

# DISCUSSION PAPER

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United Nations High Commissioner for Refugees  
Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific



## Temporary Protection

### Introduction

In the international context, temporary protection usually refers to measures adopted by States to deal with overwhelming, unexpected, mass influx situations. Through its use, governments can initially avoid having to undertake individual screening (which is both time-consuming and costly) of people displaced by civil wars and other forms of generalized violence.

Most temporary protection schemes offer refuge to *everyone* fleeing an area of generalized conflict or human rights abuse. Those protected include people who are refugees within the definition of the 1951 Convention. The temporary form of protection should not be prolonged. For those fleeing generalized violence, temporary protection can be lifted, when it is safe to return.

Beneficiaries of temporary protection are sometimes not granted all the social rights of refugees (such as welfare payments, education, or the right to work). Temporary protection regimes should not, however, as a matter of principle, violate substantive provisions of the Refugee Convention, including Article 3 (non-discrimination), Article 28 (right to travel documents), and Article 31 (by penalising refugees who arrive without proper documentation) of the 1951 Convention. This is particularly so when temporary

protection is granted for refugees who have been individually assessed as fulfilling the criteria of the 1951 Refugee Convention.

Temporary protection granted following individual assessment should also not – in UNHCR's view – be an obstacle to the principle of family unity. In certain situations the ban on family reunion is exacerbating the protection needs of the individual's family abroad, particularly women-at-risk and unaccompanied minors.

In Western Europe, some people fleeing the conflict in former Yugoslavia – many of them with extensive claims to refugee status under the 1951 Convention – found much-needed protection under various temporary schemes. But these schemes also left some of them in limbo for three years or more: longer than it would take to process any regular asylum claim. UNHCR advocates that after a reasonable period of time, people benefiting from temporary protection should be given the right to assert their claims to refugee status.

While the international community has not developed any comprehensive guidance on the provision of temporary protection, UNHCR has developed a number of policy documents which touch on the issue, including the following Standing Committee Paper of 9 June 2000. ■

### Complementary Forms of Protection: Their nature and Relationship to the International Protection Regime - EC/50/SC/CRP.18

The concept of temporary protection has evolved in Europe and other regions as a provisional protection response to situations of large-scale displacement generated, to a significant extent, by compelling reasons including or akin to those in the refugee definition. The purpose of temporary protection is to ensure immediate access to safety and protection of basic human rights, including protection from refoulement, in those countries directly affected by large-scale influx. Temporary protection may also serve to enhance prospects for a coherent regional response, beyond the immediately affected areas.

Temporary protection is an exceptional emergency device to respond to an overwhelming situation, where there are self-evident protection needs, and little or no possibility to determine such needs on an individual basis in the short term. It is distinct from complementary protection, which is a legal status offered after recognition of individual protection

needs, and a determination of their nature. Temporary protection, by definition, involves a group assessment of international protection needs based on the circumstances in the country of origin, whereas complementary protection measures apply to individuals whose protection needs have been specifically examined. While both temporary and complementary protection should ensure adequate standards of treatment for the beneficiaries, the provisional nature of temporary protection, its short duration and especially its use with large groups, warrants the use of minimum standards. Complementary protection measures, on the other hand, provide a definitively stable treatment immediately upon recognition of the individual's protection need.

Due to these, and other, significant differences between the two concepts, the provisional device of temporary protection should be clearly distinguished from forms of complementary protection provided in individual cases. ■

For this Discussion Paper, UNHCR has asked the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and the Refugee Council of Australia (RCOA) to provide comment on Australia's application of the temporary protection concept.

# The Challenge of Refugee Protection.

## The Department of Immigration and Multicultural and Indigenous Affairs

Australia's treatment of asylum seekers and refugees has come under close scrutiny since the introduction of the Temporary Protection Visas in 1999.

There is generally great passion but, unfortunately, limited balance in the public debate on these matters. Critical issues are too often viewed narrowly and out of context – with little appreciation of the global context within which today's humanitarian crises occur.

Australia was one of the first countries to sign the 1951 Convention on the Status of Refugees and remains committed to the implementation of the Convention and its 1967 Protocol.

Australia has provided refuge and support to more than 600,000 refugee and humanitarian settlers since the end of the second world war and continues to provide the opportunity for 12,000 people to come to Australia under our Refugee and Humanitarian Program each year.

