Should unauthorised arrivals in Australia have free access to advice and assistance?

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Introduction

Every year Australia has to deal with hundreds of non-citizens who come here without authorisation and then seek to remain. However, the only substantive visas Australia makes available to unauthorised arrivals (from places other than Norfolk Island and New Zealand) are border visas, which cover situations of inadvertent failure to obtain proper authorisation, and the protection visa.[1]

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Note on terminology: The government department now named the Department of Immigration and Multicultural Affairs (DIMA) has had many names over the years. The most recent name has been used throughout this article except in author, case and title citations where the name of the time has been used.

1 Crock M *Immigration and Refugee Law in Australia* (Federation Press 1998) p 54. The criterion for the grant of a protection visa is that the applicant is 'a non-citizen in Australia to whom Australia has protection obligations under the Refugee Convention as amended by the Refugee Protocol': *Migration Act 1958* (Cth) s 36(2). The treaties to which the section refers are the Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 and the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267. Hereinafter cited as the *Refugee Convention* and *Refugee Protocol*. The Refugee Convention entered into force for Australia and generally on 22 April 1954: DIMA *Onshore Refugee Procedures Manual* para 1.2.2. The *Refugee Protocol* entered into force generally on 4 October 1967: DIMA, *Onshore Refugee Procedures Manual* para 1.2.3. However, Australia acceded to the Refugee Protocol on 13 December 1973: DIMA *Onshore Refugee Procedures Manual* para 1.2.4. The Minister of Immigration

The purpose of the present article is to consider some legislative provisions and administrative practices which restrict the access of unauthorised arrivals to independent and competent advice and assistance. Such provisions and practices have the effect of ensuring that the vast majority of unauthorised arrivals are removed from Australia without being given a genuine opportunity to obtain Australia's protection even if it is needed. In this article I suggest that we tolerate this treatment of unauthorised arrivals because it is consistent with dominant rule of law narratives. However, I argue that by our toleration we set our feet upon a path that leads us all towards the perils of arbitrary government.

Need for access to independent and competent advice and assistance

Vulnerability of unauthorised arrivals

Unauthorised arrivals who are detected at the border are placed in the position of having to make any protection claims shortly after arrival in this country.[2] Such persons usually have to contend with a basic unfamiliarity with the Australian legal system and the English language, as well as ignorance of the national and international law applicable to their situation. Unauthorised arrivals who are fleeing persecution by the authorities in their own country may be so traumatised or so uncertain about the possible actions of the Australian authorities that their natural inclination is to avoid revealing the real reason they have come to Australia.[3] In the case of unauthorised arrivals who are unaccompanied minors, there is the alternative possibility that they have limited understanding of, or limited ability to articulate, why they been sent to Australia by the adults formerly responsible for them.[4]

Even if unauthorised arrivals are permitted to apply for protection visas, they are (with very few exceptions) kept in detention throughout the time taken to process

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has the power under *Migration Act 1958* (Cth) s 417 to grant protection visas to individuals who do not fit the s 36(2) criterion. However, discussion of the Minister's power of intervention is beyond the scope of this article.

2 Unauthorised arrivals, who are not granted a visa in immigration clearance, are removed from the country with great rapidity unless they are permitted to apply for a protection visa: see further, Taylor S, 'Rethinking Australia's practice of "turning around" unauthorised arrivals: the case for good faith implementation of Australia's protection obligations' (1999) 11(1) *Pacifica Review: Peace, Security and Global Change* 43.

3 *Ibid* at 48-9.

4 Commonwealth of Australia, *Reference: UN Convention on the Rights of the Child, Official Hansard Report*, Joint Standing Committee on Treaties, 9 May 1997, TR458 (testimony of Margaret Piper, Executive Director, Refugee Council of Australia).

their applications.[5] The fact that they are under the physical control of the Australian authorities makes them very vulnerable to various denials of rights. Even if the Australian authorities behave impeccably, the experience of being deprived of liberty is likely over time to rob detainees of the capacity to think clearly and act decisively.

All of these vulnerabilities are reduced by access (from the moment of arrival) to independent advice and assistance from lawyers or other persons with a sound knowledge of relevant procedure and law. The adviser's expertise becomes available to the unauthorised arrival and, almost as important, the knowledge that the adviser's function is to protect his or her interests lessens the unauthorised arrival's sense of disempowerment.

Systemic factors

Making a valid visa application

An application for a protection visa is valid if, and only if, it is made in the manner prescribed by the regulations[6] and it is not prevented by various provisions of the *Migration Act 1958* (Cth) such as the 'safe third country' provisions which I have written about elsewhere.[7] The regulations provide, among other things, that a visa application is valid only if the approved form (Form 866) is completed by the applicant in accordance with the directions on it.[8] These technical requirements have the result that it is just about impossible for an asylum seeker to manage to make a valid protection visa application without advice and assistance from either — the Department of Immigration and Multicultural Affairs (DIMA) itself or third parties.

DIMA is very selective about providing the necessary advice and assistance to unauthorised arrivals. A DIMA officer subjects each unauthorised boat arrival to a screening interview shortly after arrival. On the basis of a written summary of the interview, a senior officer of DIMA based in Canberra determines whether the unauthorised arrival has made claims which, prima facie, may engage Australia's

5 See further Savitri Taylor, 'Weaving the chains of tyranny: the misrule of law in the administrative detention of unlawful non-citizens' (1998) 16(2) *Law in Context*.

6 *Migration Act 1958* (Cth) ss 46(1) and 45(2).

7 Savitri Taylor, 'Australia's "Safe Third Country" Provisions: their impact on Australia's fulfilment of the non-refoulement obligations imposed by the Refugee Convention, the Convention Against Torture and the ICCPR' (1996) 15 *University of Tasmania Law Review* 196.

8 *Migration Regulations* (Cth) r 2.07(3).

protection obligations under the Refugee Convention.[9] An entry screening process similar to the one in place for unauthorised boat arrivals is now used to deal with unauthorised air arrivals at Sydney airport[10] and, apparently, at all of Australia's other international airports.[11] Persons arriving without authorisation are interviewed at the airport by an immigration inspector. The content of the interview is then related over the telephone to either a DIMA officer in Canberra or a State Director of DIMA who makes a prima facie determination.[12] If an unauthorised boat or air arrival is identified by the entry screening process as having made claims which, prima facie, may engage Australia's protection obligations under the Refugee Convention, DIMA facilitates the making of a protection visa application.[13]

There is clear evidence that persons who are not prevented from making a valid application for a protection visa by the 'safe third country' provisions of the *Migration Act 1958* (Cth), and who have done all that they can to invoke Australia's protection, are being removed from this country without being given an opportunity to make an application for a protection visa.[14] I have suggested elsewhere that this is because the government is so convinced that this is the only outcome that the Australian community will accept, that it is prepared to breach Australia's international legal obligations in achieving it.[15] In these circumstances the only effective safeguard against breach of Australia's international legal obligations is the provision of independent and competent advice and assistance to all unauthorised arrivals.[16]

Rejection mentality

Where a valid application for a protection visa is lodged with DIMA, a DIMA officer (acting as a delegate of the Minister for Immigration) determines whether the

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9 Australian National Audit Office *Audit Report 32 of 1997-98 Performance Audit: Management of Boat People* (1998) 66; HREOC *Those who've come across the seas: detention of unauthorised arrivals* (HREOC, 1998) p 26.

