are funded to assist in both the preparation of the paperwork for initial claims and appeals against primary refusals. However, as SE's case illustrated, they are not funded to appear with an applicant either before the RRT or the Federal Court, should a failed claimant choose to lodge appeals to these bodies.

The second scheme is the federal Legal Aid Scheme. This provides for funded legal assistance in a narrow range of migration cases: applicants must satisfy means and merits tests and their case must fall within a 'priority' area for the grant of legal assistance in migration cases. This scheme privileges applicants for judicial review whose cases raise points of law that have not been settled by either the Full Federal Court or by the High Court; as well as persons wishing to challenge the legality of their detention.[89] It does not permit the funding of advice sought for the purpose of considering the value of appealing. The narrow compass of the scheme dates back to 1998, although the constriction on legal aid funding for migration cases has a longer provenance.[90]

The system now in place has two striking features. The first is the degree of control exercised by DIMA over the IAAAS, given the role that this Department plays in the determination of refugee claims. The second is the narrow compass of the legal assistance available to failed refugee claimants who wish to challenge a ruling in the courts. Both features reflect an institutionalised distrust of lawyers and the legal system as it has operated to create and protect procedural rights in asylum seekers.

The notion that asylum seekers should have rights of any kind is a relatively new concept in Australia. As late as 1982, the High Court jurisprudence suggested that an asylum seeker had no entitlement to a hearing of any kind prior to removal unless they could demonstrate some prior legal right to remain in the country.[91] Over the intervening years the law has changed dramatically.[92] There has been a growing recognition that special measures need to be taken to ensure

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88 The funding statistics are set out in the Senate Report, note 10 *supra* at 70, para 3.7. In 1999-2000 asylum seekers in detention were allocated $1.296 million, while community based claimants were granted $289 000 for application advice and $290 000 for immigration advice. Note that the IAAAS replaces the earlier Application Assistance Scheme and the Immigration Advisory Services Scheme, which were merged in 1997.

89 Note that such challenges do not include persons contesting a visa refusal or deportation/removal order. See *ibid*, at 71; Commonwealth Legal, *Aid Guidelines*, Guideline 4.

90 For a discussion of Australia's Legal Aid system, see Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Legal Aid System – Third Report*, June 1998; and Australian Law Reform Commission Discussion Paper 62, *Review of the Federal Civil Justice System*, 1999 at Chapter 7.

91 See *Simsek v Macphee* (1982) 148 CLR 636.

92 See the landmark ruling in *Kioa v West* (1985) 159 CLR 550. There is a large body of literature on the development of the rules of procedural fairness in Australia. It is noteworthy that many of the cases at the cutting edge of doctrinal development have been immigration cases, although not all have concerned refugees. Excellent overview accounts include: M Aronson and B Dyer, *Judicial Review of Administrative Action*, LBC (1996), at Chapters 8 and 9; and M Allars, *Introduction to Australian Administrative Law*, Butterworths (1990), at Chapter 6. An historical account of the immigration cases from the 1980s is to be found in M Crock, *Administrative Law and Immigration Control in Australia: Actions and Reactions*, Unpublished PhD Thesis, Melbourne University, 1994 at Ch 4.

that asylum claims are articulated and adjudicated fairly.[93] In spite of measures designed to curb the role played by the courts in the oversight of migration decision-making,[94] there are some who argue that the Federal Court has intruded, and continues to intrude, inappropriately in the administrative process.[95] Although a lawyer himself, Minister Ruddock has been a vociferous critic of both the courts[96] and of lawyers engaged as advocates for refugee claimants.[97] Like other ministers before him,[98] he has made no secret of his desire to restrict the access of lawyers to refugee claimants in detention. Evoking images of ambulance chasing personal injury lawyers, the argument is made that refugee lawyers act for their own gain; that they delay and therefore corrupt the refugee determination process; and that they support clients who are abusing the system. It is a measure of the popular acceptance of this vision of the refugee advocates as a bothersome, intrusive nuisance that the Minister has gained support for a variety of legislative and other measures targeting such advocates. These are designed to either constrain access to asylum seekers in detention[99] or to contain and control the disbursement of public monies to persons engaged to act for asylum seekers.

In its submissions to the Senate Committee, the Department explained the 'official' rationale for this anti-advocate stance. It argued against the need for any legal assistance for asylum seekers on the basis that the burden of ensuring that Australia does not breach its protection obligations is on the case officers and the decision-maker. It stated that:

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93 See, for example, the courts' treatment of the issue of a decision-maker's duty to make further inquiries following submissions made by or on behalf of an applicant, discussed in Crock, note 2 *supra*, pp 263-4. See also the discussion on p 132 ff.

94 On this point, see Crock, note 2 *supra*, chapter 13; and M Crock, "Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy" in S Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?*, Australian Institute of Administrative Law (1999) at 57-83; and R Creyke "Restricting Judicial Review" (1997) 15 *AIAL Forum* 22.

95 See J McMillan, "Federal Court v Minister for Immigration" (1999) 22 *AIAL Forum* 16; and the discussion below at part IV.E.

96 See, for example, Australia, House of Representative, *Debates*, 2 December 1998, pp 1135-6, 1246; Speech to the Australian Institute of Administrative Law (Victorian Chapter), 12 November 1997; P Ruddock, "Narrowing of Judicial Review in the Migration Context" (1997) 15 *AIAL Forum* 13.

97 See, for example, the Minister for Immigration, Philip Ruddock, "Taxpayers foot rising asylum seeker litigation costs", Media Release, 7 March 1999; "Ruddock blames advocates" *Sydney Morning Herald*, 14 March 2000, p 1 and P Ruddock, "Government to stop use of class actions", Media Release, 14 March 2000.

98 See, for example, then Minister, Senator Ray who said as early as 1989:
"The people who have generally been stirring in this area have one common feature, that is, they are lawyers. ... They also seem to believe that the immigration area is the new growth area. Most lawyers have now been excluded from workers' compensation. They are now looking for a new area to leech onto, and the most vulnerable area they have found is the area of defenceless migrants." Australia, Senate, Debates, 7 March 1989, p 532. See further, Australia, House of Representatives, Debates, 4 November 1992, p 2622.

99 See, for example, the *Migration Amendment Act (No 2)* 1998, amending s 193 of the *Migration Act* 1958. The amendments serve to limit the ability of the federal Ombudsman and the Human Rights and Equal Opportunity Commission to access detainees who have not lodged a written complaint to those bodies.

100 See Senate Report, note 10 *supra* at 72; and DIMA Submission No 69 at 833.

> Departmental and review tribunal processes, especially those relating to refugee claimants, have been carefully set up with the explicit aim of ensuring that applicants do not need legal advisers to prepare or pursue their claims.[101]

In its evidence before the Committee, the Department stressed that the refugee determination process was not adversarial; that the Government is not 'opposed' to asylum seekers. It justified the reduction in access to legal aid for migration applicants on two bases. The first was the need to avoid duplication of assistance available under the IAAAS. The second justification was that the administrative tribunal system for reviewing the merits of decisions reduces the need for the curial oversight of decision-making.[102]

The claim that the Government and the Department are neutral arbitrators in the refugee determination process has a distinctly hollow ring. The basic problem is that the Department is first and foremost responsible for immigration control. It is Australia's first line of defence against the incursion of unwanted foreign nationals: together with the armed forces, it is a defender of Australian sovereignty and territorial integrity. This is a role that does not sit easily with the determination of refugee status. This is especially the case where the refugee claimants have entered the country without authorisation or in situations where they are indistinguishable from 'simple' illegal entrants, individuals that the Department has a legislative duty to detain and remove from the country 'as soon as practicable'.[103] Put simply, there is a conflict of interest for the Department to operate as both defender of Australian sovereignty, and guardian of the rights of a non-citizen who, on the face of things, is breaching Australia's territorial sovereignty.

