

The Independent Education Union says:

END MANDATORY DETENTION

**Refugee and Asylum Seeker Policy
in Australia**

**Research, Analysis and Recommendations Undertaken
for the Independent Education Union by**

**The Edmund Rice Centre for Justice and
Community Education**

February 26, 2002

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Preamble

The Human Rights Watch based in New York in its World Report for 2001 produced a scathing account of Australia's refugee policy. Under the title, "Australia: Xenophobia and Threats to Asylum", the report claimed that:

*"Despite only receiving a tiny proportion of the world's refugees – 9,450 asylum applicants in 1999, compared to 95,110 applicants in Germany – Australia reacted with disproportionate zeal to a perceived threat of being overwhelmed by "floods" of foreigners brought in through illegal people trafficking and smuggling."*¹

The rhetoric surrounding the recent changes in policy reflects a 'mean-spirited' approach which has been used to justify denying refugees basic rights such as family reunion and the possibility of permanent residency. It has also exacerbated community concerns and fears about foreigners, threatening to undermine Australia's commitment to multiculturalism, inflaming racial prejudice and dividing Australian communities.

Serious doubts have been raised over the sustainability and effectiveness of what has become one of the most expensive and draconian refugee policies in the Western world. Barely a week has gone by in the past year when Australia's detention centres have not made the news. A series of accusations of harsh treatment, coinciding with hunger-strikes, escapes, riots and acts of self harm by asylum seekers have resulted in constant media attention, exacerbated by claims of government censorship.

The sense of crisis has been further inflamed by Australia's handling of the Tampa issue. The so-called 'Pacific Solution' has led to more front-page news stories as the Government struggles to place the continuing flow of boat people in poorer Pacific nations, away from the gaze of the Australian media. The Pacific Solution has added enormously (and it seems exponentially) to the costs. A range of alternatives to mandatory detention in use overseas has been shown to be significantly less expensive, and far more humane, than Australia's current privatised system.

Despite Australia's commitment to deterrence, the flow of boats has continued. A comprehensive review of refugee and asylum seeker policy is imperative in order to address a system that is crisis-prone, expensive and clearly ineffectual.

¹ Human Rights Watch (HRW), World Report 2001, New York, p.514.

Executive Summary

This report considers the following possible alternatives (amongst others) to the current policy regarding refugees and asylum seekers:

- **End the Temporary Protection Visa (TPV) system. Give all refugees immediate access to a permanent Protection Visa (PV).**
- **Introduce compulsory processing to replace mandatory detention. All asylum seekers to be released after initial processing of health and security checks unless a court order is obtained for their detention. Priority to be given to children and families. Asylum seekers to be housed in the community whilst their claims for asylum are being processed.**
- **End the system of tendering for the management of detention facilities returning these facilities to direct government control.**
- **Initial screening of all asylum seekers to identify torture and trauma victims in accordance with UNHCR guidelines.**
- **Repeal legislation excising parts of Australia from Australia's migration zone.**
- **Establishing a fast-track processing facility on Christmas Island, using resources currently directed towards the 'Pacific Solution' and detention.**
- **Reevaluate the powers of the Minister and the right of appeal in order to ensure due process and the maintenance of the doctrine of the separation of powers.**
- **End the 'Pacific Solution' and enter multilateral negotiations with Indonesia and source countries to develop a more workable offshore program.**
- **De-couple the onshore and offshore programs.**
- **Reevaluate the special humanitarian program in conjunction with the family reunion program to ensure all places go to those most in need and all refugees currently resident in Australia have access to family reunion rights.**
- **Reevaluate the total number of refugee places including consideration of a flexible quota to take account of overseas crises.**
- **Implement all outstanding recommendations from the referenced reports, referred to in the Other Alternatives to be Considered section.**

Overview of the Current Situation

Australia's current system of migration remains based on the 1958 Migration Act. Incorporated into the Migration Act was the formal acknowledgement of Australia's commitments towards refugees as set out in the 1951 Refugee Convention. The Humanitarian Program within the overall Migration Program regulates Australia's intake of refugees and other people in humanitarian need. Australia has maintained a strong humanitarian commitment towards refugees throughout the 1960s and 1970s, particularly following the Vietnam War. However, in the early 1980s refugee criteria were changed from the UNHCR's group determination process to an individually based application of the refugee definition.² From the mid-1980s following increasing numbers of Cambodian boat people the policy began to shift towards an explicit notion of deterrence, alongside a decreasing refugee intake.

Mandatory detention was retrospectively introduced in 1992³ by the then Labor Government and remains the only system of mandatory detention in the western world. Despite the increasing focus by the government on deterrence, the numbers of asylum seekers arriving without authorisation have continued to increase.