10 Commonwealth of Australia, *Consideration of Estimates, Official Committee Hansard*, Senate Legal and Constitutional Legislation Committee, 13 November 1997, L&C 262 (testimony of Mr Killesteyn, DIMA).

11 Interview with Des Hogan, Refugee Co-ordinator, Amnesty International Australia, 29 October 1998.

12 Interview with Commonwealth Ombudsman Officer A (22 October 1998); interview with Leonard Karp, McDonell Solicitors, 3 November 1998.

13 HREOC, above, note 9, p 26.

14 Taylor, above, note 2 at 46-51.

15 Above, note 2, at 52-5.

16 My point is particularly well illustrated by the case of *Wu v Minister for Immigration and Ethnic Affairs and Another* (1996) 64 FCR 245.

applicant is a refugee. If the applicant is determined to be a refugee and meets certain additional criteria,[17] a protection visa will be granted. If an applicant is refused a protection visa at the primary stage, he or she is usually able to obtain merits review of the decision by the Refugee Review Tribunal (RRT).[18]

According to the Australian Government, genuine refugees do not really need any assistance in presenting their claims.[19] All they need to do in order to have their claims recognised is to relate their story to a DIMA officer and, perhaps, again to the RRT.[20] However, lawyers who act for protection visa applicants are finding that an increasing number of clients whom they believe to be genuine refugees are being rejected at both the primary and merits review stages.[21] Questionable rejections are often based on an inappropriate adverse assessment of credibility,[22] or an overly restrictive interpretation of the Refugee Convention definition of 'refugee'.[23] In such a climate, an asylum seeker has very little chance of obtaining a positive decision unless he or she puts forward all legally relevant facts, puts them forward from the very beginning (so that he or she is not suspected of making things up along the way), and, on top of all that, presents

17 The applicant must undergo a medical examination (*Migration Regulations* (Cth) cl 866.223 of Sch 2) and a chest x-ray examination (cl 866.224 of Sch 2) and satisfy public interest criteria 4001 to 4003 (cl 866.225 of Sch 2) and the Minister must be satisfied that the grant of the visa is in the national interest (cl 866.226 of Sch 2).

18 *Migration Act 1958* (Cth) ss 411, 412 and 414. The RRT has the power to affirm or vary the primary stage decision or set it aside and substitute a new decision: *Migration Act 1958* (Cth) s 415.

19 Commonwealth of Australia, *Official Hansard No 7 of 1998*, Senate, 25 May 1998, 2954 (Senator Vanstone, Minister representing Minister for Immigration).

20 Above, note 19.

21 Interview with Martin Clutterbuck, lawyer, Refugee and Immigration Legal Centre (22 October 1998); Heinrichs P 'A woman prepared to take on the system' *The Age* 21 November 1998, p 12.

22 See, for example, *Sivarasa v Minister for Immigration* (unreported, Federal Court of Australia, Burchett J, 11 June 1998); *Djalal v Minister for Immigration* (unreported, Federal Court of Australia, O'Connor J, 10 June 1998); *Kathiresan v Minister for Immigration* (unreported, Federal Court of Australia, Grey J, 4 March 1998); *Faustin Epeabaka v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court of Australia, Finkelstein J, 10 December 1997).

23 See, for example, *Okere v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court of Australia, Branson J, 21 September 1998); *Chen Shi Hai (an infant) by his next friend Chen Ren Bing v Minister for Immigration & Multicultural Affairs* [1998] 622 FCA (unreported, French J, 5 June 1998); *Mohamed v Minister for Immigration & Multicultural Affairs* (unreported, Federal Court of Australia, Hill J, 11 May 1998).

cogent legal arguments as to why he or she fits the Refugee Convention definition of 'refugee'. Because of the many disadvantages under which they labour, unauthorised arrivals simply cannot manage to do for themselves all that is necessary to protect them from falling victim to the rejection mentality of the administrative decision makers. They need access to independent and competent advice and assistance.

Time limits for review applications

An application to the RRT for review of a primary stage decision to refuse to grant a protection visa must be lodged within seven working days after notification of the primary stage decision, if the applicant is in immigration detention, and within 28 days after notification in any other case.[24] The RRT is not given any discretion to consider an out-of-time application. Likewise, an application to the Federal Court under Pt 8 of the *Migration Act 1958* for judicial review of an unfavourable decision by the RRT must be lodged within 28 days of notification of the Tribunal's decision.[25] The *Migration Act 1958* contains an explicit prohibition on the Federal Court allowing a person to lodge an out of time application.[26]

While time limits are an entirely proper device for attempting to achieve speedy processing, the inflexibility of the time limits for review of protection visa decisions is objectionable. Inflexible time limit provisions are atypical in the administrative law context,[27] because of the recognition that there are always going to be some cases in relation to which compelling reasons can be advanced for extending whatever time limit has been imposed. The likelihood of such cases arising in the asylum seeker context is, if anything, greater than in many other administrative law contexts. Asylum seekers in the community may receive written notification of a primary stage or RRT refusal (including notification of their review rights), but not manage to have it translated until after the time for making an application for review has

24 *Migration Act 1958* (Cth) s 412(1)(b) and *Migration Regulations* (Cth) reg 4.31(1)-(2). Statutory rule 109 of 1997 was going to reduce the 28 day period to 14 days. However, the Government was forced to back down by a disallowance motion in the Senate, which the Opposition was prepared to support.

25 *Migration Act 1958* (Cth) s 478(1).

26 *Migration Act 1958* (Cth) s 478(2).

27 Typical provisions are *Administrative Appeals Tribunal Act 1975* (Cth) s 29 and *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 11 which give the Administrative Appeals Tribunal and the Federal Court respectively the power to extend the time allowed for the making of an application for review under those Acts.

passed.[28] In addition, all asylum seekers face the hurdle of working out the exact mechanics of making an application for review by the RRT or the Federal Court (as the case may be) and the hurdle of working out what issues to address in the application. Asylum seekers who do not have the assistance of a competent adviser do not easily overcome these hurdles. Overcoming the hurdles could well take longer than the period allowed for lodgment of an application for review.

High Court writs

A protection visa applicant also has the option of seeking from the High Court of Australia an injunction or a writ of mandamus or prohibition against any of the decision makers previously specified.[29] At present, in contra-distinction to Federal Court review under Pt 8 of the *Migration Act 1958* (Cth), there is no time limit for seeking review[30] and there are no restrictions on the grounds of review available. However, prerogative writs are not user friendly. Asylum seekers clearly have no hope of making a successful High Court application without extremely competent legal assistance.