The Human Rights and Equal Opportunity Commission ("HREOC") and others have drawn attention to this conflict on many occasions, and called for the Government to separate the refugee determination process from immigration control.[104] These calls were rejected by the Senate Committee,[105] as they have been by successive Governments. However, the Committee was prepared to acknowledge the need for asylum seekers to have access to competent assistance and in so doing accepted that the interests of claimants and of the Department may not be *ad idem*.[106] It stated:

> The Committee notes that the complexity of the migration field militates against the capacity of a refugee applicant to effectively navigate the system unaided. In combination, the *Migration Act* 1958 and its associated regulations are extensive and subject to continuous change. Similarly, the applicants for a Protection Visa are required to fill out long and complex forms, posing particular problems if they do not read, speak or write English to a fairly advanced degree.[107]

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101 See Senate Report, *ibid* at 72; and DIMA Submission No 69 at 833.

102 See *ibid*, at 73.

103 See *Migration* Act 1958, ss 189 and 198.

104 See, for example, Submission No 73, Law Council of Australia, at 1083; Submission No 51, HREOC, at 531; and Submission No 63, National Legal Aid, at 722. All suggest that refugee determinations should be the preserve of the Attorney-General.

105 See Senate Report, note 10 *supra* at 99-101.

106 Note, however, that the Senate Committee is careful to point out that good advice can be obtained from both lawyers and persons without legal training: *ibid* at 77, para 3.36; cf 80, paras 3.45-3.47.

107 *Ibid* at para 3.34.

The Senate Committee accepted without question that application assistance should be a necessary feature of any blueprint for a 'model' refugee determination system. Beyond this, however, its analysis and critique of the scheme now in place was compromised by the Committee's determination not to question the regime mandating the detention of asylum seekers in remote holding camps. One feature of this regime is that newly detained asylum seekers are placed in what is known as 'separation detention' until they are screened by DIMA officials to determine whether they have possible 'protection' claims. The *Migration Act* provides that detainees must be given access to legal advice in relation to their detention and to application forms and facilities for making a statutory declaration upon request. However, the legislation does not require DIMA officials to notify detainees of their rights.[108] It is generally only those persons who are 'screened in' or assessed as having a basis for making an asylum claim, who are given access to lawyers.[109] The Senate Committee acknowledged the problems engendered by excluding advisers from the initial application process for asylum seekers in detention. However, instead of addressing the root of the problem, the Committee contented itself with 'focussing on the effective communication of key information' to asylum seekers. It rejected arguments that asylum seekers have legal entitlements to assistance under international law[110] and declined to recommend that the domestic laws should be changed to guarantee universal access to independent immigration advice. The Committee opted to maintain the current system whereby legal advice is provided to detainees only when requested. At the same time, it concluded:

> The Committee does not consider that providing information to detainees would necessarily result in unfounded claims, and thereby complicate and lengthen the process.[111][112]

In the result, the Committee recommended that:

> DIMA investigate the provision of videos or other appropriate media in relevant community languages, explaining the requirements of the Australian on-shore refugee determination process. This material should be available to those in detention and to IAAAS providers.[113]

This recommendation probably stands little chance of acceptance by the present Government. However, it represents an interesting softening of the hard line that has been taken in the past to informing detainees about the processes involved in determining an asylum claim.

The preparation and dissemination of such materials may help to dispel some of the misconceptions that the Committee acknowledged are rife in asylum seeker communities. What the recommendation fails to address, however, are

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108 See *Migration Act* 1958 (Cth), s 256. For a discussion of these provisions, see M Crock, note 2 *supra*, p 212-14; and N Poynder, "Marooned in Port Hedland: The Case of the Boat People The UN Human Rights Committee in Practice" (1993) 18(6) *Alt LJ* 272.

109 See further the discussion at Part IV.B, note 121 ff *infra*.

110 Senate Report, note 10 *supra* at 82-84.

111 *Ibid*, at 84, para 3.64.

112 *Ibid*.

113 *Ibid*, Recommendation 3.1, and the discussion at 84-5.

what might be termed the 'transmission' blocks that often prevent asylum seekers from absorbing or accepting information that is offered by persons in positions of authority. Genuine refugees, almost by definition, are fugitives from oppression that has either been perpetrated or tolerated by the governments of their home country. This situation can lead applicants to mistrust all officialdom to the point where the asylum seeker will prefer the opinion and views of others in their situation over those expressed by authority figures. Victims of torture and trauma face particular difficulties when dealing with government officials, with loss of trust compounded by the social or cultural implications of revealing the harms they have suffered. The primary function of a good adviser in these situations is to gain the confidence of the asylum seeker so that they will recount their story without the embellishments and interpolations of the refugee 'underground' information network.

Given the force of public sentiment against the notion that unauthorised arrivals should receive any sort of legal aid,[114] it is encouraging that the Senate Committee acknowledged both the role played by advisers and the need for public funding of service providers. While it did not support the funding of advisers to appear with applicants at tribunal appeals, the Committee did contemplate an increase in both IAAAS and legal aid funding.[115] In the case of IAAAS service providers, the Committee noted the problems caused by the failure to provide separate funding for disbursements such as the cost of interpreters, the translation of documents and the commissioning of medical and other reports. It recommended the establishment of separate funds for translation and interpretation services on the one hand and for medical and psychiatric assessments on the other.[116]

The Committee collected a large body of material relating to the operation of the IAAAS. This included examples of legal work prepared by IAAAS service providers as well as submissions on the scheme itself. The Committee noted complaints about the paucity of funds available for community based asylum seekers. However, it was not prepared to make conclusive findings about the adequacy of the total amounts allocated. It recommended merely that an efficiency audit be conducted to determine the reach and general management of the scheme.[117]

The strongest and most interesting comments made by the Committee relate to the quality of work performed by IAAAS service providers. The Committee was not persuaded to recommend the abolition of the tender system on which the

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114 These are often identified almost completely with 'illegal migrants', loathsome law-breakers who have no right to use up Australia's precious resources. See, for example, the comments of one Harry Taplin who wrote to the Senate Committee:
"It is an obscenity that persons in the country illegally are able to obtain legal aid. It is time that this plundering of the public purse, aided and abetted by some elements of the legal profession, was brought to an end. With all the assistance and relief we provide it is no wonder that we are seeing an increase in illegal arrivals. No doubt we are seen as an 'easy touch'." *Ibid* at 73.

115 *Ibid* at 89, para 3.84 and 92. Cf Recommendation 3.2 which recommends an 'efficiency audit' or an exploration of ways in which existing funds could be stretched further.

116 *Ibid* at 89-92, Recommendations 3.3 and 3.4.

117 *Ibid* at 88-9; Recommendation 3.2.

scheme is based. Nor was it prepared to acknowledge any conflict of interest in the role played by DIMA in the selection and oversight of service providers. However, it recorded at some length the complaints made about the quality of the work performed under the scheme. It noted:[118]

> It seems that at least in some cases, the result can be substandard work. [I]t is apparent that some of these representatives are simply not up to the task of properly preparing a refugee claim. Often the application is nothing more than a cut and paste job on country information with a few additional words from the applicant...[119]
>
> With the exception of three organisations, the standard [of] applications which I have seen, completed pursuant to this scheme, is extremely poor. Examples of procedures used by such agents, which I consider inadequate, are:
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> - Forms and or statements completed for people who do not have competent English language skills without the aid of an interpreter.
> - People being left with an interpreter and asked to 'tell him/her your story', which is then submitted to the Department of Immigration and Multicultural Affairs without additional questions being asked.
> - Submission of forms and statements to the Department without being read back to the applicant in her/her own language to check for errors and/or omissions.
> - Agents telling applicants that claims and details of claims can be added later, when in reality they cannot.[120]

The Committee noted problems in the mechanisms for lodging complaints against IAAAS service providers. Given the political nature of any Senate inquiry, the Committee (rightly) did not purport to make findings about either individual contractors or about the scheme as a whole. Even so, the Committee was disappointing in its reluctance to acknowledge the central issues for asylum seekers and their advisers: the power imbalance between the asylum seekers and decision-makers and the dissonance in the interests of these two players. Asylum seekers are almost always strangers to the legal systems of the countries in which they seek protection. They typically know far less about what the law requires them to demonstrate than do their interrogators, and will often have no inkling of the ramifications for their case of the responses they give to particular questions. The decision-makers can, quite literally, hold the lives of asylum seekers in their hands. If knowledge is power, the imbalance between asylum seeker and decision-maker is plain.

