The incommunicado detention of boat people: A recent development in Australia's refugee policy

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Introduction

Australia has long been criticised for its treatment of boat people.[2] To date, this criticism has centred on the Government's policy of detaining boat people for long periods while claims for refugee status are being assessed, particularly in the remote immigration detention centre at Port Hedland.[3] Other issues have included the treatment of children in detention centres[4] and the processing of refugee

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2 The term "boat people" is taken in this context to mean people who travel by boat to Australia without any entry documentation and seek the protection of the Australian Government. The desire to seek protection differentiates boat people from other undocumented arrivals found in Australian waters, such as illegal fishermen. While there are currently restrictions which prevent certain groups from applying for refugee status — see below at notes 72-74 and accompanying text — it is widely recognised that, whatever their entitlements, boat people come to Australia seeking, at the very least, protection from mistreatment in their home country and, where possible, recognition as refugees. Thus the Joint Standing Committee on Migration reported that most boat people who arrived between November 1989 and January 1994 had sought refugee status in Australia: *Asylum, Border Control and Detention*, (AGPS, Canberra 1994) para 1.7. In the same vein, the Department of Immigration in its January 1997 update of the publication, "Boat Arrivals since 1989" — *Fact Sheet No.5*, revised 2 January 1997 — continued to correlate boat arrivals with the numbers accepted as refugees. The term "boat people" may be contrasted with the more technically correct term "asylum seeker", which is usually taken to refer to a person who has sought, but not yet been accorded, refugee status. The term "refugee" applies to a person who has sought asylum and has been recognised as a refugee.

3 There is a large volume of material about the detention of boat people in Australia. The most comprehensive coverage is contained in Crock M (ed) *Protection or Punishment? The Detention of Asylum-Seekers in Australia* (Federation Press, Leichhardt 1993). The matter was also considered in detail by the Joint Standing Committee on Migration, *ibid.*

4 See, eg, Ludbrook R "Young asylum seekers: Haven or Hell?" in Guerra C and White R (eds) *Ethnic minority youth in Australia: Challenges and myths* (National Clearing House for Youth Studies, Hobart 1995) p 101.

claims[5], including attempts by the Government to limit access to judicial review.[6]

This article deals with one aspect of the detention of boat people which has recently been the subject of major controversy. This is the Government's increasing practice of holding boat people incommunicado, or in isolation from the outside world.[7] The article will concentrate mainly upon the problems which boat people have experienced in gaining access to independent legal advice while being held in detention, and will also consider a related development, being the difficulties faced by Australia's peak human rights body, the Human Rights and Equal Opportunity Commission, in its attempts to gain access to detained boat people. As will be seen, the significance of this denial of proper access to independent legal advice and human rights scrutiny lies in the impediment it creates to the exercise by boat people of their fundamental rights under domestic and international law.

The article will first consider the relevant human rights principles relating to incommunicado detention and secondly, will trace the recent developments which have taken place in Australia in relation to the incommunicado detention of boat people. It may be borne in mind that, while the treatment of boat people provides a good working example in the Australian context of the concerns surrounding the use of incommunicado detention, the human rights principles being dealt with here are universally applicable to all detainees, including those in the custody of the police and correctional institutions.

Part I: Incommunicado Detention

Incommunicado detention in general

Nigel Rodley defines incommunicado detention as follows:

> A prisoner who is held incommunicado is simply one who is unable to communicate with the world outside the place of detention. Normally a prisoner, once taken into custody, may be expected to be allowed to have contact with a lawyer, with family members, with a doctor, and possibly with others too...One who is held incommunicado, then, is one who is denied access to all of these.[8]

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5 See, eg, Mathew P "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia" (1994) 15 *Australian Year Book of International Law* 35.

6 See, eg, Walker K "Who's the Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights" (1995) 25 *WALR* 238.

7 Defined more fully below, see note 8 and accompanying text.

8 Rodley N *The Treatment of Prisoners Under International Law* (Clarendon Press, Oxford 1987) p 264.

Incommunicado detention gives rise to a number of human rights concerns, as illustrated by Paul Williams:

> There are many harms caused by [incommunicado detention]. Family members of the detainee who are unaware of his detention, and often take him for dead, suffer great anguish as a result of detention incommunicado. Detention incommunicado circumvents the rights of the detainee to have access to counsel, and to due process of law, most specifically, the right to be brought before a judge. Individuals detained incommunicado are often subject to torture and inhuman interrogation techniques. Detention incommunicado facilitates the act of torture or improper interrogation because the detainee has no access to individuals to notify them of his mistreatment. And, if the detainee is detained long enough, his wounds from torture will heal and make it more difficult to prove his mistreatment.[9]

The primary international instrument which sets civil and political standards is the International Covenant on Civil and Political Rights ("ICCPR")[10], which applies to all persons within the territory of a State party regardless of their nationality or status as a non-citizen.[11] Article 28 of the ICCPR establishes a Human Rights Committee, which assists in ensuring the implementation of these standards by receiving and examining reports from States parties[12], issuing general comments interpreting the covenant[13], and receiving communications from States parties[14] and individuals[15] alleging specific breaches of the provisions.

In carrying out its functions, the Human Rights Committee has taken the issue of incommunicado detention very seriously, requiring States parties during examinations to provide substantial detail and justification where there may be allegations of

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9 Williams P *Treatment of Detainees: Examination of Issues Relevant to Detention by the United Nations Human Rights Committee* (Henry Dunant Institute, Geneva 1990) pp 73-74.

10 Adopted and opened for signature and ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966. The ICCPR entered into force on 23 March 1976 and was ratified by Australia on 13 August 1980.