Possibility of removal after RRT review

In the case of detained asylum seekers, there is the additional danger that DIMA will attempt to effect removal as quickly as possible after they have been rejected by the RRT. The only sure way of preventing this is to obtain a stay order from the court from which judicial review has been, or will be, sought.[31] A detained asylum seeker

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28 Many asylum seekers are not able to read the English language. However, in *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311, the Full Federal Court dismissed the argument that the requirement of 'notification' means that recipient must have knowledge of contents of the notice. It held that translation into a language understood by the recipient was not a prerequisite for notification of a primary decision to be effective. *Mbwaly Paulo Mwaly v Minister for Immigration & Multicultural Affairs* [1998] 1093 FCA (unreported, Wilson J, 20 August 1998) was a case in which the applicant for judicial review was unaware of the contents of the RRT decision because he was unable to read English. See Wilson J's comments about the unsatisfactoriness of institutional arrangements that allow this state of affairs to exist.

29 *Australian Constitution* s 75(v).

30 Immigration Advice and Rights Centre, *The Immigration Kit* (5th ed, Federation Press, 1997) p 524.

31 Upon entering Australia's migration zone (see definition in *Migration Act 1958* (Cth) s 5(1)), an unauthorised arrival becomes an unlawful non-citizen and remains so until he or she leaves the migration zone or is granted a visa. A person with the status of unlawful non-citizen must be detained until removed, deported or granted a visa: *Migration Act 1958* (Cth) ss 189 and 196(1). A very few unauthorised arrivals are able to apply for and obtain a bridging visa to bridge the time that elapses while a protection visa application is

needs somebody on the outside who knows how to get such a court order and who has the physical freedom to put that knowledge to good use.

Access to advice and assistance

It has been argued in the previous section that a person who is in fact entitled to Australia's protection may well fail to secure that protection if he or she does not have access to independent and competent advice and assistance. If a person is to have *effective* access to advice and assistance that person must be informed of his or her right to seek such advice and assistance, and must not be hindered in establishing or maintaining communications with an adviser. Moreover, the need for access to advice and assistance exists irrespective of the capacity of asylum seekers to pay for it. It follows that Australia is likely to breach its international protection obligations unless persons, who do not have the means to pay for advice and assistance, are nevertheless able to obtain it from an independent and competent source. These matters will now be discussed.

Notification of right to seek independent advice and assistance

Throughout the entry screening process for unauthorised arrivals described in the previous section, DIMA goes to a lot of trouble to ensure that unauthorised arrivals

being processed. The grant of a bridging visa gives an unauthorised arrival the status of lawful non-citizen thus securing his or her release from detention. The bridging visa also protects its holder from removal for the period of its currency. Those unauthorised arrivals who are unable to obtain a bridging visa remain in detention but are safe from removal for so long as a protection visa application lodged by them is being considered by DIMA or the RRT (*Migration Act 1958* (Cth) s 198). However, the moment that either the time for making an RRT application has passed without the making of such an application or an RRT rejection has been received their unlawful status renders them liable to immediate removal (*Migration Act 1958* (Cth) s 198 and definition of 'finally determined' contained in s 5(9)). Even where an application of judicial review has actually been made, a stay order is necessary to prevent removal pending the making of a decision. In relation to applications for judicial review by the Federal Court, see *Migration Act 1958* (Cth) s 482. In relation to judicial review by the High Court see the decisions relating to the case of Seniet Abebe. This is a case in which DIMA indicated its intention to give effect to arrangements to remove a particular detainee who had received a rejection from the RRT, even after she had invoked s 75 jurisdiction of the High Court. An urgent application for court order was granted by Kirby J preventing removal until 28 January 1998. See *Ex Parte Abebe* [1998] HCA 10 (unreported, Kirby J, 10 February 1998). On 28 January 1998, DIMA gave the court an undertaking that, until the determination of the matter or an earlier further order, removal would not take place without 72 hours written notice to the detainee or her solicitors. See *Ex Parte Abebe* [1998] HCA 16 (unreported, Gummow J, 28 January 1998).

are cut off from all sources of information except DIMA.[32] In particular, DIMA does not ask unauthorised arrivals whether they wish to contact organisations able to provide independent advice and assistance, and refuses to allow such organisations to initiate contact with the unauthorised arrivals.[33] DIMA's stated aim is to prevent unauthorised arrivals being told about the possibility of applying for a protection visa and being primed with a story.[34]

Section 193(2) of the *Migration Act 1958* specifically provides that DIMA is not required: (1) to advise unauthorised arrivals about their ability to apply for a visa; or (2) to give unauthorised arrivals any opportunity to apply for a visa; or (3) to allow unauthorised arrivals access to advice (whether legal or otherwise) in connection with applications for visas.

Section 193(2) is subject to s 256 of the *Migration Act 1958* which provides:

> 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.

32 See generally HREOC above note 9, pp 131-7; Commonwealth of Australia, *Reference: Migration Legislation Amendment Bill (No 2) 1996, Hansard Proof Copy*, Senate Legal and Constitutional Legislation Committee, 26 June 1996, L&C 175 (testimony of Ross McDougall, RACS (Vic) Inc).

33 Commonwealth of Australia, *Consideration of Estimates, Official Committee Hansard*, Senate Legal and Constitutional Legislation Committee, 3 June 1998, L&C 205 (testimony of Mr Sullivan, DIMA); Amnesty International Australia, *Australia a Continuing Shame: the Mandatory Detention of Asylum Seekers* (1998) 21. In order to ensure that this policy could be implemented even after the privatisation of the immigration detention centres, it was written into the *General Agreement between the Commonwealth of Australia and Australasian Correctional Services Pty Ltd*, 27 February 1998, cl 9.4.4 that the Contract Administrator appointed by DIMA could 'impose restrictions or conditions on the rights of access to immigration detainees of any third parties, including, without limitation, the media and unsolicited lawyers or migration agents'. The lengths to which DIMA is willing to go in preventing third parties from providing unauthorised boat arrivals with advice and assistance emerged very clearly from the case of *Human Rights and Equal Opportunity Commission & Anor v Secretary, Department of Immigration and Multicultural Affairs* (1996) 67 FCR 83 and its aftermath. See Poynder N 'The incommunicado detention of boat people: a recent development in Australia's refugee policy' (1997) 3(2) AJHR 53 at 72-6.

34 Commonwealth of Australia, *Reference: Migration Legislation Amendment Bill (No 2) 1996, Hansard Proof Copy*, Senate Legal and Constitutional Legislation Committee, 26 June 1996, L&C 194 (Mr Richardson, DIMA).

However, the key words of s 256 are 'at the request of the person in immigration detention'. Only those who request the 'reasonable facilities' to which s 256 refers need be provided them, and the Federal Court of Australia has confirmed that no obligation is imposed on DIMA to inform a person in immigration detention of their rights under the section.[35]

According to DIMA, approximately 80 per cent of the unauthorised boat arrivals who were removed from Australia in 1996 and 1997 did not request access to legal advice.[36] However, it cannot be assumed that those who did not request legal advice made an actual decision not to do so. As Amnesty International and others have pointed out, many unauthorised arrivals come from countries in which the legal system functions very differently from the Australian legal system. Unauthorised arrivals from such countries may not realise that a lawyer could help them.[37] They may not even know what a lawyer is.[38] Likewise, unauthorised arrivals who are unaccompanied minors cannot be assumed to have enough knowledge and understanding to request advice and assistance.