By the same token, it is not difficult to see the divide between the interests of the asylum seeker and the decision-maker. The refugee claimant in every instance is seeking security of person and betterment of their life. The decision-maker, on the other hand, is the gate-keeper and sorter. Their task is to *sift* the refugee from the non-refugee, a technical and, as noted earlier, thorny exercise. At the most basic level, refugee status is not always determined on the basis of

118 *Ibid* at 95, para 3.111.

119 See Submission No 35, N Poynder, at 245.

120 See Submission No 30, McDonells Solicitors, at 207. See also Submission No 40, Legal Aid Western Australia, at 367, and *Transcript of evidence*, Ethnic Communities Council of NSW, at 163.

the likelihood of harm to an applicant. Even if no account is taken of the institutional pressures on decision-makers not to be too lenient on refugee applicants,[121] it is clear that the interests, goals and aspirations of the asylum seeker and the decision-maker are not the same and can on occasion be in conflict.

These issues point to the cardinal importance of asylum seekers having access to good, independent, legal advice. The Senate Committee noted in passing the worth of community legal centres such as RILC in Melbourne and the Immigration Advice and Rights Centre and the Refugee Advice and Casework Centre in Sydney.[122] However, it drew short of recommending an increase in core government funding for such centres, in spite of the efficiencies they represent for government. In concluding this aspect of the Report, the Senate did no more than recommend an independent evaluation of the administration of the IAAAS by a qualified body within two years.[123]

C. Departmental Decision-Making

The initial processing of an application for refugee status takes place in two stages in what could be described as 'screening-in' and 'full determination' phases. In the case of asylum seekers who arrive without a valid visa, a preliminary assessment of an applicant is made either at point of entry or, in the case of group arrivals, as soon as possible after the induction of the group into a detention facility. If a person is deemed to have a 'protection claim' and is not subject to an exclusion clause,[124] she or he will be permitted to lodge an application for a protection visa. Persons in detention are required to complete a simple one-page form and are then allocated advisers to help them construct their case. Those who enter Australia lawfully are required to submit a completed application form, together with a $30 fee. The initial consideration of these

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121 See, for example, the concerns that were raised in 1997 about the independence of the RRT following threats of non-renewal that were made by Minister Ruddock to Members accused of creativity in their decision-making: See article and editorial, *The Canberra Times,* 27 December 1996, p 14. The Senate Legal and Constitutional Legislation Committee provided a detailed account of the decision-making by the RRT over the period in April-June 1997 when the contracts of the existing RRT Members were up for renewal. According to evidence submitted to the Committee, the 'set-aside' rate – or the proportion of claimants being accepted by the RRT as refugees – dropped steadily as the renewal process progressed. In April 1997 – the month when interviews for contract renewal were held – the Sydney RRT granted refugee status to 2.1 per cent of claimants, down from 7.9 per cent in the previous month. In the preceding year set aside rates of 14 per cent were more the norm. See Senate Legal and Constitutional Legislation Committee, *Report on Migration Legislation Amendment Bill No 4 1997* (Cth), (1998) at 45-8.

122 These centres all provide free advice and representation for migration applicants and refugee claimants who cannot afford to pay for a lawyer in private practice. All of these centres operate with the aid of volunteers who include some of the best immigration lawyers operating in Melbourne and Sydney. These centres have been in operation since 1985 in Sydney and 1989 in Melbourne.

123 See Senate Report, note 10 *supra* at 99, Recommendation 3.5.

124 See, for example, *Migration Act* 1958 (Cth), ss 91A-91G. For a discussion of the barriers to applying for refugee status, see S Taylor, "Australia's Safe Third Country Provisions: Their Impact on Australia's Fulfilment of its Non-Refoulement Obligations" (1996) 15 *U Tas LR* 196; and the discussion below at Part VI.

applications is done 'on the papers', that is, on the face of the documentation supplied by the applicant.

(i) Screening-In Interviews

As noted earlier,[125] for persons in immigration detention, the *Migration Act* does not require immigration officials to provide either application forms or any information about visas. Individuals are either 'screened in' or 'screened out' of the refugee determination process on the basis of interviews[126] at which DIMA officers look for trigger words or concepts such as 'persecution' or 'fear of return'. These are contrasted with notions of economic and social betterment which are said to denote persons who enter Australia to secure a 'preferred immigration outcome'.

The submissions made to the Senate Committee on the initial screening process were sharply divided. DIMA asserted that great care is taken when interviewing unauthorised arrivals to ensure that all potential refugee claimants are identified and accommodated. The submissions made by persons acting for asylum seekers paint quite a different picture. The Kingsford Legal Centre stated:

> Interviews at the airport do not fulfil the standard of a properly conducted and fair interview as the applicant is likely to be disoriented, hungry, scared and without representation.[127]

Others complained about the use of telephone interpreters and the informality of the process, with no transcript of the interview other than an officer's summary of the interview.[128]

The Senate Committee noted that the UNHCR's review of airport procedures "revealed no evidence of any violation of Australia's *non-refoulement* obligations", but pointed out that the mandate of this body extends only to the Refugees Convention.[129] While not rejecting the evidence of the Department, the Committee recited at some length the adverse observations of refugee advocates with experience of screening-in processes. It noted in conclusion that "there is a possibility of people being turned around, especially at airports, without sufficient consideration having been given to their situation". Significantly, the Committee declined to endorse the view that persons who arrange to be met at the airport by an adviser are necessarily abusing the process or lacking a valid claim to protection.

The Senate Committee's recommendations and criticisms are aimed at the openness of the determination process and invite the Government to be less defensive in its approach to asylum seekers, whatever their mode of entry into

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125 See note 107 *supra*.

126 While these interviews are supposed to be conducted as soon as possible after the apprehension of the detainee, in practice individuals can be kept in separation detention for months before the screening process is completed.

127 See Senate Report, note 10 *supra* at 117-18, para 4.31.

128 See the evidence of McDonells Solicitors, Submission No 30, quoted at para 4.31, footnote 36.

129 Hereafter "UNHCR". See Senate Report at 119, para 4.35. Note that Australia's *non-refoulement* obligations extend to non-refugees at risk of torture and other gross abuses of human rights.

the country. The Committee repeated its earlier criticisms of the practice of withholding information and legal advice from potential asylum seekers.[130] It also expressed concern that interviewees are given no warning that what they say will be recorded and used against them in future proceedings and stressed the inequity of failing to supply applicants with copies of the record of their interview as a matter of course.[131] The Committee recommended that all information provided during initial interviews be retained, even where a person is removed from the country. Where individuals subsequently make a refugee claim, the information collected should be made available to them.