11 UN Human Rights Committee, General Comment No 15/27 of 22 July 1986 (Position of Aliens).

12 ICCPR, Article 40.

13 ICCPR, Article 40(4).

14 ICCPR, Article 41.

15 *First Optional Protocol* to the ICCPR, acceded to by Australia on 25 December 1991.

incommunicado detention[16], and specifically warning States that "the protection of the detainee...requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members."[17]

Several specific provisions in the ICCPR are relevant to the issue of incommunicado detention. Two of these — Articles 9(3) and 14(3) — are restricted to criminal detainees and provide safeguards in terms of access to bail and fairness in trial procedures. Two others — Articles 7 and 10(1) — provide more general guarantees. Article 7 provides a blanket prohibition against all "torture, cruel, inhuman or degrading treatment or punishment", and Article 10(1), which is the most useful provision in relation to incommunicado detention, provides that:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Importantly, Article 10(1) applies to *all* detainees, including:

> ... anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals — particularly psychiatric hospitals — detention camps, or correctional institutions or elsewhere.[18]

In dealing with individual communications in relation to incommunicado detention, the Human Rights Committee has frequently found violations of both Article 7 and Article 10(1), and in over a dozen cases has found violation of Article 10(1) alone.[19] The Committee has found that incommunicado detention, even for very short periods, will be in breach of Article 10(1). Thus, in *Arzuaga (Gilboa) v Uruguay* [20], a period of incommunicado detention for fifteen days was found to be in breach of Article 10(1), while periods of forty-four days[21], three months[22] and five months[23] have also found to be in breach.

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16 See, eg Peru HRC Report, in Williams, *op cit* note 763-764 and accompanying text.

17 General Comment 20/44 of 3 April 1992 (Prohibition of Torture).

18 General Comment No 21/44 of 6 April 1992 (Rights of Detainees).

19 McGoldrick D *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, (Oxford University Press, Oxford 1994) p 378.

20 147/1983, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, UN doc.CCPR/C/OP/2 1990 at 176.

21 *Penarrieta v Bolivia* (176/84) *ibid* at 201.

22 *Conteris v Uruguay* (139/1983) *ibid* at 168.

23 *Machado v Uruguay* (83/1981) *ibid* at 108.

Other international human rights bodies have also raised concerns about incommunicado detention. The UN Special Rapporteur on torture has said that incommunicado detention "should not exceed seven days", including regular visits by a doctor, followed by a right to see "a lawyer and/or doctor" of choice immediately afterwards.[24] In addition, the UN Special Rapporteur on States of Emergency has drawn attention to the high incidence of people detained incommunicado even for short periods during states of emergency, and has called for guarantees against incommunicado detention, and the right of "habeas corpus or other prompt and effective remedy" to be treated as non-suspendible.[25]

Incommunicado detention and access to lawyers

While references by the Human Rights Committee under the ICCPR to incommunicado detention invariably emphasise the importance of access by detainees to lawyers, more specific provisions on access to lawyers can be found in resolutions of other UN bodies which, while not strictly binding, have played "...a major role in the setting of international standards in the field of human rights."[26]

Foremost among these are the *Standard Minimum Rules for the Treatment of Prisoners* ("the Standard Minimum Rules")[27], and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* ("the Body of Principles").[28]

Although the Standard Minimum Rules are primarily directed to criminal detainees, they are also relevant to persons detained under any non-criminal process, including administrative detention. Rule 94 states that such persons shall be accorded treatment "not less favourable" than that of an untried prisoner who, under Rule 93:

> shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions.

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24 UN doc E/CN.41/1986/15, para 151.

25 Cited in Marks S "Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights" (1995) 15 *Oxford Journal of Legal Studies* 69 at 82-83.

26 Department of Foreign Affairs and Trade *Human Rights Manual* (AGPS, Canberra 1993) p 48.

27 Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and endorsed by the UN Economic and Social Council July 1957: Ecosoc res 663 C (XXIV), 31 July 1957.

28 Adopted by the UN General Assembly on 9 December 1988: UNGA res 43/173.

The Body of Principles is even more explicit and unambiguous in the obligations which it places upon States. Principle 13 provides that:

> Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

This is again emphasised by Principle 15, which provides that, notwithstanding exceptional circumstances where the needs of an investigation so require[29] or otherwise to maintain security and good order where specified by law[30]:

> ... communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 18(1) also provides that:

> A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

One of the most important provisions, particularly in the context of incommunicado detention in the recent Australian context[31], is Principle 17, which provides:

> A detained person shall be entitled to have the assistance of a legal counsel. *He shall be informed of his right by the competent authority promptly after his arrest* and shall be provided with reasonable facilities for exercising it. (emphasis added)

Of course, as resolutions of the Economic and Social Council and the General Assembly respectively, the Standard Minimum Rules and the Body of Principles are — unlike treaties — not *in themselves* binding upon States. However, this treasure trove of principles has in practice been transformed into binding form by the practice of the Human Rights Committee through its interpretation of Article 10(1) of the ICCPR, which imports the obligations of a State to accord the minimum standards of humane treatment contained in these instruments. Thus, in receiving and considering reports under Article 40, the Human Rights Committee now invites States:

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29 Principle 16(4).

30 Principle 18(3).

31 See below at note 75 and following text.

> ... to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).[32]

It is suggested that this approach is entirely consistent with the *traveaux preparatoires* of Article 10, where the Third Committee of the General Assembly stressed that the Standard Minimum Rules (the Body of Principles not yet having been created) should be taken into account in interpreting and applying Article 10.[33]

In this way, therefore, the Standard Minimum Rules and the Body of Principles are effectively binding on States parties to the ICCPR, via Article 10(1).[34]

The other major human rights resolution which is relevant in the present context is the *Basic Principles on the Role of Lawyers* [35], which calls for "...effective access to legal services provided by an independent legal profession"[36] and provides that "...

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32 General Comment No 21/44 of 6 April 1992 (Rights of Detainees). For example, in considering the U.S. report in April 1995 the Human Rights Committee requested a guarantee that persons deprived of their liberty in U.S. prisons "... be treated with humanity and with respect for the inherent dignity of the human person, and implementing the United Nations Standard Minimum Rules for the Treatment of Prisoners...": *Consideration of Reports Submitted by States parties Under Article 40 of the Covenant* ("HRC report"), UN doc CCPR/C/79/Add 50, 1413rd meeting, fifty-third session, 6 April 1995.