Access to assistance without hindrance

Persons who have physical liberty are able to seek out and communicate with an adviser as and when they please. Most unauthorised arrivals, however, are kept in immigration detention and can easily be denied access to advice and assistance by being denied the opportunity to contact or to maintain communication with an adviser.

In its report entitled *Those who've come across the seas: detention of unauthorised arrivals*, the Human Rights and Equal Opportunity Commission (HREOC) has documented many recent cases in which DIMA has either failed to respond to requests for access to legal

35 See *Wu v Minister for Immigration and Ethnic Affairs and another* (1996) 64 FCR 245 at 290 per Nicholson J.

36 Entry in the *Australian Human Rights Register* compiled by the Catholic Commission for Justice, Development and Peace, Melbourne Archdiocese, citing response by DIMA (24 April 1998) to question asked by Senator Brian Harradine at the Senate Legal and Constitutional Legislation Committee Consideration of Estimates hearing of 26 February 1998. DIMA does not keep similar statistics in relation to unauthorised air arrivals: Entry in the *Australian Human Rights Register* compiled by the Catholic Commission for Justice, Development and Peace, Melbourne Archdiocese, citing response by DIMA (24 April 1998) to question asked by Senator Brian Harradine at the Senate Legal and Constitutional Legislation Committee Consideration of Estimates hearing of 26 February 1998.

37 Amnesty International Australia, above, note 34, p 21; Poynder, above, note 33, at 64.

38 Poynder, above note, 33, at 64.

advice made by persons detained at the Port Hedland Immigration Detention Centre,[39] or has responded only after multiple requests have been made and/or after a delay of weeks or months.[40] In some cases access has been provided only after the making of a complaint to HREOC.[41] While HREOC focuses on difficulties experienced by detainees at the Port Hedland Immigration Reception and Processing Centre, the problem does not appear to be confined to that detention centre.[42]

Public funding of advice and assistance

Immigration Advice and Application Assistance Scheme

Outline of funding arrangements

Publicly funded advice and assistance in the making of primary applications and applications for RRT review is provided to some protection visa applicants through the Immigration Advice and Application Assistance Scheme (IAAAS).[43] The IAAAS is a scheme funded and managed by DIMA.[44] The organisations contracted by DIMA to provide advice and assistance under IAAAS include private law firms, private firms of migration agents, non-profit community organisations and legal aid commissions[45] selected through an open competitive tendering process.[46]

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39 HREOC, above, note 9, pp 215-7.

40 Australian National Audit Office, above, note 9, pp 210-5.

41 Australian National Audit Office, above, note 9, p 214.

42 Interview with Martin Clutterbuck, lawyer, Refugee and Immigration Legal Centre (22 October 1998) re Maribrynong IDC. It is worth noting that the Immigration Detention Standards scheduled to the *Detention Services Contract between the Commonwealth of Australia and Australasian Correctional Services Pty Ltd*, 27 February 1998, provide that all requests by detainees for access to legal advice must be referred to DIMA.

43 Commonwealth of Australia, *Official Hansard No 6 of 1998*, Senate, 12 May 1998, 2521 (Senator Vanstone, Minister representing Minister for Immigration).

44 IAAAS has operated since late 1997: Senate Legal and Constitutional References Committee, *Legal Aid Report Three* (25 June 1998) para 7.13 <www.aph.gov.au/senate/committee/legcon_ctte/legal3/index.htm>. It is a merged version of two previously existing schemes (the Application Assistance Scheme for asylum seekers in detention and the community and the Immigration Advisory Services Scheme for disadvantaged and vulnerable DIMA clients in the community): Senate Legal and Constitutional References Committee, *Legal Aid Report Three* (25 June 1998) para 7.13; DIMA *Annual Report 1996-97*, 13.

45 List of IAAAS Service Providers contained in DIMA, *Fact Sheet 70: Immigration Advice and Application Assistance Scheme* (revised 11 November 1998).

46 DIMA *Annual Report 1996-97*, 13. The contracts were put out to tender in July 1997: DIMA *Fact Sheet 70: Immigration Advice and Application Assistance Scheme* (revised 11 November 1998).

As I have already mentioned most unauthorised arrivals are kept in immigration detention. Under IAAAS, all non-citizens in immigration detention who have been permitted to apply for a protection visa are provided with free advice and assistance[47] by a contractor of DIMA's choice.[48] Prospective protection visa applicants living in the wider community are also provided with free advice and assistance through IAAAS if their case has merit and they are experiencing financial hardship or they have suffered past torture and trauma.[49] The advice and assistance in such cases is provided by a contractor of the applicant's choice. Persons who lodge a protection visa application while they are at large in the community are treated as community applicants for the purposes of the IAAAS scheme even if they are subsequently detained.[50] This means that unauthorised arrivals who manage to evade detection by DIMA until after they have lodged a protection visa application, do not obtain automatic access to the services of an IAAAS funded adviser.[51]

It should also be noted that once an adviser is allocated or chosen under IAAAS, DIMA will not fund a change of adviser simply because the asylum seeker has lost confidence in the original adviser. Generally, DIMA will only fund a change of adviser in the case of serious error or misconduct on the part of the original adviser.[52] Generally speaking the options of an asylum seeker who is dissatisfied with his or her IAAAS adviser are: find the money to pay for a new adviser, find a new adviser who is willing to act on a *pro bono* basis, or go it alone.[53] The last is the most likely outcome.

DIMA takes the position that in most cases in which asylum seekers express dissatisfaction with their adviser what is happening is that a negative decision in a

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47 DIMA *Fact Sheet 42: Assistance for asylum seekers in Australia* (revised 21 October 1998).

48 DIMA's practice appears to vary from detention centre to detention centre. Recent practice in relation to Maribyrnong IDC detainees appears to be to split referrals equally between the three organisations that it has contracted to take referrals from that centre. DIMA does not consider itself obliged to comply with detainee requests for referral to a particular contractor, although it usually does comply with such requests. Information from an interview with Martin Clutterbuck, lawyer, Refugee and Immigration Legal Centre (22 October 1998).

49 DIMA *Fact Sheet 70: Immigration Advice and Application Assistance Scheme* (revised 11 November1998).

50 Case cited in interview with Martin Clutterbuck, lawyer, Refugee and Immigration Legal Centre (22 October 1998); case study cited in Amnesty International Australia, above, note 33, p 23-4.

51 Above, note 50.

52 Interview with Martin Clutterbuck, lawyer, Refugee and Immigration Legal Centre (22 October 1998); Interview with Commonwealth Ombudsman officer A (22 October 1998).