Although buried in the Committee's report, this simple recommendation, if implemented, could result in a significant improvement in the fairness of the initial processing of refugee claims. Without access to all of the information that the Department is using in its assessment of a refugee claim, both the applicant and their adviser can be placed at a considerable disadvantage. For lawyers, it is a principle of basic procedural fairness that an applicant should have an opportunity to answer any allegation or material that is adverse to their case and that is likely to be a critical factor in the decision-making process.[132] Disclosing the adverse material or inference to an applicant is a very basic and necessary precondition to a fair hearing.[133]

The Committee's assessment of the screening-in procedures was coloured once again by its refusal to countenance a re-thinking of the detention policies. Points that could have been made about the accuracy of any system that allows individuals to be assessed on the basis of personal interviews and the utterance of 'trigger' words were neglected. Where people have risked their life and, perhaps, the lives of their children and loved ones, to make a perilous ocean voyage to Australia, it almost beggars belief that the use of certain arbitrarily designated phrases can be used to exclude access to refugee determination. For individuals who lack any knowledge of substantive refugee law or of the English language, traumatised and alien to Australia's cultural framework, it is not difficult to see the shortcomings of the screening system.

(ii) Primary Decision-Making

In relation to the processes followed after the screening-in of an asylum seeker, the Senate Committee acknowledged criticisms of both the proficiency of the Departmental decision-makers and of the procedures they follow. While it made no findings about the extent of any systemic failings, the Committee noted that the information provided to it suggested that the determination process at the Departmental level often left much to be desired. It quoted a former member of the RRT who said:

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130 See *ibid* at 119, para 4.37.

131 The Committee noted that this now occurs but is not uniform. See *ibid* at 119-20.

132 See *Kioa v West* (1985) 159 CLR 550.

133 See, for example, *ibid*; *News Corp Ltd v National Companies and Securities Commission* (1984) 156 CLR 296; and M Aronson & B Dyer, note 92 *supra*, p 532.

> Primary decision-makers ... are often woefully ignorant of the law and of conditions in the country against which they assess the applicant. Anecdotal evidence is that they are often arrogant, hostile and even abusive towards applicants. In some cases, they reveal attitudes of prejudice, xenophobia and racism.[134]

The concerns raised by the Committee relate to both the accuracy of the primary determination process, given the expertise of the staff, and the efficiency of the system. It noted that changes in 1996 were designed to increase the speed of decision-making so as to expedite the overall process.[135] One way in which this was achieved was to drastically increase the number of decisions made 'on the papers'. The statistics cited by the Committee suggest that 87 per cent of community based asylum seekers have their cases determined without an interview, while 33 per cent of those in detention are rejected on the papers or on the basis of the screening-in interview. This is so in spite of the fact that refugee claims depend in large measure on a decision-maker's assessment of the credibility of an asylum seeker's story.

Although this practice may increase the apparent efficiency of the Department's procedures, it does nothing to expedite the determination process as a whole and actually adds considerably to the cost of the system. This is because asylum seekers rejected at first instance have a right to appeal to the RRT, a body that must grant an oral hearing to persons whose claims cannot be approved on the papers. RRT hearings, by definition, take longer and are much more costly than hearings conducted at Departmental level.

The Senate Committee stopped short of recommending that all asylum seekers be interviewed before being rejected at Departmental level. However, it did recommend that where a rejection is made without an interview, claimants should be provided with written reasons for the decision not to hold an interview.[136] On the matter of the skills of the decision-makers, the Committee recommended that officers be provided with further training before and during their tenure in the refugee status section of the Department.[137]

While increased training is a laudable and achievable recommendation, the significance of the efficiency measures introduced in 1996 and the consequent drop in interview rates cannot be over-emphasised. The Committee's most telling comment is its endorsement of the views expressed by Barrister Nicholas Poynder who said:

> [A] better way of approaching the reform of the refugee determination process is to spend ... less time devising ways of preventing applicants from appealing decisions, and ... more time in improving the quality and independence of the decision-making process.[138]

In this context, the Committee also commented on the inflexibility of the primary determination process, with the imposition of strict time limits on the preparation and submission of evidence. The Committee noted that the overall

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134 Submission No 16, Dr Rory Hudson, at 77, and Senate Report, note 10 *supra* at 123, para 4.55.

135 For an account of the case management targets of decision-makers, see Senate Report, note 10 *supra* at 124, paras 4.61-63.

136 *Ibid* at 125-7, Recommendation 4.4.

137 *Ibid* at 127, Recommendations 4.2 and 4.3.

138 Submission No 35, N Poynder, at 256

efficiency of the process would be enhanced if applicants were permitted the time and resources required to put in as complete and informative a submission as is possible. The evidence on the process once again highlighted the shortcomings of the IAAAS.[139]

(iii) The Quality and Use of Country Information

The Committee collected a considerable body of material on the operation and use of the 'Country Information Service' ("CIS"). This is a section within the Department established to collect and furnish information about 'political, social and human rights conditions' in the asylum seekers countries of origin. As the Committee notes, the CIS contains a range of material from the UNHCR, the Department of Foreign Affairs and Trade ("DFAT"), other countries, newspapers, books, magazines, Internet web sites, information provided by community groups, protection visa applicants, academics and non-government organisations.[140] DFAT provides material of a general nature collected by officers stationed at overseas posts, as well as specific information about individual asylum seekers commissioned by the Department or by a Member of the RRT.

The Senate Committee expressed concerns about both the quality of the information contained in the CIS and the skill of Departmental staff in accessing and interpreting data held by the Service. It noted that DFAT makes no attempt to comment on the quality or reliability of the information it furnishes to the CIS. Conversely, the Committee heard evidence from a number of sources suggesting that information from DFAT sources can be unreliable or even biased. The South Brisbane Immigration and Community Legal Service cited as an example reports received on the former Yugoslavia which tended to focus on abuses against Albanian Kosovars while ignoring harms committed against ethnic Serbs.[141] The Law Council of Australia described DFAT reports as views "from the cocktail bar of the Tehran Hilton".[142]

Committee members expressed particular concern about the quality and quantity of material supplied by the DFAT on the 'one child' policy of the PRC. Senator Harradine drew attention to the wealth of material on the incidence of forced or coerced abortions and sterilisations analysed by experts such as John Aird, who gave evidence to the Committee from the United States in a private capacity. The Senator expressed incredulity at DFAT's insistence that

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139 See Senate Report, note 10 *supra* at 133-8 and Part IV.B *supra*.

140 See *ibid* at 130, para 4.88 and Submission No 69, Department of Immigration and Multicultural Affairs, at p 327.

141 See *ibid* at 132; and Submission No 61, at 629-30.

142 See evidence of Law Council of Australia, Transcript of Evidence, Senate Legal and Constitutional References Committee, 26 July 1999 at 333; and Senate Report, note 10 *supra* at 132. For an earlier critique of the CIS, see S Taylor, "Informational Deficiencies Affecting Refugee Status Determination Process: Sources and Solutions" (1994) 13(1) *Uni Tas LR* 43 at 44.

information on the situation in China is "extraordinarily difficult to get".[143] The allegation was made by a number of witnesses that trade and diplomatic considerations can sometimes work against DFAT providing a full and frank account of human rights abuses in a country such as China.

D. The Refugee Review Tribunal

The mechanisms for determining refugee status in Australia have always included an avenue of administrative appeal for reviewing the merits of decisions made. Until 1993 and the establishment of the RRT, however, such appeals were determined solely on the basis of written submissions. Refugee claimants were rarely interviewed. It is a measure of the political sensitivity of refugee determinations that the RRT heard its first appeals some three years after the generalist Immigration Review Tribunal began taking oral submissions from other visa applicants.[144] The two immigration tribunals constituted something of an experiment, modelled as they are on a quasi-inquisitorial style of administrative review.[145] With proposals to adopt the migration experiment across the whole gamut of administrative appeals in Australia,[146] the Senate Committee's consideration of this aspect of the refugee determination system is of particular interest.