33 United Nations, *Official Records of the General Assembly, Thirteenth Session, Third Committee*, 16 September to 8 December 1958, at 160-173 and 227-241. Some States in fact called for an express reference to these rules in article 10, although this was not included in the final draft.

34 This interpretation was adopted by Carr J (dissenting) in the Federal Court of Australia in the *Albatross* case, below note 75 and following text

35 Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, at Havana from 27 August to 7 September 1990 and "welcomed" by the UN General Assembly in a resolution of 14 December 1990: UN GA Res 45/121.

36 Preamble.

Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction."[37]

Incommunicado detention and the right of a detainee to receive correspondence

The denial of a detainee's right to receive correspondence is an aspect of incommunicado detention, and is covered by international human rights provisions relating to the right of privacy. Article 17(1) of the ICCPR provides:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

The Human Rights Committee has on several occasions found that interference with a prisoner's correspondence is in breach of Article 17(1), usually in conjunction with Article 10(1).[38]

The issue has, in particular, been developed by the European Court of Human Rights in a series of decisions which have found that interference with prisoners' mail is in breach of the corresponding provision in Article 8 of the *European Convention on Human Rights*.[39] For example, in *Schonenberger and Durmaz*, the wife of an accused man being held in detention by Swiss police pending trial for drug offences arranged for a lawyer to write a letter enclosing an authorisation form to enable him to represent the person, which was sent to the district prosecutor with a request that the enclosure be forwarded to the detainee. However, the district prosecutor who received the letter and enclosure kept them from the detainee without telling him that he had received them. The Court, in finding a breach of Article 8, rejected the Swiss Government's argument that stopping the letter was justified in the prevention of disorder and crime, holding that:

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37 Principle 2.

38 *Pinkney v Canada*, No. 27/1980 (control and censorship by authorities of prisoner correspondence failed to provide satisfactory safeguards); *Miguel Angel Estrella v Uruguay*, No 74/1980 (severe censorship of prisoner's correspondence to lawyers and international organizations from Libertad Prison).

39 Signed in Rome on 4 November 1950 and entered into force on 3 September 1953. The cases include: *Silver and others*, 25 March 1983, Series A no. 61; *Schonenberger and Durmaz*, 20 June 1988, Series A no. 137 *Campbell v United Kingdom* (1992) 15 E.H.R.R. 137; *Herczegfalvy*, 24 September 1992, Series A no. 244.

in a democratic society, any interference must be found on a pressing social need and, in particular, be proportionate to the legitimate aim pursued.[40]

Incommunicado detention and access of independent bodies to detainees

Finally, in its examination of States parties on the rights of detainees under the ICCPR, the Human Rights Committee has placed emphasis upon the ability of independent bodies such as State human rights institutions, the Red Cross and Amnesty International, to gain access to places of detention to investigate the operation of the facilities, and to investigate specific complaints. The primary concern of the Committee has been whether such bodies actually have access to the detention facilities of the State[41], and subsidiary questions have included whether these bodies have the right to visit detainees, to hear complaints and have them investigated, and the availability and effectiveness of such procedures.[42]

PART II: AUSTRALIA'S TREATMENT OF BOAT PEOPLE IN DETENTION

Boat people and the policy of detention

Since November 1989, some 2,585 boat people have arrived in Australia[43], most of whom have sought refugee status pursuant to Australia's obligations under the 1951 *Convention Relating to the Status of Refugees* ("the Refugee Convention").[44]

The procedure by which all asylum seekers, including boat people, seek refugee status in Australia is by applying for a Protection Visa under the *Migration Act 1958* (Cth)[45] *("Migration Act")*, which has as one of its requirements that the applicant be "... a person to whom Australia has protection obligations under the Refugee Convention".[46]

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40 *Schonenberger and Durmaz*, 20 June 1988, Series A no. 137 at 13.

41 Mongolia, HRC report, 1980 at 23, cited in Williams, *op cit* p 47.

42 Iran, HRC report, 1982 at 69.

43 Department of Immigration, "Boat Arrivals since 1989", *op cit.*

44 1951 *Convention Relating to the Status of Refugees*, done 28 July 1951, Australian Treaty Series No 5 of 1954, entered into force 21 April 1954; Australia deposited instrument of accession 22 January 1954. As amended by the 1967 *Protocol Relating to the Status of Refugees*, done 1 January 1967, Australian Treaty Series No 37 of 1973, entered into force 4 October 1967; Australia deposited instrument of accession 13 December 1973.

45 Section 36; *Migration Regulations* Schedule 2, Subclass 866 Protection (Residence) Visa.

46 *Migration Regulations*, Reg 866.221.

Under the *Migration Act*, any person in Australia who does not hold a valid visa must be held in detention until he or she departs Australia or is granted a visa.[47] As a result of this provision, boat people — who invariably do not carry travel documentation — will usually remain in detention for the entire period of the processing of their application.[48] In most cases, newly arriving boat people will be met by an official vessel and escorted to the nearest harbour — usually Darwin in the Northern Territory — and then on to the immigration detention centre at Port Hedland, in the far north-west of Western Australia.

For people in detention who are aware of their rights, it is reasonably easy to apply for a Protection Visa. The application form can readily be completed with the assistance of an interpreter[49], although in most cases the applicant will need to supply further details of his or her history and claims in relation to one or more of the five grounds referred to in Article 1A(2) Refugee Convention.[50]

When an application for a Protection Visa has been lodged with the Department of Immigration[51], the applicant will be interviewed by a case officer from the Onshore Refugee Program, who will either recommend acceptance or rejection of the claim. If the claim is rejected, the applicant may apply for merits review by an independent statutory body, the Refugee Review Tribunal (RRT)[52], and beyond that may seek

47 *Migration Act* s 189, s 196.