53 HREOC, above, note 9, pp 219-20.

hopeless case is being blamed on an actually blameless adviser. There is probably a large element of truth in this. However, legitimate grievances are also more than likely.

Independence

The reason that asylum seekers need access to independent advice and assistance is to ensure, among other things, that they do not become victims of unlawful actions or incorrect decisions on the part of DIMA. In other words, 'independent' in this context has to mean independent of DIMA. When the matter is considered in the abstract, IAAAS contractors cannot possibly be described as independent of DIMA. This is because of the ever present possibility that a contractor might avoid acting in a manner displeasing to DIMA (even if such action is in the best interests of their clients), because of a fear that DIMA might respond by choosing not to award further contracts to them or by cutting back the funds available under future contracts. Whether or not such a fear would be well-founded is, of course, beside the point. It is the fear itself which has the capacity to undermine independence. As a matter of practice, the independence of some of DIMA's contractors is beyond question. For example, RILC and RACS are non-profit community organisations whose sole purpose is to be of service to their clients. This strong sense of purpose has ensured that RILC and RACS have never allowed the knowledge that most of their funding comes from DIMA to inhibit them from acting in the best interests of their clients. However, I am not as confident of the commitment of some private contractors to place the interests of their clients ahead of financial self-interest.

While public funding is by definition government controlled to some extent, the specific department of government that controls the funding ought not to be the very one whose decisions are being questioned. The Attorney-General's Department rather than DIMA ought to be responsible for funding and managing IAAAS.

Competence

The government has gone out of its way to emphasise that the advice and assistance provided to protection visa applicants under IAAAS is not legal advice and assistance, although some of the contracted migration agents have legal qualifications.[54] The government position is that protection visa applicants have no need for the advice and assistance of legally qualified persons at either the primary or merits review stage.[55] I

54 Senate Legal and Constitutional References Committee, *Legal Aid Report Three* (25 June 1998) para 7.14.

55 Commonwealth of Australia, *Official Hansard No 6 of 1998*, Senate, 12 May 1998, 2521 (Senator Vanstone, Minister representing Minister for Immigration).

agree up to a point. What is important is that the person providing advice and assistance has a sound grasp of the law and practice relevant to the making of protection visa applications. It is quite possible for persons who have not been trained as lawyers to acquire the relevant expertise.

Having said that, it is quite clear that the some of the organisations that have been contracted by DIMA to provide advice and assistance to protection visa applicants under IAAAS are providing a far from adequate service. HREOC has received and investigated many complaints from immigration detainees about the quality of the advice and assistance provided to them. The picture painted by the case studies included in HREOC's report *Those who've come across the seas*, is of contractors who do not communicate with their clients, do not manage to obtain protection visas for genuine refugees,[56] and do not really care.[57] DIMA, for its part, takes the position that it is not responsible for the quality of the advice and assistance provided by the organisations contracted by it.[58]

While some contractors are providing clients with a less than satisfactory service, others such as RILC are providing the highest quality of advice and assistance. However, DIMA's decision to divide the funding available through IAAAS between several contractors in each State has seriously jeopardised the continued existence of organisations such as RILC. If the battle for survival is lost, the ability of protection visa applicants to access competent advice and assistance will be greatly reduced.

Commonwealth Public Interest and Test Cases Scheme and legal aid

Moving from administrative to judicial proceedings, there are two possible sources of public funding for advice and assistance to protection visa applicants in relation to judicial proceedings. The first is the Commonwealth Public Interest and Test Cases Scheme, which is administered by the Attorney-General's Department.[59] The

56 This is evidenced by the fact that some individuals who have been helped to a rejection at primary stage by their DIMA-contracted adviser, but have then got RILC, or its predecessor RACS, to assist them with their review application on a pro bono basis have been granted protection visas on review: HREOC, above, note 9, p 221.

57 HREOC, above, note 9, pp 218-21. The picture is reinforced by other sources including an interview with a former immigration detainee, 22 February 1998.

58 HREOC, above, note 9, p 218.

59 See further *Guidelines for the Provision of Assistance by the Commonwealth for Legal and Related Expenses under the Commonwealth Public Interest and Test Cases Scheme* (August 1996).

agreements between the Commonwealth and the various States relating to the provision of legal aid require legal aid commissions to refer requests for funding in relation to test cases to the Attorney-General's Department in the first instance.[60] However, the scheme does not appear to be a significant source of funding for refugee matters.

The main source of public funding for judicial proceedings is, of course, legal aid. Before 1 July 1998 legal aid funding was potentially available to protection visa applicants, on a means and merits tested basis, at every stage of the process from the lodgment of a primary application to the making of an application for judicial review.[61] On 1 July 1998, as part of taking a whole of government approach, overlapping eligibility for IAAAS and legal aid was eliminated.[62] Legal aid funding is no longer available for the making of primary applications for protection visas or applications for RRT review.[63] Legal aid funding is available for applications for judicial review of RRT decisions on a means and merits tested basis, but only where the issues to be raised are issues about which 'there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court or the High Court'.[64] This last requirement is new to the 1 July 1998 funding guidelines. Finally, of course, legal aid commissions are 'not required to grant legal assistance simply because all tests and guidelines are met'.[65] They 'must have regard to available funds and competing priorities'.[66] Overall, the change in the legal aid funding guidelines is likely to make it more difficult than ever for asylum seekers in the community to obtain advice and assistance at any stage, and more difficult for

60 See *Agreement between the Commonwealth of Australia and the State of Victoria in relation to Provision of Legal Assistance*, 7 November 1997, cl 4.3. The equivalent agreements with all other jurisdictions, except Queensland, contain a similar provision: Senate Legal and Constitutional References Committee, *Legal Aid Report Three* (25 June 1998) para 4.46.

61 *Commonwealth Civil Law Guidelines*, guideline 5.1 (available as appendix 2C in Victoria Legal Aid, *Legal Aid Handbook* (9th ed, January 1998)). The continuation of funding was reconsidered at every stage of each case.

62 Commonwealth of Australia, *Official Hansard No 6 of 1998*, Senate, 12 May 1998, 2520 (Senator Vanstone, Minister representing Minister for Immigration).

63 *Commonwealth Guidelines: Legal Assistance in Respect of Matters Arising Under Commonwealth Laws*, Civil Law Guidelines (1 July 1998) guideline 4.2.

64 *Ibid*, guideline 4.1(i).