In 1999 a new category of visa was introduced into the refugee program, a Temporary Protection Visa (TPV). This was the only visa available to asylum seekers who applied on-shore and who arrived without valid documentation. Since 2001 the TPV has been divided into a number of categories and has extended to applications made offshore but outside the asylum seekers home country or country of 'first asylum'. The TPV was introduced as a deterrent and to deny those perceived to be subverting Australia's immigration procedures the 'generous entitlements' of the Protection Visa (PV). However, the number of asylum seekers arriving without authorisation has increased since its introduction (in 1999) drawing its effectiveness into question.

The current system of processing for asylum seekers has been developed over more than a decade. The explicit justification for this policy has been two-fold:

- **Deterrence** – The Government has made it clear that the primary purpose of many changes is to deter asylum seekers from applying for asylum outside their home country, or closest 'safe country'. This is aimed at enhancing the integrity of the international resettlement program giving priority to those considered by the Australian Government to be most in need. It is also claimed that by reducing the numbers of asylum seekers arriving in Australia the total cost of the humanitarian program will be reduced.
- **Protection of Australia's borders** – This is ensured through the active policing of borders and the use of detention to ensure that asylum seekers are not able to gain access to Australia without authorisation. The policy has been famously summed up in Prime Minister John Howard's pre-election remark "We will decide who comes to this country and the circumstances in which they come".

³ For accounts of the history of refugee policy see, US Committee for Refugees, 'Sea Change: Australia's New Approach to Asylum Seekers', February 2002, pp.5-6; Department of Immigration, Multicultural and Indigenous Affairs (DIMIA), 'Fact Sheet 82 – Immigration Detention', November 2001.

Critique of the Current System

Critics of the current policy have rejected the underlying logic of Australia's position in relation to asylum seekers. They have highlighted the inability of the increasingly harsh stance to deter people from travelling to Australia and the inconsistencies in the system between different categories of asylum seekers:

- **Deterrence** – It has been made clear by the UNHCR that deterrence is not an acceptable policy objective in relation to refugee convention.⁴ However, a broader critique has centred on the inability of policies such as mandatory detention to prevent 'boat people' from seeking asylum and safety in Australia. Since the introduction of mandatory detention the numbers of asylum seekers arriving in an unauthorised manner has continued to increase (although numbers have varied from year to year as world and regional crises unfold). This trend has continued since the introduction of the TPV system in 1999.⁵ The recent dramatic increase (from 1,000 to 5,000 p.a.) appears to be a direct result of unfolding humanitarian crises in Afghanistan and Iraq.

A recent report from the Refugee Council of Australia on the refugee situation in Iran indicates that despite all measures by the Australian Government, Australia remains a cheaper alternative to Europe for desperate people fleeing the Middle East.⁶ While numbers have decreased since the introduction of the 'Pacific Solution' it remains unclear whether this is a permanent fall or simply seasonal variation coinciding with the monsoon season.⁷

- **Protecting our Borders** – Another key element of mandatory detention has been the claim that it prevents asylum seekers 'disappearing' into the Australian community. However, Australia allows the majority of asylum seekers (those who arrived on valid visas) to stay in the country outside detention whilst their claims are assessed. The acceptance rate of those who arrived on valid papers is significantly lower than that for those who arrived in an unauthorised manner. As the risk of flight is argued to be linked to the fear that claims will be rejected, it would appear unauthorised arrivals pose a significantly smaller flight risk. The arrival of asylum seekers threatened to undermine Australia's sovereign right to protect its borders. The Minister for Immigration has claimed that two groups of people have gained access to Australian protection without genuine need, those who could have been afforded protection elsewhere and non-refugees who seek a better economic future. Those asylum seekers who have already settled in a safe third country have never been afforded protection under Australian law, nor have economic migrants. We only offer protection to those that qualify as refugees under the 1951 Convention, to which Australia remains committed.

Criticism of current policy has also drawn attention to a number of other issues:

⁵ DIMIA web site, 'Summary of unauthorised boat arrivals', http://www.immi.gov.au/facts/74unauthorised_summary.htm. See Appendix 4.

⁶ M. Piper, 'Report on RCOA Field Visit to Iran', Refugee Council of Australia, December 2001.

⁷ L. Murdoch, 'Ready to risk all again as storms clear for smugglers', *Sydney Morning Herald*, 25 February 2002.