48 Bridging visas, which allow for the release of detainees pending a decision on their application, are available for certain classes of detainees, notably the very old, the very young, and torture and trauma victims — see *Migration Act* s 72, *Migration Regulations* reg 2.20. However in practice these have rarely been granted to boat people.

49 The application form for a Protection Visa — Form 866 — consists of four parts — A, B, C and D — of which only Part A, needs to be filled out by a person in detention. Part A consists of one page of questions designed to elucidate the basic details of the person's claim.

50 Article 1A(2) requires, *inter alia*, that a refugee have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".

51 The full title for the Department and its Minister over the past several years has variously been described as "Local Government, Ethnic Affairs and Immigration", "Immigration and Ethnic Affairs" and "Immigration and Multicultural Affairs". For ease of reference, the title of both will be shortened to "Immigration".

52 *Migration Act*, Part 7.

judicial review in the Federal Court of Australia[53] or in the High Court of Australia in its original jurisdiction.[54]

In terms of incommunicado detention, the critical point is the initial reception and processing of the applicant immediately upon arrival in Australia, usually when in the custody of officers of the Department of Immigration's Entry and Compliance Division. It is at this stage that new arrivals are at their most vulnerable, and it is here that accusations have been raised that officers have deliberately prevented detainees from gaining information about their legal rights, including their right to apply for a Protection Visa.[55]

If indeed immigration officers seek to keep new arrivals "uncontaminated" by external contact, they are greatly assisted by certain provisions in the *Migration Act*. In the first place, while s 194 requires an officer "as soon as reasonably practicable" to advise a detainee of the consequences of detention and the right to apply for a visa, this provision does not apply to a person who has been refused or has bypassed immigration clearance or has been detained upon entry to Australia, which will include all boat arrivals: s 193(1). In addition, the extraordinary s 193(2) removes any requirement upon an officer to advise such a person of the right to apply for a visa, to give any opportunity to apply for a visa, or to provide any access to any advice (where legal or otherwise) in connection with an application for a visa.

The position of detainees is compounded by the draconian time limits within which an application for a visa must be made. Section 195 requires that an application by a detainee for any type of visa must be made within two working days of being advised of their rights (recalling that boat people are not advised of any of their rights) although this may be extended by five working days if, within the first two days, the person advises an officer in writing of an intention to so apply. Protection Visa applicants may apply outside this period (s 195(2)); however, given their difficulty in accessing information about their right to apply for visas and the imperative upon the Department of Immigration to remove them if no valid application for a visa is made, they are particularly vulnerable for deportation without having even known of their right to seek such a visa.

53 *Migration Act*, Part 8.

54 *Judiciary Act 1903* (Cth), s 39B.

55 See below at note 75 and following text.

Finally, there is the crucial but troublesome provision in s 256 of the *Migration Act* which reads:

> Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, *at the request of the person in immigration detention*, afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention (emphasis added).

As will be seen, the Department of Immigration has interpreted this provision restrictively, so that no access to legal advice is given until an actual request for a lawyer has been made by a detainee.

Why do boat people need access to independent legal advice?[56]

It should be noted that many — if not most — boat people who come to Australia have no concept of lawyers in Western society. Many will have come from countries where the part played by lawyers is very different from Western practice and often officially curtailed[57]; while in other countries there may be no functioning legal system at all[58], so that a new arrival may not even know what a lawyer is in order to request one.

It should be fairly obvious why any detained asylum seeker would wish to obtain access to independent legal advice at the earliest possible stage. In the first place, many will be unaware of their right to apply for asylum beyond a vague idea that they are escaping oppression in their home country and seeking a new life in the country of reception. Certainly, most are not aware of the strict technical requirements of the Convention definition of "refugee", and it is notorious that they often fail properly to enunciate the grounds of their claim upon arrival. Anecdotal

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56 It will be assumed, for the purposes of this article, that advice is given by lawyers, although this is not always the case. The *Migration Act*, Part 3, provides for the registration of migration agents who are able to give advice but are not required to have any legal qualifications.

57 See, e.g. Lawyers Committee for Human Rights *Criminal Justice with Chinese Characteristics: China's Criminal Process and Violations of Human Rights* (New York 1993).

58 Cambodia at the time of the arrival of Cambodian boat people in Australia, in the late 1980s and early 1990s, was an example of a State where the legal system had, for all intents and purposes, ceased to exist: see Lawyers Committee for Human Rights *Cambodia: The Justice System and Violations of Human Rights* (New York 1992).

evidence has suggested that many asylum seekers, when first questioned, will say something unrelated to refugee status along the lines of "I'm looking for a better life", or "I want to work in Australia", or may say things which may not necessarily be taken as sufficient to engage Australia's protection obligations.[59] This may occur because of confusion and disorientation upon arrival, or apprehension *vis-a-vis* any authority because of the person's previous home country experiences which may prevent the person from speaking out freely or giving a full and accurate account.[60] The consequences of failing adequately to indicate a claim for asylum — particularly where the receiving authorities are unwilling to look beyond the face value of the words used by the new arrival — may be a brutally fast return to the country of origin. It is therefore apparent that newly arriving boat people may require the assistance of a lawyer, at the very least, to inform them of their right to apply for asylum and to assist in the preparation of the details of their claim.

There are other reasons why newly arriving boat people would be assisted by independent legal advice. Many will not have a strong claim for asylum, but will have good grounds upon which they could request the Minister for Immigration to exercise his discretion to allow the person to remain "in the public interest". This non-enforceable discretion can be exercised by the Minister under s 417 where an application for a Protection Visa has been refused by the Refugee Review Tribunal, and the most recent guidelines, published by the former Minister, include those people who do not meet the technical definition of refugee but who face a "significant threat to personal security, human rights or human dignity if returned to their country of origin".[61] There are good reasons why a person should have the assistance of a lawyer to provide advice as to the existence of this discretion and to bring the relevant material to the attention of the Minister.