65 Above, note 63, introduction.

66 Above, note 63.

asylum seekers in detention to obtain advice and assistance in exercising their judicial review rights.[67]

Despite the fact that most asylum seekers are not able to access publicly funded assistance for the making of judicial review applications, many asylum seekers who receive an adverse decision from the RRT do lodge applications for judicial review.[68] Many of these applications have obviously been drafted by enterprising migration agents on a one size fits all basis.[69] At the hearing, the applicant tries to represent him or herself and the Minister is represented by counsel. The judge tries without success to explain the limited role of the court to the applicant, and ends up making the applicant's case for him or her.[70]

Most of those who make pro forma judicial review applications need not have bothered. In recent judgments, Justices Wilcox and Madgwick have both suggested that if applicants were in receipt of independent and competent legal advice fewer of them would be proceeding with judicial review applications that have no hope of succeeding.[71] They have suggested that the fact that public funding for advice and assistance is generally unavailable beyond the merits review stage, has simply resulted in the expenditure of even greater amounts of public money in paying the Minister's solicitor and counsel to respond to hopeless applications and paying the judge to decide them.[72]

Not only would the public save money if it funded advice and assistance for the

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67 Lester E 'Measures designed to deter, discourage, degrade, demonize, diminish and disown: where has the decency and dignity gone?' (keynote address delivered to Refugee Council of Western Australia, Public Forum: Asylum seekers: Welcome or Not?, Perth, 8 July 1998) 14, footnote 54.

68 *Mbuaby Paulo Muaby v Minister for Immigration & Multicultural Affairs* [1998] 1093 FCA (unreported, Wilcox J, 20 August 1998).

69 HREOC, above, note 9.

70 *Wilson Lunardi v Minister for Immigration & Multicultural Affairs* [1998] 1091 FCA (unreported, Madgwick J, 27 August 1998); *Lai Tommy Kumula v.Minister for Immigration & Multicultural Affairs* [1998] 613 FCA (unreported, Madgwick J, 18 May 1998).

71 *Mbuaby Paulo Muaby v Minister for Immigration & Multicultural Affairs* [1998] 1093 FCA (unreported, Wilcox J, 20 August 1998); *Lai Tommy Kumula v. Minister for Immigration & Multicultural Affairs* [1998] 613 FCA (unreported, Madgwick J, 18 May 1998).

72 *Mbuaby Paulo Muaby v Minister for Immigration & Multicultural Affairs* [1998] 1093 FCA (unreported, Wilcox J, 20 August 1998); *Lai Tommy Kumula v Minister for Immigration & Multicultural Affairs* [1998] 613 FCA (unreported, Madgwick J, 18 May 1998).

making of judicial review applications, it would also save lives. The fact that many of those who are rejected by the RRT are making pro forma judicial review applications and that judges are generally conscientious in considering the applications, increases the chances that at least some of the cases in which RRT decisions have been affected by an error of law or similar defect will be identified and remitted. However, not all those who have a good case for judicial review will have sufficient knowledge to make even a pro forma application for review. Such individuals will be removed from Australia, even though they may well be refugees.

While I have been dealing thus far with judicial review applications made by asylum seekers who have received negative RRT decisions, it should be noted that the Minister has increasingly taken to applying for judicial review of positive RRT decisions. The respondent asylum seeker is by no means guaranteed public funding for advice and assistance in relation to such proceedings. In particular, the fact of a positive RRT decision does not appear to be regarded as persuasive of the merits of the asylum seeker's case. In any event, the requirement that the issue raised be one in relation to which there are differences of judicial opinion may not be met. The danger clearly exists that asylum seekers who have been found to be refugees by the RRT may then be forced to fight for their right to protection in a contest in which they face the lions of the State unarmed.

Implications for the rule of law in Australia

At the heart of most rule of law theories is the idea that every action of government must be justified by, and testable against, pre-existing law.[73] A government, which does not accept this proposition, is arbitrary government, even if it is prepared to be held accountable for its actions at the polls.[74] The function of the legal system is not only to protect the governed from the personal caprices of those who govern, but also to protect the rights of unpopular individuals from being sacrificed to the popular will.[75] Precisely because unpopular individuals are unpopular, there will always be good arguments found for failing to protect the rights they supposedly have.[76] If we wish to be safe from arbitrary government it is important that we do

73 See, for example, Pennock J R *Administration and the Rule of Law* (Farrar and Rinehart Inc, 1941) p 9.

74 Feldman D 'Democracy, The Rule of Law and Judicial Review' (1990) 19 *Federal Law Review* 1.

75 Brennan G 'The State Of The Judicature' (paper presented at the opening of the 30th Australian Legal Convention, Melbourne, 19 September 1997) <www.hcourt.gov.au/judicat.htm>.

76 Walker G *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) p 321.

not allow those arguments to prevail. It is important that we do not allow distinctions to be drawn between different categories of the governed.

None of the foregoing is particularly contentious. But now consider this. Who precisely are the governed? A moments thought gives the answer: every person subject to Australian law.[77] In other words, every person physically present in Australia. Why then do domestic rule of law narratives often appear to suggest that the function of the legal system is to protect the rights of only one subgroup of the governed?

The following is a key passage from the submission made to the Senate Legal and Constitutional References Committee's Legal Aid Inquiry by the National Association of Community Legal Centres:

> The rationale for legal aid arises directly out of the role that the legal system plays in Australian democratic society. The legal system is both the means by which democratically elected governments regulate society in the interests of all citizens and the means by which all citizens can ensure that they are able to exercise their rights, carry out their responsibilities, hold others accountable to the law, and receive fair and equitable treatment as citizens.[78]

This passage presents the legal system as being purely a means of giving effect to the social contract which exists between the members of the Australian community: with the group of members being conceived narrowly as consisting of citizens only.

The National Association of Community Legal Centres includes in its membership organisations such as RILC. It is also the case that elsewhere in its submission the National Association of Community Legal Centres states that it supports the Principles of Legal Aid which were developed by the National Legal Aid Advisory Committee in 1990 (and ignored by government).[79] The principles included the principle of ensuring access to the legal system by all persons subject to Australian law.[80] It may be, therefore, that the passage just quoted excluded non-citizens

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77 Martin D 'Due process and membership in the national community: political asylum and beyond' (1983) 44 *University of Pittsburgh Law Review* 165 at 201.

78 National Association of Community Legal Centres, *Submission to Senate Legal and Constitutional References Committee Legal Aid Inquiry* (December 1996) p 18.

79 *Ibid*, p 21.

80 National Legal Aid Advisory Committee, *Legal Aid for the Australian Community: Legal Aid Policy, Programs and Strategies — A Report* (Australian Government Publishing Service, 1990) pp 56-7.

through carelessness rather than conscious intent. However, that is telling in itself. The tendency to exclude non-citizens from our rule of law narratives must be deeply ingrained, if it is the reflex tendency of the membership of an organisation such as the National Association of Community Legal Centres.

It would be patently untrue to say that the entire space of public discourse is taken up by rule of law narratives, which are exclusionary of non-citizens. However, it is very true to say that the rule of law narratives which have the most powerful grip on our national psyche go something like this. Every person physically present in Australia is *subject* to the Australian legal system because that is necessary if the government we have elected to look after the general welfare is to regulate society in the interests of the Australian community. Likewise members of the Australian community need to be able to ensure that their rights under the social contract are honoured both by the government and other members, and it is a function of the legal system to give them the means to do so. By contrast, those outside the Australian community may be *given* rights, but they are not *owed* rights. We may choose to give outsiders access to our legal system as a means of ensuring enjoyment of the rights (or to use a more accurate term privileges) which we have chosen to give them, but it is not an inherent function of the legal system to ensure that enjoyment.