The Senate Report is not the first review undertaken of the procedures prescribed for migration tribunals,[147] but it is the first specific evaluation of the RRT. Although the Senate Committee did not seek any fundamental systemic changes to the review mechanisms, its recommendations provide important insights into the shortcomings in the Tribunal's operations.

The RRT sits as a single Member tribunal. Like the present Migration Review Tribunal ("MRT") and the Veterans' Review Board, its procedures are inquisitorial in the sense that Members gather evidence and control proceedings by asking questions of applicants who appear in person and without representation. An applicant may nominate witnesses but it is the Tribunal's decision as to who appears and gives evidence. The applicant can neither

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143 See evidence of Department of Immigration and Multicultural Affairs, Transcript of Evidence, Senate Legal and Constitutional References Committee, 16 September 1999 at 655-7; and Senate Report, note 10 *supra* at 133. As noted above in Part III.A, the Senate Committee heard evidence from a number of witnesses about human rights abuses in China, among them a woman doctor who had been required to perform late term abortions.

144 Although the IRT was formally created in December 1989, it did not begin hearing cases until July 1990. The RRT began operating in July 1993. For an account of the previous system, see M Crock, note 2 *supra*, pp 126-9.

145 The two tribunals were modelled on the Veterans' Review Board. See J Vrachnas, "The Impact of Administrative Law: Immigration and the Immigration Review Tribunal" in J McMillan, *Administrative Law: Does the Public Benefit?*, Proceedings of the Australian Institute of Administrative Law Forum, 1992, AILA (1992); P Dawson, "Tenure and Tribunal Membership" (1997) 4 *Aust J Admin L* 140; L Certoma, "The Non-Adversarial Administrative Process and the Immigration Review Tribunal" (1993) 4 *PLR* 4; and M Chaaya, "Proposed Changes to the Review of Migration Decisions: Sensible Reform Agenda or Political Expediency?" (1997) 19 *Syd L Rev* 547.

146 See Administrative Review Tribunal Bill 2000 (Cth).

147 See Committee for the Review of the System for Review of Migration Decisions, *Non-Adversarial Review of Migration Decisions: The Way Forward*, AGPS (1992).

examine nor cross-examine witnesses called by the Tribunal. If an applicant has engaged an adviser, the adviser may only address the Tribunal at the invitation of the Tribunal.[148]

There are several features that distinguish the RRT from Australia's other quasi-inquisitorial tribunals. The RRT's decision-making is made on the basis of standards set by international law rather than by the tight regulatory framework of domestic legislation. Its fact-finding role is complicated by chronic lack of accessible, and therefore reliable, evidence: refugee claimants quite frequently have little more than their own testimony to bring before the Tribunal. The most significant feature of RRT hearings, however, is that they are conducted *in camera*: the public cannot gain admission while the Tribunal is in session.

The Senate Committee identified a number of concerns relating to the structure and operation of the Tribunal. These included: the adequacy of the inquisitorial procedures; the training and qualification of RRT Members; the manner in which interviews are conducted, including the significance placed by Members on credibility issues; the use by the Tribunal of country information; and the constitution of the Tribunal with Members sitting alone. The Committee also considered with some care the issue of the Tribunal's relationship with DIMA, with particular regard to the secondment of DIMA officers to the RRT.[149]

The popularity of inquisitorial tribunals has grown in inverse proportion to the fall from political favour of lawyers and their adversarial mode of operation. An inquisitorial system requires tribunal Members to engage with the decision-making process, rather than acting as passive arbiters weighing up the material presented by two opposing sides. Lawyers or paralegal advisers as advocates can be seen in such a context as a hindrance to the 'truth' and to the fact-finding process, as their task is to press the version of events most favourable to their clients. In the final analysis, the Senate Committee, at least by implication, accepted this vision of the adversarial system. It cited a former RRT Member who spoke of the advantage of being free to explore issues and points 'critical to a case' that may not have been canvassed by an applicant. It noted again the argument that the Government is nobody's opponent in refugee determinations as it is in everyone's interests to see that genuine refugees are recognised and given protection.[150]

Rather than attack the concept of inquisitorial procedures, the Senate Committee concentrated on the extent to which the RRT allegedly fails to adopt a truly non-adversarial role. The Report iterates complaints made about the RRT Members' poor interviewing and interpersonal skills and the tendency for Members to develop 'compassion fatigue' or even to develop an overt bias against refugee claimants.[151] It repeated its expression of concern about the

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148 For a fuller account of the RRT and its procedures, see M Crock, note 2 *supra*, pp 257-9; and S Kneebone, "The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?" (1998) 5 *Australian Journal of Administrative Law* 78.

149 Senate Report, note 10 *supra* at 172-3 and Recommendation 5.6.

150 *Ibid* at 149, and evidence of the Attorney-General's Department, Transcript of Evidence, Senate Legal and Constitutional References Committee, 13 August 1999 at 431.

151 See Senate Report, *ibid* at 155, 159.

quality and use of country information collected in the CIS.[152] Particular concerns were expressed by witnesses before the Committee about the fairness of the procedures followed by the Tribunal in complying with the obligation in s 424A of the *Migration Act*. This provision requires Members to disclose to applicants any adverse material that is specific to them. The Senate Committee heard evidence that RRT Members often wait until the oral hearing before furnishing an applicant with such material. Given the pressures of the hearing process and (in many cases) in the absence of an adviser to help a claimant digest and contextualise new material, it is not hard to see the potential for distress here.

What emerges most forcefully from the evidence collected by the Committee, and from its analysis of this material, is the closed and opaque nature of the RRT hearing process and the defensiveness that this appears to engender in the Tribunal. Members interview claimants alone, with perhaps an interpreter and an adviser in attendance. As the ALRC wrote in its submission:

> The RRT itself is a very pared down merits review model. The Tribunal member is the investigator, hearing advocate and decision-maker. Such an array of skills and roles is not easily combined in one person, and cases can be particularly difficult when they turn on credibility issues.[153]

The ALRC also noted that "practitioners are emphatic in their comments to the Commission that most clients who seek judicial review are motivated by the sense that they were not fairly dealt with by the RRT".[154] In the Senate hearings, considerable attention was given to the tendency in the Tribunal to base adverse refugee status decisions on the (lack of) credibility in witnesses. Witnesses testified to the injustice of focussing on inconsistencies in a person's testimony to the exclusion of hard evidence and of cultural, psychological and other factors. The more serious implication was that credit is used as a way of 'judge proofing' decisions. Based as it is on the intensely personal process of forming an opinion about the totality of a person's testimony and demeanour, the simple statement 'I do not believe you', renders an adverse ruling extremely difficult to 'fault' as a matter of administrative law.

The RRT is not the only tribunal charged with making decisions on the basis of oral evidence provided by applicants. However, it is a tribunal that produces a disproportionately high number of adverse rulings in which issues of credit are articulated as the critical, decisive factor for the decision-maker. The process is personalised in the relationship between the claimant and the Tribunal – in the *I* do not believe *you* – creating the impression of both defensiveness and adversarial combat in the Tribunal.

The Senate Committee made some attempt to find remedies for the problems identified. In answer to its observations regarding the actual or perceived independence of the Tribunal, it recommended strongly that serving members of DIMA not be appointed to the RRT. The Committee suggested that any DIMA

152 See *ibid* at 155 quote of Barney Cooney. On this point, see also S Taylor, note 142 *supra*.

153 See Senate Report, note 10 *supra*, at 163; and Submission 31A, Australian Law Reform Commission, at 289.

154 Australian Law Reform Commission, *ibid*.

officer seeking appointment should transfer out of the Department onto the public service 'free' list. On operational matters, the Committee recommended that RRT Members be given further training in interviewing and in inquisitorial techniques. Its most interesting suggestion is that the RRT be permitted to convene as three Member panels in appropriate cases.[155] The primary reasoning behind this recommendation is that multi-Member panels would reduce the isolation of individual Members, allowing for interaction (and learning) between Members, and for the identification and remedying of problem behaviour.