Boat people may also require independent advice as to whether they fall within one or other of the groups which are excluded from applying for refugee status, such as those from a "safe third country" including Vietnamese from China[62], or those Indo-

59 See, eg, the reasons given by the arrivals in the *Albatross case*, below at note 81.

60 This is acknowledged by the Office of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva January 1988), UN doc HCR/IP/4/Eng.Rev.1 at para 198.

61 Senator Nick Bolkus, Minister for Immigration and Ethnic Affairs "Guidelines for stay in Australia on humanitarian grounds" *Media Release*, 24 May 1994.

62 *Migration Act*, s 91D. See below at note 74 and accompanying text.

Chinese who have already been screened out under the Comprehensive Plan of Action.[63] These people also may qualify for a discretion which can be exercised by the Minister to override these exclusions in the public interest.[64] Boat people may also require advice as to whether they qualify for a Bridging Visa, which can provide release from detention and access to a number of entitlements, including permission to work.[65]

Finally, all boat people should also be entitled to have access to independent advice that they do *not* have a good claim for refugee status or any of the other benefits under the *Migration Act*, so that they may secure a dignified and expeditious return to their home country.

Access by boat people to legal assistance: recent developments

The position up until late 1994

Until late 1994, there does not appear to have been any conscious policy of the Australian Government to prevent access by immigration detainees to information about their legal rights. An early report into conditions at the Villawood Detention Centre in Sydney by the (then) Human Rights Commission noted that, while complaints had been received that detainees were not always advised of their legal rights, the Department of Immigration had begun the practice of providing detainees on their arrival at the Centre with a letter setting out their rights.[66]

Even during the controversial period in the early 1990s when a group of Cambodian boat people were held in prolonged detention[67], the primary criticism by refugee advocates was not that the authorities were withholding information from detainees, but rather that there had been an unconscionable delay before properly funded legal assistance was provided to the detainees[68] and that the detention of boat people in

63 *Migration Act*, s 91E. See below at note 74 and accompanying text.

64 *Migration Act*, s 91F.

65 *Migration Act*, s 37; Migration Regulations Div 2.5 and Schedule 2.

66 Human Rights Commission *The Observance of Human Rights at the Villawood Immigration Detention Centre* (AGPS, Canberra 1983) p 11.

67 For a history of the detention of the Cambodian boat people, see Hamilton A "Three years hard", (1993) 3(1) *Eureka Street* at 24-30 and (1993) 3(2) *Eureka Street* at 22-28.

68 Refugee Council of Australia, submission to the Joint Standing Committee on Migration Regulations, at 6-7. The Joint Standing Committee's report was published as: *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control* (AGPS, Canberra 1992).

remote Port Hedland made it difficult and expensive for detainees to gain access to lawyers.[69] However by 1993-1994 it was fairly well accepted that detained boat people would be given publicly funded legal advisers at least at the case officer stage[70], and in practice all new boat arrivals were routinely allocated independent lawyers who were under contract to the Department of Immigration.[71]

The fundamental change in the Government's attitude appears to have occurred in late 1994, with the arrival of a number of boats carrying people who, the Government ultimately determined, should not be entitled to apply for refugee status in Australia. These were, firstly, Vietnamese who had previously been assessed and had failed in their claims for refugee status in other countries — primarily Indonesia — under the UN sponsored Comprehensive Plan of Action; and secondly, ethnic Chinese who had been expelled from Vietnam to southern China during a border war in 1979 who had, according to the UNHCR, already received protection in China.[72] Under public pressure which was largely fuelled by media and Government perceptions that Australia was facing a massive new wave of boat people[73], the Government moved to enact legislation and pass regulations which prevented any person from these groups from applying for a Protection Visa.[74]

Having thereby cut off access to Protection Visas by these groups, the Government appears to have hardened its resolve to ensure that they could not easily obtain

69 Joint Standing Committee on Migration, *op cit* pp 187-188.

70 Joint Standing Committee on Migration Regulations, *op cit* p 103.

71 Interview, author with Margaret Piper, Executive Director, Refugee Council of Australia, 11 March 1997.

72 See Poynder N "Recent Implementation of the Refugee Convention in Australia and the Law of Accommodations to International Human Rights Treaties. Have We Gone Too Far?" (1995) 2(1) *AJHR* 75 at 81- 85.

73 See, e.g. "The third wave", *Weekend Australian* 31 December 1994 — 1 January 1995. Many commentators also recognised that this fear was being exaggerated: see e.g. "Govt overreacts on new arrivals", *Sydney Morning Herald*, 3 January 1995.

74 *Migration Legislation Amendment Act (No 4)* 1994 (Cth) (non-citizens "covered" by the CPA or from a safe third country not entitled to apply for a protection visa), assented to 15 November 1994; *Migration Legislation* Regulations *Amendment* 1995 (Cth), SR 1995 No 3 (China a safe third country for Vietnamese nationals resettled in China), Gazetted 27 January 1995; *Migration Legislation Amendment Act (No 2)* 1995 (Cth) (backdating China as a safe third country provisions to 30 December 1994), assented to 17 February 1995.

access to lawyers. It was in this context that the *Albatross* case took place.

Fang and Others v Minister for Immigration and Ethnic Affairs and Another ("the Albatross case")[75]

The *Albatross* case involved 118 Sino-Vietnamese nationals who had travelled to Australia on a boat — later code-named the *Albatross* — which was intercepted in Australian waters by HMAS *Gawler* on 12 November 1994. The arrivals were taken into custody by immigration officials and escorted to Darwin, then on 15 November 1994 to the Port Hedland detention centre. Upon arrival at Port Hedland, the detainees were kept in isolation in a separate section of the detention compound[76], and they did not ultimately gain access to any legal advisers until January 1995.