Australia's multicultural society has ensured that refugees from all parts of the world can settle in Australia with safety and dignity.

Australia continues to work with the UNHCR and other countries to ensure that the international protection system delivers durable solutions in a timely, efficient and fair manner, to those refugees who need them.

Constraints and competing priorities are a fact of life. There are limits to the resources governments have at their disposal and hard choices have to be made. There will always be some disagreement between various parties as to where limits should be set but there is no doubt that the capacity of Australia, or indeed of any country, is not unlimited.

Using the Refugee Convention definition there are already 12 million refugees in the world, with another 11 million people of concern identified by the UNHCR. Australia can't help them all, but we do demonstrate every year that we will continue our efforts to assist those most in need.

Every element of our international strategy should be managed according to the resource limits within which it is set – including the provision of resettlement places as a durable solution for refugees. No one could reasonably expect any country's offer of resettlement places to be open-ended.

Having decided the scope of how Australia will participate in the international humanitarian effort and having allocated generous resources, the Government must make a third set of decisions before implementing its policies and programs. Who will be the recipients?

The intended recipients of resettlement places in Australia's programs are chosen from those for whom there

is no alternative. Australia's offshore Humanitarian Program targets refugees and people in humanitarian need who cannot go home and who cannot be integrated in their country of first asylum – refugees with no resources to hire a people smuggler and whose desperate voices are the first ignored in much of the public debate.

Importantly also, being a refugee does not entitle a person to resettlement in another country, nor do all refugees in countries of first asylum actually need resettlement.

Globally, resettlement places are limited – only about 110,000 per year are available in a handful of resettlement countries.

Governments and the UNHCR must decide who gets a resettlement place. This cannot be a self-selection exercise, nor can it be left to people smugglers to decide.

Only by retaining control of the system of international protection, including determining which refugees are in need of resettlement, can the international community ensure that the finite collective resources of governments are allocated effectively and efficiently.

### Why temporary protection?

Australia's protection obligations under the Refugees Convention require the onshore component to take priority over the offshore component when it comes to the use of these places. Accordingly, any increase in the number of people who arrive in Australia and engage its protection obligations translates to a decrease in the number of resettlement places that Australia can offer to people waiting overseas.

Between 1998 and 2001, the number of unauthorised people arriving by boat from rose from around 900 to the order of 4000, with no sign of this increase abating. Most of these unauthorised arrivals were refugees or asylum seekers who were either abandoning effective protection that they already enjoyed, often for long periods, in a country of first asylum, or were bypassing opportunities to seek and obtain protection in countries closer to their homelands.

By travelling to Australia, these persons were using, and being exploited by, a growing network of people smuggling organisations which specialise in undermining the laws and border controls of countries of transit and countries of destination.

These criminal organisations are motivated by greed and the tragic deaths which have occurred around the world as a result of people smuggling are testament to the people-smugglers' callous disregard for human life.

While refugees have a right to protection, they do not have the right to choose the country that provides the protection, or a right to enter any country without permission, or to obtain

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# When Deterrent feels like Punishment:

## The Impact of Temporary Protection Visas in Australia

### The Refugee Council of Australia

As of 20 October 1999, successful refugee claimants who arrive in Australia without authorization are not granted permanent protection visas. Instead they are granted a three year Temporary Protection Visa (TPV) which significantly limits their entitlements to settlement services and other welfare support<sup>1</sup>. The TPV also precludes family reunion and rights to re-entry should a refugee with a TPV leave Australia.

The TPV (Section 785 of the Migration Act) was introduced as one of a range of measures to deter people arriving without authorization and seeking asylum in Australia<sup>2</sup>.

Since that time over 7,500 people have been granted a TPV. Predominantly they have come from Afghanistan and Iraq, with smaller groups from Iran, Sri Lanka and other 'usual suspect' countries engaging in the persecution of their citizens.

Refugees with a TPV have all experienced detention. Once released, they are taken by bus to various locations around Australia. The largest numbers have gone to Perth, Adelaide, Melbourne and Brisbane with much smaller numbers to Canberra, Tasmania, Darwin and Sydney. Following rumours of jobs or reuniting with friends and family many move from these cities, often to NSW where an estimated 49% of the total reside, and specifically to Sydney's western suburbs. The rest are scattered between the other states and territories in Australia.