While the Committee's suggested changes would undoubtedly improve the merits review process for refugee refusals, the recommendations amount to little more than tinkering with the system and are redolent of political compromise. The inquisitorial procedures of the RRT are the creation of a Parliament committed to the idea of reducing the role of lawyers in the administrative process. In this context, it is perhaps not surprising that the Committee should cling to the fiction that refugee determinations are a non-adversarial process. Having said this, the truth of the matter is that both primary decisions-makers and the RRT are asked to engage in a sorting process. As noted earlier, this process arguably puts the asylum seekers and the reviewers in different 'camps', with the reviewers in a situation of superior power. As many commentators have noted,[156] the disadvantage of the refugee claimant has a number of different facets. If decision-makers can quite literally hold the refugee's life in their hands, the refugee can be handicapped by language, culture, physical and mental dysfunction and (again) simple lack of knowledge in articulating a cognisable claim. At the end of the day, the Senate Committee was not prepared to recognise this. Nor was it prepared to countenance its most obvious remedy: the guarantee of *effective* legal assistance for refugees at every stage of both the application and merit review process. In so far as the current regime does not readily permit refugee claimants to be legally represented in hearings before the RRT, it is my opinion that the system is flawed.

The introduction of multi-panel Tribunals may reduce the incidence of actual or perceived bias in Tribunal Members, but it could equally result in the intensification of some of the negative aspects of the inquisitorial system. With three Members firing questions at an unrepresented claimant, it is not difficult to imagine the claimant being intimidated or even overwhelmed by the experience. On the other hand, formalising a claimant's right to assistance at a hearing could do much to redress the incipient disadvantage of asylum seekers. In an ideal world, my personal preference would be to see both the introduction of multi-Member panels in appropriate cases *and* the inclusion of legal advisers in the review process. As the European system demonstrates, the inclusion of legal representatives at a hearing does not mean the abandonment of an inquisitorial process. What it does do, however, is expand the (potential) range of expertise involved in the process. As a number of witnesses before the Senate Committee

155 See Senate Report, note 10 *supra* at 166-9 and Recommendation 5.4.

156 See, for example, W Kalin "Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing" (1986) 20 *Int'l Migration Rev* 230; S Legomsky "The New Techniques for Managing High-Volume Asylum Systems" (1996) 81 *Iowa L Rev* 671; Martin, note 17 *supra*.

attested, a good representative can do much to assist the Tribunal in identifying issues and points of law. The participation of a representative can also enhance the claimant's sense that he or she has had a fair hearing, and so decrease the incidence of legal appeals from a tribunal ruling. Although meeting two of the objectives identified earlier as attributes of good administration, it is regrettable indeed that the chances are slim of seeing such changes in the short term.

E. Safety Nets – Of Discretions and Obligations

The final matter of substance that I wish to consider in this article is the operation of Australia's laws and procedures for persons who fear harm but who do not meet the strict terms of the definition of refugee. In his additional comments, appended to the Senate Report, Senator Cooney states plainly:

> Australia does not have an onshore humanitarian program. Section 417 of the Migration Act gives the Minister ... the ability to grant a person who has exhausted all other avenues but is in need of humanitarian relief permission to remain here and so to save him or her from the ill consequences of returning to where he or she would otherwise have to go. Section 417 provides the Minister with a discretion which he may or may not chose to use. ... [It] does not equip Australia with a humanitarian program. A discretion which is at large, whose exercise is unfettered and non reviewable, and whose use can in effect be arbitrary, does not constitute a humanitarian system.[157]

As noted earlier, the two cases of Ms Z and SE highlight the difficulties posed by people who fall into a legal penumbra at the periphery of the refugee protection regime. In Ms Z's instance, the Senate Committee expressed particular concerns about the procedures that were followed prior to her removal that operated to prevent the then acting Minister from learning of Ms Z's pregnancy.[158] The Committee clearly regarded this case as one in which the discretion vested by s 417 of the *Migration Act* should have been brought into play. In spite of the access SE enjoyed to Australia's legal system, the central question in his case was the appropriateness of the s 417 discretion as the sole mechanism for ensuring non-refoulement for persons covered by the Convention Against Torture.[159]

The Senate Committee looked in some detail at the operation of s 417 of the *Migration Act*. As Merkel J noted in *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs*,[160] an exercise of this discretion permits three different decisions: a decision to exercise the discretion; a decision not to exercise the discretion; and a decision not to consider whether to consider exercising the discretion.[161] Of these decisions, the first two must be exercised

157 Senate Report, note 10 *supra* at 347.

158 See the discussion above, Part III.A.

159 See above, Part III.B.

160 (1996) 137 ALR 103. Aspects of Merkel J's judgment were later overruled by the Full Federal Court in *Minister for Immigration, Local Government and Ethnic Affairs v Ozmanian* (1996) 141 ALR 322. However, his description of s 417 was upheld.

161 *Ibid* at 118 per Merkel J.

by the Minister acting personally.[162] The third decision is implicit in s 417(7), which makes the discretion non-compellable and in s 475(2)(e), which prevents Federal Court review. The third decision can be delegated because it is not covered by s 417(3) and because s 496 allows the Minister to delegate his power to grant or refuse a visa.[163]

In the final analysis, the Senate Committee did not question the need for a residual discretion vested in the Minister.[164] Nor did it find 'against' the particular formula adopted in s 417, in spite of criticisms that the provision encourages 'influence peddling'[165] and is inappropriate because of the volume and nature of requests received.[166] It noted that the provision was a vehicle that *could* be used to facilitate compliance with Australia's obligations under the Torture Convention, the ICCPR and the CROC.[167] On the issue of whether the discretion is sufficient to *ensure* compliance with these obligations, however, the overwhelming inference from the Committee is that s 417 is not a sufficient safety net for the 'near miss' refugee cases. However, the Committee does not grapple directly with the matter of creating the on-shore humanitarian option favoured by Senator Cooney. Instead, it recommends yet another inquiry: this time calling on the Attorney-General's Department to investigate ways in which Australia's broader non-refoulement obligations could be legislated.[168]

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162 See s 417(1) of the *Migration Act* which vests in the Minister the power to overrule decisions of the RRT and s 417(3) which states expressly that the power in s 417(1) must be exercised personally.

163 Note 160 *supra* at 120, per Merkel J. Delegated decisions are also protected from review because the discretion is non-compellable and no reasons need be given for not exercising the discretion.

164 On the value of maintaining discretion in the administrative process, see KC Davis, *Discretionary Justice: A Preliminary Inquiry*, Louisiana State University Press (1969) pp 3-4; and D Kanstroom "Surrounding the Hole in the Doughnut: Discretion and Deference in US Immigration Law" (1997) 71 *Tulane Law Review* 703. See also RM Dworkin, "Is Law a System of Rules?" in RM Dworkin (ed) *The Philosophy of Law* (1977) 52. Dworkin argued that discretion "like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction".

165 See the comments of Senator Ray, then Minister for Immigration who argued that codification would introduce equity into an immigration system characterised by unequal access to the Minister: Australia, Senate, 30 May 1989, p 3013.