At the time that the *Albatross* detainees had arrived in Port Hedland, there were already lawyers present at the detention centre employed by the Refugee Advice and Casework Service (RACS), a community legal centre which had been contracted to provide legal advice to other detainees. However, when a RACS solicitor wrote to the Manager of the detention centre on 24 November 1994 requesting access to the new detainees, a reply was received noting that:

> none of the persons from that boat have requested the provision of reasonable facilities for obtaining legal advice. Accordingly, the Department formally declines to furnish your lawyers with access to the persons from the *Albatross*.[77]

The careful wording of this letter reflected the change in policy by the Department of Immigration in providing access by boat people to lawyers. No longer would detainees routinely be allocated lawyers. Instead — as was publicly acknowledged for the first time in a radio interview in January 1995 by a Deputy Secretary of the Department, Mr Mark Sullivan — the Department had now decided to interpret s 256 in the most restricted way, so that it would only provide access to a lawyer when *actually requested* by a detainee. In the absence of a request, it would not provide any information as to the availability of legal advice.[78]

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75 (1996) 135 ALR 583.

76 Evidence of MH Richardson, Centre Manager, affidavit sworn 28 March 1995.

77 (1996) 135 ALR 583 at 601.

78 ABC Radio National *Indian Pacific*, Interview with Mark Sullivan, 28 January 1995, (Croll's Monitoring Australia).

The timing of this change in policy was critical in the *Albatross* case and provides an insight into the reasons for the change. When the *Albatross* detainees first arrived in Port Hedland in November 1994, the possibility of applying for a Protection Visa was still open to them. However, by the time the detainees had been given access to lawyers in January 1995, the Government had introduced the legislation declaring China a safe third country for all Vietnamese nationals, which was backdated to 30 December 1994[79]. The detainees were therefore unable to apply for a Protection Visa.

In the subsequent proceedings for judicial review in the Federal Court of Australia, O'Loughlin J at first instance[80] and the Full Federal Court rejected arguments that the words used by the *Albatross* detainees upon their arrival in Australia[81] amounted to constructive applications for Protection Visas, finding that the completion of a Form 866 was mandatory under the *Migration Act*.[82]

However, of greater relevance to the issue of incommunicado detention were the findings in relation to the obligation placed upon the Department of Immigration to advise detainees of their right to request access to a lawyer. It was on this latter point that leave was granted to the Human Rights and Equal Opportunity Commission ("HREOC") to intervene by way of written submission, pursuant to its power under s 11(1)(o) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ("the HREOC Act").[83]

O'Loughlin J at first instance had found as a fact that none of the detainees had made a request for access to lawyers prior to January 1995[84], so the main argument relied upon by the appellants in the Full Federal Court on this issue was that they had been denied procedural fairness because they had been detained in isolation and had not

79 See above at note 74 and accompanying text.

80 Unreported, Federal Court of Australia, O'Loughlin J, 27 July 1995, at 52-53.

81 These included such phrases as "trouble in China", "we were not being treated fairly by the Chinese Government", "our house was being demolished by the Chinese Government" and "we have to pay a higher fee for a licence and for school fees": (1996) 135 ALR 583 at 621.

82 (1996) 135 ALR 583 at 615-618 per Nicholson J and 599 per Carr J.

83 "human rights" is defined in s 3(1) of the HREOC Act to include the rights and freedoms recognised in the ICCPR, which is contained in Schedule 2 to the Act.

84 Unreported, Federal Court of Australia, O'Loughlin J, 27 July 1995, at 52-53. This was the major factual issue at first instance.

been advised of their right to request a lawyer. The appellants were supported by HREOC's submissions, which set out the international human rights principles relating to incommunicado detention which have already been referred to.[85]

The Court's findings on this issue were something of a mixed bag, and depended primarily upon the preparedness of each judge to interpret the relevant Australian domestic law — in the *Migration Act*, especially ss 193 and 256 — in light of the international human rights principles.

Nicholson J for the majority (Jenkinson J agreeing) confined himself to the domestic law, in accordance with the well-established principle that "... the existence of ambiguity is a necessary precondition to resort to Australia's obligations under an international treaty as an aid to construction".[86] His Honour found firstly, that under s 193(2) the detainees were not entitled to be told that they had a right to apply for a visa[87]; secondly, that under s 256 the detainees had no right to be informed of their right to legal advice[88]; and thirdly, that the existence of the above provisions, along with a similar provision in s 198(4), exhibited a clear and unambiguous intent by Parliament to deny any procedural fairness to persons in the position of the detainees.[89]

However, while his Honour's decision supported the respondents and the application was dismissed, his concluding remarks suggest that he was far from comfortable with the situation:

> This is a case in which Parliament has negated the possibility of common law concepts of procedural fairness applying in favour of non-citizen applicants...The inference from the findings of the trial judge is that the representatives of the relevant arm of the executive were well informed of this and avoided acting so as to place the applicants in a position where they had the means to apply for a Protection Visa when the course remained open to

85 Above, Part I

86 (1996) 135 ALR 583 at 628-629. See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at 361-362 and 375; and Kirby M "The Australian Usage of International Human Rights Norms: From Bangalore to Balliol — A view from the Antipodes" (1993) 16(2) *UNSWLJ* 363.

87 (1996) 135 ALR 583 at 626.

88 *Ibid* at 627-628.

89 *Ibid* at 631-33.

> them, prior to its preclusion by legislation. *While that executive conduct does not accord with internationally expressed goals relating to conduct in relation to refugees,* the conditions for application of international law, as prescribed by Australian domestic law, are not present to control that conduct. Furthermore, such conduct was supported by the enactments of the Australian Parliament which, to that extent, evince an intention to non-citizens to *negate the application of those internationally commended basic procedural requirements.* The result is that the non-citizen applicants are unassisted by either Australian domestic law or by international law (emphasis added).