Most TPV holders are male and between the ages of 18 and 44 years old. There are also a significant numbers of unaccompanied minors, women, children and the elderly. Typically people have made the trip to Australia alone, and many have a wife and children waiting for them in their own countries or in countries of first asylum. They range from highly educated professionals to those who are illiterate in their own language.

Legislative changes introduced last year means that unless they applied for permanent visas before September 27 2001, TPV holders are now no longer eligible for permanent residence. If they are found to be refugees again after three years, they are eligible only for another TPV. If not, they will be in Australia unlawfully and may be detained again or removed if they fail to leave Australia voluntarily.<sup>3</sup> We can expect that there will be people in our community permanently on a TPV, who will never have access to permanent protection or to the services they need, and who will be in a state of continuous stress as they face the refugee determination process every three years.

The first TPVs are due to expire in November 2002.

States and territories have responded differently to

federal government policy. The Queensland State Government subsidize services so that refugees with a TPV could access the same settlement services as refugees with a permanent protection visa. The Victorian and South Australian Governments have provided some support to community-based projects. Other states have failed to engage on the issue.

Many of the concerns raised by the RCOA in August 2000<sup>4</sup> have now been confirmed. The major issues are:

#### Long-term Welfare Dependency

The vast majority of refugees with TPV are desperate to get work to support their families. Some Afghan men have borrowed money to enable them to travel to Australia, leaving their wives and children as "collateral". They believed that soon after their arrival they would be able to earn enough to pay off the debt and reunite with their families. The period of detention, plus the restrictions of the TPVs, has made these men frantic with worry.

Employment prospects for TPV holders are poor because unlike other refugees they are excluded from funded English classes and labour market programs. In addition, a lack of skills recognition and the reluctance of employers to offer permanent jobs to temporary residents, has meant that half are unemployed and reliant on welfare payments.<sup>5</sup> Without assistance to break this cycle many will continue to be unemployed for long periods.

TPV holders may also be highly vulnerable to unscrupulous employers who want cheap labour or people prepared to work in unsafe conditions.

#### Lack of Family Reunion

The TPV does not allow the holder to apply to be reunited with their immediate family (spouse and children), with no special provisions made for unaccompanied minors. Denial of family reunion effectively presents TPV holders with a 'Sophie's Choice': they can either risk the danger of returning to their country of origin to be with their families, or stay in Australia and never see their families again. As a major motivation expressed by TPV holders entering Australia is to protect their families<sup>6</sup>, the psychological impact of introducing a successive TPV cannot be over-emphasized.

For the "lucky ones" who did apply before the legislation changed, reunion, if possible, will be complicated by:

- the impact of an extended separation of at least four years from wives and children;
- permanent separation from children who reach the age of majority and thus no longer qualify as a dependant child; and
- any relationships formed in the interim.

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permanent residence in that country. Article 31 of the Refugees Convention makes explicit provision for the treatment of refugees who arrive "unlawfully" in signatory States and, in particular, those refugees who do not have "good cause for their illegal entry or presence."

The Convention drafters clearly intended that document to preserve the capacity of states to manage collective responses to refugee crises. They recognised that the challenges posed by the needs of millions of refugees could not accommodate a system where individuals could pick and choose their preferred destination and move on unnecessarily. In particular, in the current context the unnecessary, secondary movement of people to desirable countries such as Australia directly undermines the ability of countries to distribute resettlement places to UNHCR-coordinated efforts to provide resettlement places on the basis of need.

Secondary flows disadvantage the resettlement prospects of those refugees who may be in equal or greater relative need of assistance, including those residing in refugee camps and those who do not have the financial resources to pay people smugglers.

What this comes down to is whether States should abandon attempts to help people on the basis of their need for resettlement places and, instead, protect only those who are healthy enough, lucky enough or wealthy enough to organise their travel to Australia. It is worth noting that the UNHCR has indicated that some 50 per cent of refugees in the world are women and 50 per cent of all persons of concern to the UNHCR are children, however, less than 30 per cent of those arriving unlawfully in Australia are women and children.

The introduction in October 1999 of the temporary protection visa (TPV) for unauthorised arrivals found to be owed protection kept in place the fundamental arrangements needed to meet our international refugee obligations. The changes removed the additional benefits that had been encouraging the misuse of the protection process by unauthorised arrivals and the use of people smugglers to assist people to travel unlawfully to Australia.