166 Thousands of applications are made to the Minister each year asking him to exercise his discretion. For example in 1996-97, 10 267 visa applications were made; and 2 168 protection visas were granted by primary decision-makers and the RRT. The Minister exercised his discretion in 79 cases, resulting in an extra 107 protection visas: See DIMA, *Annual Report 1996-97* at "Program 3 Onshore Protection" at <http://www.immi.gov.au/annual_report/annrep97/html/prog3002.htm#E9E1>. Evidence by the Law Council of Australia also raised concerns about the speed at which refugee applications are processed and the extent to which this prevents proper exercise of the s 417 discretion. Evidence given to the Senate Legal and Constitutional Legislation Committee on Migration Amendment Bill (No.2) 1995 (Cth), revealed that 26 Sino-Vietnamese applicants were processed in 48 hours. See S Spindler, 'Dissenting Report' in *Report by Senate Legal and Constitutional Legislation Committee, Migration Amendment Bill (No.2) 1995*, AGPS (1995) 3; and Submission No 73, Law Council of Australia.

167 Senate Report, note 10 *supra* at 267.

168 Note also that this recommendation is made in Chapter 2 of the Senate Report, *ibid.* See note 10 *supra* at 64, para 2.77 ff.

V. CONCLUSION

The tendency of the Senate Committee to opt for further inquiries when faced with difficult questions such as the reintroduction of an on-shore humanitarian visa class underscores the limitations of Parliamentary inquiries as a process for securing meaningful reform. In the 1980s, the scope left for 'humanitarian' decision-making in migration cases was seen politically to be the undoing of the migration program. There was a perception that 'soft' decisions – and curial intervention in humanitarian cases – were largely to blame, while the politicians were left with the fall-out.[169] This legacy lives on for today's parliamentarians. To state the obvious, it is the highly political nature of immigration control that makes the search for simple solutions to the challenges posed by asylum seekers so difficult.

If it is too much to expect a Parliamentary Committee to produce a complete blueprint for the reform of Australia's refugee and humanitarian processes, the Senate Committee's work nevertheless represents a very serious attempt to begin the debate necessary for meaningful changes. This process is one that will take time to gain momentum. The Senate Report itself is long and complex. Not surprisingly, it has proved difficult to 'sell': there has been little or no public discussion of the document since its release in July 2000. As of November 2000, the Government was yet to offer a formal response. Cutting through the complexities, however, the Senate Report sends a number of important messages. The most significant of these relate to the need for a more open and principled system for facilitating and determining protection applications from asylum seekers.

From the perspective of a long-term player in the refugee field – as advocate and more recently as academic – the most striking feature of the Senate Report is the call for greater community education about refugee law and asylum processes. Successive governments have acted to blinker both refugee claimants and decision-makers, adopting a narrow, highly focussed and ultimately, apprehensive approach to refugee protection. The contrast in the Senate Report is patent in the series of recommendations that urge the Government to let asylum seekers know their rights and to help them construct their applications in a way that maximises the chances of getting decisions right the first time. The Senate Committee calls for Australia to embrace the international standards of human rights law in a manner that is open and comprehensible.

If this aspect of the Senate Committee's report were to be accepted, the potential for real and lasting improvements to Australia's refugee and humanitarian processes would be great. Problematically, the recommendations seem to be light years away from the thinking of the current Government. Many of the Government's most recent legislative initiatives are aimed at reducing external scrutiny of the refugee process and down-grading the entitlements of claimants. The most striking example is the proposal to alter the whole system

169 Over the 1980s and early 1990s, immigration became a political graveyard with an almost bi-annual turnover of migration Ministers. See M Crock, note 2 *supra*, chapter 3.

of federal administrative review with the establishment of a new super-tribunal: the Administrative Review Tribunal ("ART"). This new tribunal would subsume or replace the current RRT. The legislation currently before Parliament contrasts starkly with the proposals made by the Senate Committee in a number of respects. Examples in point are provisions which indicate that the Principal Member of the new tribunal would not have the title or status of a superior court judge and the proposal to make oral hearings before the new body optional at the discretion of a sitting Member.

If implemented, these provisions would represent a serious down-grading of the rights of refugee claimants – as it would the rights of all persons seeking review of an administrative decision. The right to an oral hearing is now the norm across all federal tribunals. In some respects the proposed procedures of the new tribunal would resemble those of the RRT. For refugee claimants, this would mean little change to the inquisitorial mode of operation, and no improvement in access to representatives at hearings.

Given the Government's long standing concern about the level of appeals from the RRT to the Federal and High Courts, the ART proposals are somewhat surprising. It is difficult to see how these reform measures would improve satisfaction with the administrative process so as to improve the acceptability of the decisions made and provide 'closure' for applicants.

Leaving to one side the issue of refugee appeals, there are two important aspects of Australia's asylum regime deserving of comment that the Senate Committee did not canvass in its review of Australia's refugee and humanitarian program. These are: access to refugee determination procedures and detention. In my view, both are critical to the issue of procedural openness and weigh heavily on accuracy, efficiency and acceptability of Australia's refugee determination procedures.

Barriers to applying for refugee status represent the most immediate and obvious threat to Australia's observance of its obligation not to *refoule* or return refugees and other victims of torture and trauma to places of persecution. With the arrival of successive waves of asylum seekers from the Asian region and more recently from the Middle East and with the growing number of air arrivals entering the country with false documentation, Australia has followed the Western trend in erecting access barriers to its asylum procedures. Australia's laws now replicate many measures seen first in Europe and North America. 'Safe third country' provisions operate to bar asylum applications by nominated non-citizens with rights of residence in countries 'gazetted' by the Australian Government as 'safe'.[170] These provisions were strengthened in 1999 with legislative amendments increasing the powers of Australian coastal surveillance officers to interdict and return asylum seekers to third countries so as to prevent the lodging of claims in Australia. The same package of reforms envisages the creation of 'white list' countries, or safe countries of origin. Again, the objective is to reduce the range of people eligible to lodge asylum applications in

170 See S Taylor, "Australia's 'safe third country' provisions : their impact on Australia's fulfilment of its non-refoulement obligations" (1996) 15 *U Tas LJ* 196.

Australia.[171] There are a number of reasons why these measures are less appropriate in Australia than they are likely to be in Europe and North America, the most significant of which are the under-developed refugee protection regimes of many of Australia's near neighbours.[172] In spite of this, the Senate Committee was not prepared to call for the opening up of the screening processes used in the administration of these provisions.

Just as serious to the issue of Australia's compliance with its protection obligations are the raft of measures that act as disincentives to 'abusive' asylum seekers. These are refugee claimants who might be using the system to achieve an 'immigration result' rather than as a means of gaining 'genuine' refuge from persecution. In addition to the regime for the mandatory detention of unauthorised arrivals, asylum seekers who arrive lawfully will only gain the right to work and income support while their claims are processed if they lodge their applications within 45 days of arriving.[173] Individuals who fail to convince the RRT that they are refugees are subjected to a 'post application' filing fee of $1 000.[174] In 2000, there have been moves to restrict the rights of these on-shore asylum seekers to government subsidised health care.[175] Again, the politics of the refugee phenomenon appear to have prevented the Senate Committee from engaging with the human impact of these measures.

The issue of detention brings this discussion of Australia's refugee determination processes full circle. It is a matter that cannot be ignored in mapping a new model asylum process. Whether or not acknowledged by the Senate Committee, many of the concerns raised about the operation of Australia's refugee and humanitarian system have their roots in the regime of mandatory detention for unauthorised arrivals who claim refugee status. The detention scheme is also the primary reason for the prohibitive expense of the

171 See the *Border Protection Act* 1999 (Cth); and the discussion in AR Grimm, *Bills Digest* No 140 of 1999-2000, Information and Research Service, Department of Parliamentary Library.