I am willing to concede that, at the present time, our notion of community is not as limited as I have made it out to be thus far. Most people at the present time probably do not conceive the Australian community as consisting solely of citizens. Most people probably think of the Australian community as a group having two or three levels of membership, which can be visualised, as concentric circles radiating out from a core.[81] In the core or innermost circle are citizens. In the next circle out are permanent residents. Some might even be prepared to say that there is a third circle consisting of non-citizens who have managed one way or another to live in Australia for years, and have in actual fact developed substantial ties to persons within the first two circles. However, most unauthorised arrivals stand outside all the circles of community. Since they are usually detected upon arrival and detained upon detection they are never given the opportunity to develop substantial ties to the persons within the first two circles. While physically within the territory of Australia, they remain outsiders to whom no rights are owed.

81 This image is taken from Martin D, above, note 77, at 201-2.

There is also the issue of human rights to consider. The fact that Australia is party to a whole lot of human rights treaties including the Refugee Convention would appear to testify to our acceptance that there are certain rights which every person physically present in Australia *must* be accorded by reason of his or her humanity alone. However, it is my contention that we treat human rights as a species of rights inferior to the special relational rights of the social contract. The human right of protection is a case in point. The *Migration Act 1958* (Cth) contains substantive provisions which purport to give effect to Australia's protection obligations under the Refugee Convention. 'Look at us', we say. 'Universal human rights are important to us.'

The devil is in the procedural detail. It is in the boring technical stuff that is not part of the big picture, and is easy to gloss over. It lies in requiring asylum seekers to fill out a Form 866 in order to make a valid protection visa application, in having inflexible time limits for review, and in dozens of other procedural pitfalls — some legislated and some just a matter of administrative practice. It lies above all in ensuring that asylum seekers need the assistance of expert advisers to get through the system, and then making it as difficult as possible for them to get that assistance.

A society, which truly values the human rights which it puts into the form of substantive law, facilitates the exercise of those rights even when the exercise is an inconvenience. A society which truly values human rights ensures that the holders of the rights know of their existence and are provided with all the assistance that they need to enforce those rights should they wish to do so. A society that truly values human rights does not enact procedural provisions such as s 193(2) of the *Migration Act 1958* (Cth),[82] and it does not tolerate administrative hindrances to accessing advice and assistance. Finally, it puts it money where its mouth is and ensures that an individual's ability to access the independent and competent advice and assistance that he or she needs to vindicate substantive rights, is not contingent on his or her capacity to pay.

At every turn, the procedural law and administrative practices outlined in the preceding sections of this article violate the international procedural standards, which are the buttress of international human rights law. These standards are contained in documents such as the United Nations Standard Minimum Rules for the Treatment of

82 See also comment in *Wu v Minister for Immigration and Ethnic Affairs and another* (1996) 64 FCR 245 at 295 (Nicholson J).

Prisoners,[83] the United Nations Body of Principles for the Protection of All Persons in Any Form of Detention or Imprisonment,[84] the Basic Principles on the Role of Lawyers,[85] and various United Nations UNHCR guidelines on refugee status determination procedures.[86] We excuse our non-compliance by pointing to the non-binding nature of the documents, which contain the standards,[87] but the excuse does not explain why we reject the guidance of principles, which we admit 'represent much of the current international thinking on these issues'.[88] In my view, the explanation is that we do not accept the basic premise of international human rights law: the premise of equal human worth. We say we accept it. We may even delude ourselves that we do. But in actual fact we discount the worth of persons who are not bound to us in more immediate and intimate ways than their membership of the human species. We discount the worth of those who are not part of the Australian community.

While the written text of our substantive law tends to create the illusion and self-delusion that we have embraced universalism, we reveal our fundamental tribalism[89] in the way we

83 See Standard Minimum Rule 93. The Standard Minimum Rules were 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 in 1957: *Wu v Minister for Immigration and Ethnic Affairs and another* (1996) 64 FCR 245 at 265 per Carr J. Standard Minimum Rule 95 extends the application Standard Minimum Rule 93 to persons arrested or imprisoned without charge: *Wu v Minister for Immigration and Ethnic Affairs and another* (1996) 64 FCR 245 at 265 per Carr J.

84 See Principles 13, 15, 17 and 18. The Body of Principles was adopted by a resolution of the United Nations General Assembly on 9 December 1988: *Wu v Minister for Immigration and Ethnic Affairs and another* (1996) 64 FCR 245 at 265 per Carr J.

85 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

86 For example, see UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (revised ed, Office of the United Nations High Commissioner for Refugees, 1988) UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Office of the United Nations High Commissioner for Refugees, 1997).

87 See, for example, Commonwealth of Australia *Reference: Migration Legislation Amendment Bill (No 2) 1996, Hansard Proof Copy*, Senate Legal and Constitutional Legislation Committee, 26 June 1996, L&C 158 (testimony of Mr Burmester, Attorney-General's Department).

88 Letter from Attorney-General's Department to Department of Immigration dated 25 August 1993 contained in Department of Immigration and Ethnic Affairs, Submission No 97, 1 September 1993 in Joint Standing Committee on Migration, *Inquiry into Detention Practices Submissions* (1993) vol 4, S 995-6.

89 As Andrew Linklater points out, '[the State] is universalistic in comparison with tribal social organisation. However, it remains a particularistic association in so far as citizenship replaces kinship as

conceptualise, and accord, procedural rights. Let us look at what has been said and done about providing procedural fairness to protection visa applicants and potential protection visa applicants. Three points emerge. First, it is clear that the government is responding to a feeling within the Australian community that as little as possible of taxpayers' money ought to be spent on providing procedural fairness to persons who are not members of the Australian community. There has been a constant harping on the theme that the vindication of individual rights must be balanced against budgetary considerations.[90] The system for processing protection visa applications is a costly one.[91] Many of the government's procedural reforms have been directed at bringing the cost down.

The use of an entry screening process saves the cost of processing applications that would otherwise have been made by the persons screened out. According to the Australian National Audit Office, the reduction in the number of unauthorised boat arrivals given access to the full-blown determination system has saved about $62 million over several years.[92] The changes to the legal aid guidelines have also been presented as reducing the access to community resources of persons who are outside the circles of community allegiance. For example, on 12 May 1998, Senator Vanstone representing the Minister for Immigration said in response to a question about the changes to the guidelines:

> The Minister has been concerned for some time about the use of legal aid resources on refugee and migration applications. In these cases, the principal beneficiaries are not Australian citizens or permanent residents but people with no right to remain in Australia and who are seeking to prolong their stay.[93]

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the basis of an exclusive form of social organisation and as the centre of an internal concept of obligation': Linklater A *Men and Citizens in the Theory of International Relations* (Macmillan, 1982) p 167.

90 Ruddock P 'Proposed Changes to the Administrative Review Scheme' (paper presented at *The Balancing Act: Immigration Decision Making — The Department, the Tribunals and the Courts Seminar*, Melbourne, 12 November 1997).