#### **What the TPV confers**

Unauthorised arrivals found to be refugees have access to a three-year temporary protection visa only, in the first instance. Holders of the visa are protected against being returned to their homeland and can apply for further protection after 30 months if their need for protection is continuing.

Holders of temporary protection visas are:

- able to work and receive Job Matching from Centrelink;
- eligible for Special Benefit, Family Tax Benefit, Child care Benefit, Double Orphan Pension, Maternity Allowance and Maternity Immunisation Allowance;
- able to gain access to Medicare benefits;
- eligible for referral to the early health assessment and intervention program;

#### **The Challenge of Refugee Protection**

- eligible for torture and trauma counselling; and
- able to apply for a Protection visa which may be granted after a period of 30 months, or a shorter period if specified by the Minister, if there is a continuing need for protection;
- TPV Minors are also eligible for the Commonwealth-funded English as a Second Language – New Arrivals program to assist their participation in school classroom activities;

#### **TPVs and family reunification**

The Refugee Convention imposes no obligation to provide for the reunification of family members – each family member must demonstrate that they are owed protection and be granted refugee status in their own right. However States have the discretion to allow family members to remain with or be reunified with a person found to be a refugee by that State.

Long-standing arrangements in Australia allow family members arriving together to remain in Australia together, even if only one is found to be a refugee. Where family members arrive and apply for protection separately, they are assessed according to the Refugee Convention definition of a refugee. If they have no personal grounds for refugee protection it is expected that they depart Australia.

#### **Australia's other work to assist refugees**

Australia's TPV arrangements are one element of Australia's broad strategy to assist UNHCR to resettle refugees on a basis of need, including:

- preventing the misuse of the refugee determination processes and growth of people smuggling by people merely seeking a migration outcome;
- supporting countries of first asylum who are often providing temporary protection to large numbers of refugees; and
- addressing the core problems which lead to the creation of refugees in the first place.

Australia is active in supporting and developing international efforts, working closely with the UNHCR, other international agencies and countries to address each of these issues.

In addition to providing formal resettlement places for refugees, Australia is a major contributor to the UNHCR, and a regular supporter of programs of the UNHCR, World Food Program, UNICEF and other international organisations in a range of refugee crisis areas of the world. Since September 2001 the Australian government has committed in the order of \$50m to address the problems faced by refugees from Afghanistan, Iraq and other countries.

#### **Conclusion**

Australia has an enviable record of achievement in assisting those in humanitarian need.

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Our desire to ensure the integrity of Australia's borders and the right to decide who should and should not enter Australia in no way diminishes our commitment to providing humanitarian assistance to help those most in need.

Because of the success of our border management policies more offshore resettlement places are available so more people, who don't have the money to pay a people smuggler, will be able to come to Australia.

Only by retaining control of the system of international protection, including determining which refugees are in need of resettlement, can the international community ensure that the finite collective resources of governments are allocated effectively and efficiently.

## The Challenge of Refugee Protection

Australia will continue to meet its obligations under the Refugees Convention but working within this framework with such strategies as the TPV we will continue to focus efforts on protecting those most in need.

Further information is available through the Internet on:  
<http://www.immi.gov.au>  
Fact Sheets web site  
Questions and Answers web site  
The Department also operates a national telephone inquiry line on 131 881 for the cost of a local call anywhere in Australia. ■

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Some people have lost contact with family altogether since arriving in Australia, particularly as a result of the conflict in Afghanistan. Others have used people smugglers to assist their wife and children join them in Australia. These claims are assessed separately so that even if they are granted refugee status their visas will expire at different times.

### Unaccompanied Minors

While not a numerically large group,<sup>7</sup> unaccompanied minors require particular attention because of their vulnerability. In each state the guardianship responsibilities for unaccompanied minors have been passed from DIMIA to each relevant government department and, in some cases to a community agency. How this operates in practice varies from state to state.

RCOA has raised serious concerns about: the ability of the state agencies to provide adequate support to meet the complex legal, psychological and social needs of unaccompanied refugees. In no states is a person appointed to act as legal guardian for the purposes of the refugee status application procedure and thus the child has no effective advocate in this or other interactions with authorities.

The inability to be reunited with family also has devastating implications for unaccompanied minors granted temporary protection.