172 To begin with, Australia's near neighbours do not all subscribe to refugee protection regimes that permit the coerced return of asylum seekers who have passed through in transit. Australia's *non-refoulement* obligations prohibit the return of asylum seekers to countries that offer no form of protection (or determination process) for refugees. With many of the asylum seekers travelling outside of (any) law, securing their return when they have left the territorial waters of a neighbouring state can also represent insurmountable difficulties for Australia. In practical terms, it is often not possible to get the 'transit' state to take back the asylum seekers. The only hope Australia has of doing this is to prevent the asylum seekers from boarding the boats that take them to Australia. Australian coast guard officials have used their powers under the *Border Protection Act* 1999 to do just this. Without a resident police force in the foreign state, however, these measures can never be more than cat-and-mouse skirmishes with the people smugglers. Finally, the asylum seekers who make the long and perilous journey to Australia by boat (or by air) generally have come from countries that no self respecting democracy could label 'safe' countries of origin.

173 See *Migration Regulations* 1994 (Cth) sch 2 clauses 010.611, 030.212(3) and clause 030.6 (Bridging visa C) and para 050.613A(1) (Bridging visa E subclass 050). Note also the requirement to show a 'compelling need to work', defined as the experiencing of 'financial hardship' (reg 1.08(a)). See generally, S Taylor, "Do on-shore asylum seekers have economic and social rights?: Dealing with the moral contradiction of liberal democracy" (2000) 1 *Melb J Int'l L* (forthcoming); Martin Clutterbuck, "A Place to Call Home?" (2000) 13(4) *Parity* 16; and DIMA, Fact Sheet 42: *Assistance for Asylum* Seekers.

174 See reg 4.31B of the Regulations, introduced by SR 109 and 185 of 1997.

175 See Migration Legislation Bill No 2 2000.

determination procedures in this country. Until the folly of Australia's mandatory detention laws is recognised, it is also my view that any moves to improve the operation of the refugee and humanitarian system as a whole will have only a marginal impact.

From any perspective external to Australia, the concentrated efforts that have been made in this country to prevent the admission of asylum seekers; to deter those already in the country from pursuing refugee claims; and to confine the powers of non-government actors to extend a helping hand, must seem quite bizarre. The frenzy of the banner headlines warning of invasions and national disaster belie the fact that Australia has never experienced anything approximating a flood of refugee claimants. 'Whole villages' have not uprooted and come to Australia. Given Australia's geographical isolation, a refugee-led invasion is *not* an obvious threat. If even a small percentage of the money expended on detention and the administration costs attendant on remote processing sites were to be redirected into an open and transparent system, the possibilities for real improvements are considerable. For this to happen, however, Australia needs to change its mind-set with respect to asylum seekers. We must stop seeing them as a threat, and focus instead on them as *people* in need of protection, whether in the short or in the long term.

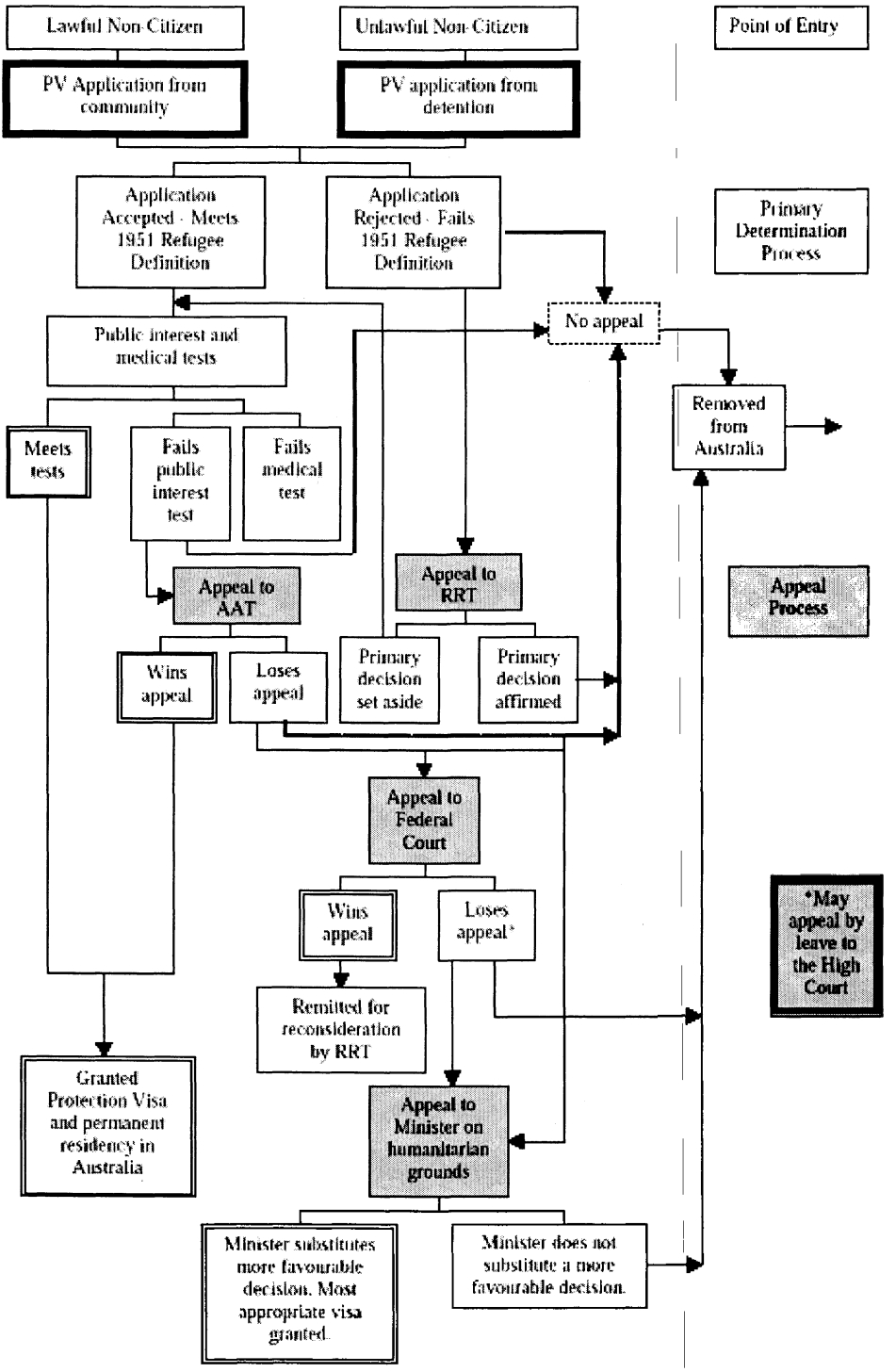
As Gervase Coles argues persuasively,[176] it is not just Australia but the whole world community that needs to re-think its attitude towards asylum seekers. This may involve broadening our collective perspective so as to look more closely at the responsibilities of those states who are responsible for the exodus of their people. Closer to home, however, the message is clear: asylum seekers need not be radically more expensive to process than 'regular' migrants. It is our choice to erect the many obstacles they face in trying to engage our protection obligations.

In my view, if asylum seekers present any threat to the country, the threat lies in the consequences of failing to act to protect the basic human rights and interests of individuals in need of assistance. The recognition and protection of basic human rights is at the very centre of a rational system represented by the rule of law. The failure to offer succour to an individual at risk is antithetical to the rule of law. It constitutes a gesture that supports if not incites disorder and anarchy by permitting the perpetuation of pain and the infliction of harm. The international regime for the protection of refugees may be imperfect, but it is better than no regime at all. If Australia is to imagine itself as a nation built on respect for the rule of law – as well as on its fancied notions of mateship and fair play – we must change our attitude towards asylum seekers. The benefits at every level would be considerable.

176 See G Coles, *UNHCR and the Political Dimension of Protection*, Belley, August 1995: Internal Working Paper.

APPENDIX 1:[177]

Current Refugee Determination Process



177 This table is taken from the Senate Report at 111.