Even more powerful on the issue of incommunicado detention was Carr J's dissent, which gave precedence to the international human rights principles on the basis that s 256 is silent on the question of whether officers are under an obligation to inform detainees that they may request legal assistance[90] and s 193 and s 198 do not express a sufficiently unambiguous intention to abrogate the common law right of procedural fairness.[91] His Honour was clearly troubled by the conduct of the Department of Immigration, and in declaring that there had been a denial of procedural fairness made the following comments:

> In my opinion, particularly given the linguistic barriers and the different cultural environment from which the appellants came, the very circumstances of their being in detention and the legitimate expectations arising out of the treaty obligations, common law procedural fairness did require them to be informed of their rights to apply for legal assistance. What the first respondent's officers did, in this matter, was to have regard to the requirements of s.256 at the same time as denying access to the appellants by a lawyer who was anxious to assist them. This all occurred at a time when the [respondents] knew that negotiations were proceeding with China which would have the consequence of denying the appellants even the right to make an application for refugee status...In the present matter the respondents' officers may, when they finished their work, have felt that they had dealt with the appellants efficiently and expediently (probably on instructions from more senior officers in the [respondent's] Canberra office). I doubt that they would have felt that the appellants had been treated fairly.[92]

The *Albatross* detainees subsequently sought special leave to appeal to the High

90 *Ibid* at 607.

91 *Ibid* at 609.

92 *Ibid* at 607-608.

Court of Australia and, while the application was unsuccessful[93], the following extracts from remarks made by Kirby J and Gaudron J in response to submissions by counsel for the Minister for Immigration, Mr Tracey QC, would provide little comfort to immigration policy-makers in the event that the matter comes before the High Court at some time in the future:

> **Kirby J:** ... is this not something of a catch-22, almost a...situation, that until they are provided with the legal advice that was apparently available to them, offered to them, ready to be provided to them, they do not know what their entitlements are...
>
> ... Here is a case where they could have availed themselves of [legal advice], there was a person willing to give it, there was a person who offered to give it, and you did not give it and you went ahead and changed your regulations in the meantime.
>
> ... you and I both know that the Convention definition is quite technical and not without its difficulties. Even in the time I have sat here, we have had cases involving it, and it is quite difficult, and how is a person with the educational background of these people to know where they fit into that technical definition? They really need legal advice, and they did, in fact, ultimately formulate that demand, but just a little too late, in your submission.
>
> **Gaudron J:** ... you are missing the point, Mr Tracey, namely, that no application can ever be made unless people are aware of their rights to make an application and the question therefore arises whether there is not a duty...to inform them of the rights.
>
> **Kirby J:** ... they perhaps did not know that there is this Convention, there is a definition, the definition is complicated, they might fall within one of the categories if they have got the evidence and if they have got a lawyer that will tell them about the Convention, tell them about the definition and the categories. You did not give them access to the lawyer who went there to offer them just that.[94]

Human Rights and Equal Opportunity Commission and Another v Secretary, Department of

93 Primarily on the grounds that there was no judicially-reviewable decision sufficient to attract the jurisdiction of the Court under the *Migration Act*. This point had not been argued in the lower courts.

94 *Wu Yu Fang and 117 others v Minister for Immigration and Ethnic Affairs and Commonwealth of Australia*, transcript of proceedings in the High Court of Australia in Melbourne before Gaudron J, McHugh J and Kirby J, 16 April 1996, at 11-13.

Immigration and Multicultural Affairs ("the Teal case")[95]

HREOC again became involved in the incommunicado controversy in early 1996, when a similar situation occurred in Port Hedland with the arrival of 46 Chinese on a boat codenamed *Teal*. Once again, a RACS lawyer was at the detention centre and requested access to the detainees; once again, the Department of Immigration held the detainees in isolation and refused access on the grounds that no request for lawyers had been made. However in this case RACS lodged a complaint with HREOC and requested it to investigate the matter pursuant to its power to do so where an allegation has been made that an act of the Commonwealth is "... inconsistent with or contrary to any human right".[96]

Upon receiving the RACS complaint, HREOC commenced its investigation and sent two letters to Port Hedland. The first was in a sealed envelope addressed to the *Teal* detainees, requesting that they contact HREOC by telephone to discuss their complaint. This letter also included the telephone number for RACS and suggested that the detainees could contact RACS if they required legal advice — a matter which was later seized upon by the Department of Immigration. This letter was sent with a second letter addressed to the Manager of the detention centre, requesting that the first letter be handed to the captain of the *Teal* in its sealed form.

HREOC's power to send the sealed letter was contained in s 20(6)(b) of the HREOC Act, which provides that a detainee is entitled:

> to have delivered to the detainee, without undue delay, any sealed envelope, addressed to the detainee and sent by the Commission, that comes into the possession or under the control of the custodian or of a custodial officer

Following delivery of the letter to the Manager of the detention centre, HREOC was contacted by the Secretary of the Department of Immigration and advised that the letter would not be delivered, on the basis of legal advice apparently received by the Department that s 20(6)(b) is confined to communications by HREOC arising out of a complaint lodged *by a detainee only*, and it does not apply where the complaint is lodged by a third party such as RACS.

HREOC thereupon commenced proceedings in the Federal Court of Australia

95 (1996) 41 ALD 325.

96 HREOC Act, s 3(1) ("act" defined), s 11(1)(f) and s 20(1)(b).

seeking an order that the letter be delivered, and Lindgren J had no hesitation in making an order in the nature of mandamus against the Department of Immigration.[97] Once again, the relevant international human rights — this time under Article 17 of the ICCPR[98] — were referred to in argument; however Lindgren took the view that the plain grammatical effect of s 20(6)(b) was unambiguous and that there was no need to rely upon those standards as an aid to interpretation.[99]

The importance of ensuring that the detainees were able to bypass their custodians to receive the sealed letter was not lost on his Honour:

> It is almost too obvious to merit statement that in the case of a detainee whose human rights are, according to a third party, being infringed, the infringer might be the custodian or those whom the custodian represents.[100]

In dealing with the reference to the RACS telephone number in the sealed letter, the respondents also made a submission which really exposed the policy behind the decision to hold boat people incommunicado. It was submitted that advising the detainees of the contact number for RACS, in effect, subverted the policy of not permitting lawyers to approach detainees unless a request had been made, as well as the proper construction of s 256 established by the *Albatross* case. On this basis, it was argued that HREOC had not acted properly and should therefore be denied the prerogative remedy of mandamus. This argument was, however, rejected out of hand by Lindgren J who, while accepting the probability that the detainees might by contacting RACS have obtained legal advice on the question of their refugee status, found nothing untoward in the conduct of HREOC.[101]

Migration Legislation Amendment Bill (No 2) 1996

Given its previous record when faced with adverse decisions relating to boat people[102], human rights advocates were unsurprised when the Government

97 (1996) 41 ALD 325 at 338.