### Disabilities and the TPV

A small number of TPV holders have a disability and this presents a range of new issues to disability services who may be unaware of refugee issues or refugee support networks. Detention centres rarely refer disabled children or adults to specialist services on release into the community. Without appropriate referral, gaining access to services is almost impossible for this group who are ineligible for most federally funded programs and services otherwise available to permanent residents.

When Deterrent Feels Like Punishment

### The Psychological Impact on Refugees

Experiences of persecution, the high incidence of trauma reported amongst those who have been released from detention, rejection from the Australian public, the psychological impact of the TPV and practical obstacles to successful resettlement has left many refugees in a very poor psychological state.

Workers report that TPV holders are in a continual state of insecurity. They feel discriminated against not only by the Government, but also by the education system, employers and other welfare agencies. This exacerbates pre-existing conditions of anxiety, depression and Post Traumatic Stress Disorder. Further, experiences and media coverage of incidents in Immigration Detention Centres have successfully retraumatised an already vulnerable group.<sup>8</sup>

Specialist torture and trauma services are left to address these complex issues as the only federally funded settlement service available to TPV holders and are currently stretched beyond capacity.

### Impact on Community Sector

Contractual obligations with the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) means most settlement service agencies are not allowed to assist TPV holders leaving many professionals deeply distressed.

Where other resources are available, they are insufficient to meet the demand and are often diverted from other high need groups, such as asylum seekers in the community who may have no other means of support. As the government has pulled out of providing anything but the most basic information to TPV holders, services and volunteers are placed in the unenviable position of having to communicate government policy and changed legislation to the refugees, often at the risk of their trust relationship with their clients. The large numbers of TPV holders, the variety of needs, and

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the knowledge that there is often nowhere else to get assistance from has placed enormous demands on support workers that is often not sustainable.

### Impact on Volunteer Groups

Volunteers provide most of the practical assistance to refugees with a TPV. Some have experience, others have come to the area fresh and many are feeling overwhelmed by the enormity of the task and anxious about their ability to sustain their work.

While volunteers have picked up the pieces they provide assistance with limited training or interpreters, provide services that are not necessarily co-ordinated, and operate with few guidelines or safeguards. Volunteer help is no substitute for professional services, as the volunteers readily admit.

### Community Disharmony

The introduction of the TPV has been dangerously divisive and has undermined efforts to promote multiculturalism in Australia. Politicians and government officials have actively encouraged division between communities through their efforts to portray the boat arrivals as 'illegals', 'queue jumpers' and 'criminals'.

Divisions within communities have been encouraged. Refugee communities that are already fractured by a history of civil war and exile have been warned by the federal government that they should not become involved and told that refugees with a TPV are "taking resettlement places from your families". Federally funded ethnic workers are prevented from assisting their compatriots.

### Reassessment and uncertainty

The confusion and uncertainty of the TPV has had a significant impact on the refugees themselves and the ability of service providers to provide reliable advice. The uncertainty about the reassessment process, the lack of information provided by the Department of Immigration, the impact of changes in country and related Ministerial pronouncements on the outcomes of applications have left TPV holders desperate with worry, highly confused and left rumours about their fate unchecked.

The Refugee Council reiterates its objection to the current temporary protection visa regime. The short-term expedient of deterring further arrivals could well result in long term social problems and has already caused great suffering to people who came here believing that in Australia they would find the safety and dignity they had been denied. While it may be argued that the TPV is a deterrent, not a punishment, those refugees with temporary protection do feel punished<sup>9</sup>. The granting of temporary protection visas to people determined to be refugees is not acceptable and should be abandoned.

### When Deterrent Feels Like Punishment

Without the opportunities to advance TPV holders are likely to remain a highly traumatized economic underclass effectively marginalized from our community yet unable to return to their own. ■

### Readings on Temporary Protection Visas in Australia

- Fernandes P, 'Burning in the Fire': Working with TPV holders in NSW, paper presented at the Diversity in Health Conference, Sydney, 2001
- Mann R, *Temporary Protection Visa Holders in Queensland*, Multicultural Affairs Queensland, 2001
- Mansouri F, *Politics of Social Exclusion: Refugees on Temporary Protection Visa in Victoria*, Deakin University, 2002
- RCOA Position Paper, 'Temporary Protection Visa Holders: Current Issues and Future Concerns', August 2000
- RCOA Information Paper, 'Temporary Protection Visas', May 2001
- South Brisbane Immigration and Community Legal Service Inc., 'Temporary Protection: The New Cornerstone of Australia's Refugee and Humanitarian Response', 23 October 2001