91 Australian National Audit Office, above, note 9, p 75.

92 Australian National Audit Office, above, note 9.

93 Commonwealth of Australia *Official Hansard No 6 of 1998*, Senate, 12 May 1998, 2520 (Senator Vanstone). See also Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 24 September 1997, vol 216, 8302 (the Hon Philip Ruddock, Minister for Immigration). It is worth noting that we are not talking about an attitude unique to the conservative side of politics. In a submission to the National Legal Aid Advisory Committee while Labor was in Government, the Department of Immigration argued that only Australian citizens and permanent residents should be eligible for legal aid: Department of Immigration Local Government and Ethnic Affairs, *Response to Issues Paper*, 14 December 1989 quoted in National

It was earlier mentioned that at least two Federal Court judges have suggested that it might actually cost the public more to deny legal aid funding to asylum seekers than to grant it. However, the government's expenditure choices make perfect sense if it is realised that the objective is not necessarily to make a net saving of public money. The objective is to ensure that persons outside the circles of community allegiance are not the beneficiaries of the expenditure of public money.

The second point flows on from the first. The reason that the government is prepared to spend large amounts of public money opposing protection visa applicants in the Federal Court, and in some instances dragging them there even if they have won at the RRT, is that the Australian community considers its stake in the outcome to be high. For a variety of reasons, the Australian community thinks it is of the utmost importance that it be able to control membership.[94] Moreover, in common with most other national communities, it feels entitled to do so. The making of a protection visa decision is the making of a decision about whether or not a particular person is to become a member of the Australian community.[95] Non-citizens who come here and then invoke their human right of protection are attempting to deny us the choice of excluding them from membership. Although we have enacted the human right of protection into our substantive law, our tribal selves[96] regard the potential beneficiaries of that right as invaders to be repelled. This explains why we are prepared to spend any amount of public money in ensuring that the risk of incorrect positive decisions is eliminated. It also provides another reason for our marked lack of enthusiasm for providing procedural safeguards for unauthorised arrivals. We suspect (probably rightly) that the more we reduce the risk of removing persons with protection needs, the more we increase the risk of granting protection visas to persons who do not have protection needs. And when it comes right down to it, that is not a price that we are prepared to pay.

The third and most important point is this. The interests that the Australian community has at stake in protection visa proceedings are the community resources consumed by the proceedings and the possibility that an incorrect positive decision will result in the grant of community membership to a person that it would not have

Legal Aid Advisory Committee, *Legal Aid for the Australian Community: Legal Aid Policy, Programs and Strategies — A Report* (July 1990) p 57.

94 Taylor, above, note 2, at 52-4. Australia's draconian detention regime for unauthorised arrivals is a measure of how far Australia is prepared to go in ensuring control of community membership.

95 Martin, above, note 77, at 199-200 (making the point in relation to the US).

96 See Linklater, above, note 89.

chosen as a member independently of its international law protection obligations. However, consider for a moment the stakes for those asylum seekers who are in fact entitled to Australia's protection under international law. Very literally their life may be at stake. The interests that an asylum seeker may have at stake are, therefore, greater by far than the interests which the community has at stake, especially when it is kept in mind that an asylum seeker who is the beneficiary of an incorrect positive decision is more than likely to turn out to be a productive member of the community. Yet if the comparative stakes were to be inferred from the procedural safeguards provided to asylum seekers, one would think that the balance lay the other way.

Let us now consider how we balance the stakes in the only other legal proceedings where the individual stake is at all comparable in magnitude, that is criminal proceedings. Although the community's stake in the outcome is considerably higher in a criminal trial than in protection visa proceedings,[97] criminal trials are conducted so as to ensure, as far as possible, the acquittal of all those who are innocent rather than the conviction of all those who are guilty. How is it conceivable that an asylum seeker could have a lesser entitlement to procedural safeguards? The only possible explanation for the differential treatment is that we think that the loss of life or liberty by a person who is not a member of the Australian community is of less consequence than the loss of liberty of a member of the community. Which is proof of the proposition put at the very beginning — we have not as yet truly accepted the premise of equal human worth which underlies the international human rights treaties to which we have become party. While the written text of our substantive law is largely consistent with the universal morality we purport to espouse, our fundamental tribalism is painfully evident in the procedural sphere.

This clearly has sad implications for asylum seekers, but why should it matter to persons who are members of the Australian community already? If we need an incentive to treat 'others' as equal to 'ourselves', what possible incentive could be offered? After all no one questions that the greatest possible procedural protection is owed to members of the Australian community, varying only according to the importance of the substantive rights which they have at stake in the proceedings in question. Very simply, the argument from self-interest for treating 'others' as equal to 'ourselves' is that very few of us can be confident that we are forever safe from being perceived as 'other' by those we think of as 'ourselves'. In other words, 'the Australian community' is not a natural and immutable group. Any so-called community which is so large that its members do not all know each other is an

97 If a guilty person goes free, that person not only escapes punishment for having engaged in morally repugnant conduct in the past but also remains a continuing threat to society.

abstract concept not an experienced reality.[98] In the face of a political, economic or other crisis, it is likely that the outer reaches of our artificial sense of allegiance and relational obligation, that is our artificial sense of community, will start contracting. Perhaps permanent residents will drop off the edge first.[99] Perhaps naturalised citizens next.[100] Or perhaps we will stop presuming that all citizens are participants in the social contract and start distinguishing between those who have shown their commitment to the community and those who have not.[101] Are you so confident that you will never be judged un-Australian that you are willing to gamble your procedural protections (and consequently your substantive rights) on the verdict? ●

98 Martin, above, note 77 at 205 (putting this as part of the case for the other side).

99 This is already happening in the area of welfare rights: Leser D 'Welcome to Australia', *Good Weekend* (Sydney), 12 September 1998, p 16.

100 There are precedents. For example, during the First World War, Australia interned approximately 700 naturalised and 70 Australian born British subjects of German ethnicity very often 'for no good reason': Fischer G *Enemy Aliens: Internment and the Home Front Experience in Australia 1914-1920* (University of Queensland Press, 1989) 77, 86-126. During the Second World War, Australia interned 947 naturalised and 62 Australian born British subjects of Italian ethnicity because of 'attitudes which equated race with nationality and which regarded assimilation as a necessary pre-condition to citizenship, albeit second-class citizenship': O'Brien I M 'The Internment of Australian Born and Naturalised British Subjects of Italian Origin' in Bosworth R and Ugolini R (eds) *War, Internment and Mass Migration: the Italo-Australian Experience 1940-1990* (Gruppo Editoriale Internazionale, 1992) p 89.

101 Again there are precedents. For example, in 1951, Australia came to the brink of denying substantive and procedural rights to persons labelled as communists: see Atkin and Evans (eds), *Seeing Red: The Communist Party Dissolution Act and Referendum 1951: Lessons for Constitutional Reform* (Evatt Foundation, 1992).