98 See above at note 38 and accompanying text.

99 (1996) 41 ALD 325 at 333 and 335.

100 *Ibid* at 335.

101 *Ibid* at 334-335.

102 A number of commentators have referred to the "tit-for-tat" nature of the Government's practice of enacting legislation to overturn judicial decisions which have gone against the Government in relation to boat people; see e.g. Crock M "The Peril of the Boat People" in

responded to the above decision by introducing into Parliament, on a motion of urgency, a Bill inserting a new s 193(3) into the *Migration Act* which not only prevented HREOC from initiating contact with detained boat people, but also extended the restriction to the Commonwealth Ombudsman:

> (3) If:
>
> (a) a person covered by subsection (1) has not made a complaint in writing to the Human Rights and Equal Opportunity Commission, paragraph 20(6)(b) of the *Human Rights and Equal Opportunity Commission Act 1986* does not apply to the person
>
> (b) a person covered by subsection (1) has not made a complaint in writing to the Commonwealth Ombudsman, paragraph 7(3)(b) of the *Ombudsman Act 1976* does not apply to the person

The purpose of the Government's policy of incommunicado detention of boat people now became absolutely clear — "undeserving" arrivals were to be restricted as far as possible from finding out about their right to apply for refugee status, in order to avoid "lengthy and expensive processing":

> Certain interest groups have always argued that all unlawful non-citizens should, on arrival in Australia, be granted immediate access to legal advice. Such an approach would, however, have the effect of ensuring that all unlawful non-citizens, regardless of their reason for coming to Australia, would invoke lengthy and expensive processing.[103]

This policy is in flagrant breach of the various international human rights protections which had been raised in the *Albatross* and *Teal* cases. It also exposes a strong political element in the Government's attempts to restrict access to the refugee process. If, as the Government seems to have decided, "undeserving" arrivals consist primarily of those already considered to have been given protection — that is, the Vietnamese and Sino-Vietnamese[104] — then there is no justification whatsoever to extend the restriction to other groups — such as the Chinese who arrived on the *Teal*. In choosing to do so, the Government appears to have concluded that *all* arrivals are

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Selby H (ed) *Tomorrow's Law* (Federation Press, Sydney 1995) 28 at 37ff; Walker, *op cit* at 246.

103 Commonwealth of Australia, *Parliamentary Debates, Senate Weekly Hansard*, 20 June 1996, p 1935 per Senator Short, Second Reading Speech to *Migration Legislation Amendment Bill (No 2) 1996* (Cth).

104 See above at note 74 and accompanying text.

undeserving *per se*, or at the very least that they are likely, with the connivance of lawyers, to make bogus claims for refugee status which will "jam up" the system.

This policy also rests upon the morally dubious principle that detainees should deliberately be kept in ignorance of the law. It attacks the very foundation of due process under our legal system, and was picked up by a subsequent Senate Committee which, citing a reference by Blackstone to Caligula's propensity for displaying his laws "... in a very small character, and [hanging] them up on high pillars, the more effectively to ensnare people", concluded as follows:

> The maxim of law that ignorance of the law is no excuse is based upon the assumption that people are able to find out what the law is that effects them. It seems to the committee that the provisions of this bill are clearly designed to make it as difficult as possible for the people subject to these laws to find out what rights they have in law. The committee rejects the notion that this is justified because it will cost money to enable them to exercise their rights if they find out about them. The protection of rights ought not to be governed by cost-benefit analysis.[105]

Nevertheless, the Government ignored the Committee's findings that the Bill unduly trespassed on personal rights and liberties and pressed ahead with the legislation with support from the Opposition Labor Party. The Bill was only halted by filibuster from the minor Democrat Party in the Senate on 28 June 1996 which took the matter to the end of the Parliamentary session, giving opponents of the Bill an opportunity to negotiate with the Government.

Following an escalating outcry from human rights advocates as the provisions became more widely known, the Bill was put "on hold", pending negotiations with HREOC and other interested parties, and by early 1997 its fate had not been determined.

Conclusion

The author does not suggest that Australia's immigration authorities are actually torturing or otherwise physically mistreating boat people being held in incommunicado detention. However, the safeguards envisaged by bodies such as the Human Rights Committee and the Torture Committee in their exhortation to States

105 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 4 of 1996*, 26 June 1996.

to avoid incommunicado detention have, it is suggested, a very sound foundation, particularly in the context of access to the refugee determination process. The consequence for a genuine refugee who is denied protection will obviously be extremely serious — by definition the person will be returned to a situation where he or she will be persecuted. It is therefore disturbing that, from November 1989 until July 1994, 38% of boat people were recognised as refugees, yet since the policy of incommunicado detention has been in place and groups have been deported without access to the refugee process, only 3.6% have been recognised as refugees.[106] Australia's obligations towards asylum seekers are simply too important to allow decisions to be made without any independent advice and scrutiny. Fairness and due process requires the utmost in transparency, and it is a sorry situation indeed when this is put at risk in the name of political and financial expediency. ●

106 This point was made by the Human Rights Commissioner, Mr Chris Sidoti, in a keynote address, "Retreating from the Refugee Convention", Northern Territory University, 8 February 1997.