### Notes

1 See RCOA Information Paper on Temporary Protection Visas, May 2001

2 Department of Immigration and Multicultural and Indigenous Affairs, Media Release 143/99, Ruddock Announces Tough New Initiatives, Wednesday 13 October 1999

3 Department of Immigration and Multicultural and Indigenous Affairs, Fact Sheet 68: Temporary Protection Visa Holders Applying for Further Protection, 2002 at 1

4 See RCOA Position Paper on Temporary Protection Visa Holders: Current Issues and Future Concerns, August 2000

5 TPV holders are not eligible for the full range of social security payments. They are eligible for the Special Benefit, which equates to roughly 80% of the standard unemployment benefit.

6 Fernandes P, 'Burning in the Fire': Working with TPV holders in NSW, research presented at the Diversity in Health Conference, Sydney 2001

7 As at 19 April 2002 there were 169 minors with Temporary Protection Visas receiving social security payments.

8 Fernandes P, 'Burning in the Fire': Working with TPV holders in NSW, paper presented at the Diversity in Health Conference, Sydney, 2001

9 Mansouri F, *Politics of Social Exclusion: Refugees on Temporary Protection Visa in Victoria*, Deakin University, 2002, p 46

The Refugee Council of Australia (RCOA) is a peak organisation with some 140 organisational and individual members.

The aim of RCOA is to promote the adoption of flexible, humane and constructive policies towards refugees, asylum seekers and displaced persons by the Australian and other Governments and their communities.

In 2000, RCOA was highly commended by the Human Rights and Equal Opportunity Commission in its Human Rights Day Awards for the promotion of humane and constructive policies towards refugees.

# Australia Not Alone in Detention Stance:

## DIMIA's Response to Discussion Paper No. 1 The Department of Immigration and Multicultural and Indigenous Affairs

Australia's border management strategies are increasingly being looked at by other countries as a model on which to base the development of their own programs.

The Minister for Immigration and Multicultural and Indigenous Affairs, Philip Ruddock, who recently returned from an overseas visit to South Africa, Tanzania, Greece, Yugoslavia (Serbia and Kosovo), the Czech Republic, Slovakia, Austria, and England, said claims that Australia's border management strategies have come under international criticism are simply not true.

Government officials, academics and NGO representatives were impressed with the success Australia is having in managing issues associated with a managed legal migration program as well as with people smuggling and unauthorised arrivals.

A seminar the Minister led in London, attended by senior UK and Irish Government officials, as well as academics, was acknowledged by the audience as very relevant to their own border management issues.

Throughout the visit there was a general acknowledgment of Australia's expertise in these areas and further acknowledgment of the role Australia plays in the international discussions on refugee issues.

In terms of our own borders it is Australia's sovereign right under international law to determine who can be admitted or permitted to remain in Australia, and the conditions under which they may be removed.

A key element of this determination is Australia's mandatory detention law. Immigration detention in Australia is informed by Australia's obligations under international conventions and treaties.

Having said that, detention is not imposed arbitrarily. It is for administrative purposes.

The key elements in determining whether detention is arbitrary are whether the circumstances under which a person is detained are 'reasonable' and 'necessary' in all of the circumstances, or otherwise arbitrary in that the detention is inappropriate, unjust or unpredictable.

As Dr Ozdowski, Human Rights and Equal Opportunity Commissioner concedes, detention is not arbitrary per se if it is a proportionate means to achieve a legitimate aim.

Detention is both reasonable and necessary to ensure that unlawful non-citizens are available for processing, for

identity, security and health checks and to ensure availability for removal if detainees are not owed protection.

Every effort is made to ensure assessments for visa applications are undertaken quickly, with applications from persons in detention receiving the highest priority. Consistent with the legislative requirement for detention, every effort is made to ensure that detainees are able to go about their daily lives with as few restrictions as possible. A comprehensive system of merits and judicial review is also available.

As a signatory to the United Nations Convention on the Rights of the Child (CROC), Australia takes its obligations seriously. In implementation of immigration detention, the government has put in place, within a legislative framework, policies, procedures and practices that are consistent with Australia's international obligations.

The CROC requirement that a child remain in detention for the 'shortest appropriate period of time' and 'as a measure of last resort' (Article 37(b)), needs to be balanced against a child's right to live with his or her parents, where the parents are required to remain in detention. Other international instruments also underline the importance of keeping families together. Article 37(b) also recognises that detention of children should only occur 'in conformity with the law', as occurs in Australia in accordance with the Migration Act.

Every effort is made to ensure that children remain in detention for the shortest possible period, through expediting of applications for people in detention and, as required, arrangements for their removal. In some cases, the actions of parents may extend the length of time a child is detained, for example, through the destruction of identity documents and lack of cooperation with removal arrangements.

DIMIA requires that all incidents, suspicions or allegations of abuse or neglect are reported, both to the local child welfare authorities and, under the detention services contract, to the Department. In most States, the child welfare authority will then decide if other parties need to be involved, such as the police.

A long-standing program of continuous improvement of amenities has been progressively implemented at immigration detention facilities over the last couple of years. In addition, the Immigration Detention Standards (IDS), which form a key component of the contractual obligations of the detention services provider, were revised in the context of the decision in 2001 to tender for a new contract for the provision of detention services.

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It is expected that the new contract and the revised IDS will become operational before the end of 2002.

In revising the IDS and associated performance measures the Department took account of key issues which had emerged over the life of, and its experience in managing and monitoring, the current detention services contract. The new IDS were developed in consultation with the Commonwealth Ombudsman, the Human Rights and Equal Opportunity Commission (HREOC), and the Immigration Detention Advisory Group (IDAG).

Within the mandatory detention framework and consistent with the Migration Act, DIMIA takes innovative approaches to alternative detention arrangements.

These arrangements seek to respond to the needs of particular groups, such as women and children and unaccompanied minors. Alternative places of detention are established outside detention facilities.

In August 2001 DIMIA instituted a trial of alternative detention arrangements for women and children in the Woomera township. The residential housing project enables up to 25 detainee women and children to live in family-style accommodation in a cluster of houses away from the Woomera IRPC, supervised by Services Provider staff. To maintain the integrity of family units, the participants are able to regularly visit family members and friends remaining in the IRPC.

An evaluation of the trial has concluded that it was successful and the Minister has agreed to expand the eligibility criteria for women and their children wishing to participate in the alternative detention arrangements.

Other arrangements are in place which facilitate the accommodation of children in alternative detention locations. Under special arrangements with South Australian child welfare authorities, most unaccompanied minors from the Woomera IRPC have been placed in alternative detention arrangements, including foster care. These arrangements

Australia Not Alone in Detention Stance operate within a legislative framework that includes both the Migration Act and state child welfare legislation.

For example, the Immigration Detention Standards (IDS) which set out the standards or conditions and services in immigration detention facilities that must be met by the Detention Services Provider are informed by human rights standards that have been accepted by Australia and incorporated into domestic law.

Having said that, there is no prescribed means by which States must give effect to or fulfil human rights obligations. In implementing their treaty obligations, State Parties have a 'margin of appreciation'. This margin allows States to determine the best means by which to implement their international obligations given their particular circumstances. Each country has some flexibility in relation to the manner of implementation of its international human rights obligations. Given their need to cover a wide variety of circumstances international conventions are set out in general terms, and as a result there are different opinions on whether standards or requirements have been met.

Rights under these instruments exist in relation to individuals. A determination of whether Australia has violated its human rights obligations would normally require an assessment of the relevant international obligations in the light of the circumstances of the individual.

Other 'soft law' documents such as UNHCR guidelines are not treaties and therefore do not place legal obligations on States. However, it is accepted that such guidelines provide some guidance in the interpretation of treaty obligations and they also evidence the 'best practice' of the international community. As guides only, they can assist, but are not determinative of, the scope of human rights treaties such as the ICCPR and CROC.

Australia takes seriously its international obligations and is conscientious in seeking to meet these obligations in a concrete and practical manner while ensuring the integrity of our entry programs. ■

UNHCR's Regional Office in Canberra instituted in 2002 a series of discussion papers on current issues affecting asylum-seekers and refugees.

Copies of Discussion Paper No. 1 - 'Detention of Asylum Seekers' are available from UNHCR's Regional Office in Canberra, Australia. Phone 61 2 6290 1355 or email [aulca@unhcr.ch](mailto:aulca@unhcr.ch)

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