- **International law and human rights violations** – The United Nations (UN) and UN bodies have criticised Australia’s treatment of asylum seekers, including claiming breaches of the 1951 Refugee convention. These include:
 - The UNHCR claimed in October 1999 that amendments to the 1958 Migration Act “seriously undermined refugee protection”.
 - The UNHCR Executive Committee concluded that the denial of reentry rights to refugees issued Temporary Protection Visas was in violation of article 31, and article 28 of the 1951 convention.⁸
- **Cost** – The cost of both detention (\$104 million per annum)⁹ and the total cost of processing in the light of the Pacific Solution (\$482 million this financial year)¹⁰ make Australia’s system of handling asylum claims one of the most expensive in the world.
- **Centralisation of power** – Limitations on the right of appeal as well as centralisation of power within the executive, through the expansion of the Minister’s discretionary powers, have led to a breach of the doctrine of the separation of powers.
- **Abuse of regional power** – Concerns have been raised over the way Australia is using its influence in the region to dictate to other countries through the Pacific Solution. Under the Pacific Solution Nauru has received \$30 million from Australia in return for their agreement to house asylum seekers. In contrast Nauru was only scheduled to receive \$3.4 million in aid from Australia this year.¹¹ This suggests a distorting of aid priorities for political expediency.
- **Differential treatment** – Whilst extraordinary measures have been undertaken to repel the 4,000-4,500 unauthorised entrants who have arrived each of the past two years¹², only minimal resources are directed towards detecting the more than 60,000 visa over-stayers who are currently illegally in the Australian community.¹³
- **Politicisation of military** – Senate Estimates hearings have revealed deep tensions within Australia’s armed forces over the handling of asylum seekers. The testimony of Admiral Chris Barrie, head of Australia’s armed forces, has been at odds with Air Marshal Angus Houston, head of the Air Force, and all other military leaders over whether claims that children were thrown overboard by asylum seekers were in fact correct.¹⁴
- **Racial Intolerance** – Neville Roach, AO, former senior advisor to the Government on Immigration, recently resigned his position claiming that “The greater tragedy is that the

⁹ For financial year 2000/2001. DIMIA, ‘January 2002 Rebuttals to False Information Relating to Immigration Detention’, DIMIA web site,

http://www.minister.immi.gov.au/detention/rebuttal_290102.htm, February 2002.

¹⁰ Figure given by Treasurer Peter Costello, reported in Metherell & Clennell, ‘Pacific solution ‘worth it’ at twice the price’, *Sydney Morning Herald*, February 14, 2002.

¹¹ Oxfam Community Aid Abroad, *Adrift in the Pacific: The implications of Australia’s Pacific Refugee Solution*, February 2002, pp.9, 12.

¹² DIMIA, ‘Fact Sheet No.74, Unauthorised arrivals by air and sea’, DIMIA web site, <http://www.immi.gov.au/facts/74unauthorised.htm>, February 2002;

¹³ DIMIA, ‘Fact Sheet No.86, Overstayers and people in breach of visa conditions’, DIMIA web site, <http://www.immi.gov.au/facts/86overstayers.htm>, February 2002.

¹⁴ Seccombe, ‘Houston, we have a problem: you’re too truthful’, *Sydney Morning Herald*, February 22, 2002.

vilification, abuse and even violence that has resulted (from the Government's tactics) has not been directed exclusively towards asylum seekers, but to the wider Islamic community and others of Middle-Eastern appearance".¹⁵ This has largely been the result of the Federal Government giving a misleading impression of asylum seekers as not being genuine refugees and of the structure of the humanitarian program, where they claim that asylum seekers take the places of more needy refugees (see Structure of Humanitarian Program).

Issues and Specific Policy Considerations

The Visa System

Appendix 1 sets out the various sub-classes of visa, including information on what visas can be accessed by different groups of asylum seekers and changes made to this regime in 2001. Appendix 2 sets out the entitlements provided to TPV holders and to permanent Protection Visa (PV) holders.

Issues:

- Temporary protection is usually associated with a grant of rights to a large number of asylum seekers en masse, rather than to individuals, as an interim measure until their claims can be processed individually. Temporary protection arrangements have been included in other contexts (and are only acknowledged as legitimate under international law) in cases where there are large-scale mass influxes of asylum seekers that exceed the capacity of the state to process in the short-term, such as the inflow of refugees to Eastern European countries during the crisis in Kosovo. This is only to be applied as an exceptional measure and is inappropriate in the Australian context.¹⁶
- TPV holders are denied access to family reunion rights, undermining Principle B of the 1951 Refugee Convention which states that "the unity of the family... is an essential right of the refugee". The Convention recommends that countries act to ensure that "the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country".¹⁷

¹⁶ For more information see, P. Mathew, 'Jesuit Refugee Service Position Paper Regarding the Adoption of the Principle of Temporary Protection by Australia', 1999.

¹⁷ UNHCR, Convention and Protocol relating to the status of refugees, August 1996.

- TPV holders are denied access to travel documents preventing them from reentering the country, in contravention of Article 28 of the 1951 Refugee Convention.¹⁸
- Refugees who receive a TPV are denied access to a range of resettlement services when they enter the Australian community. A Queensland Government report on the TPV system claims that community organisations are struggling to cope with the sudden demand on their services, particularly in relation to accommodation, food and employment assistance. The report states that “The TPV policy severely limits people’s capacity to participate in the everyday life and activities of Australian society.”¹⁹
- The National Council of Churches has argued that “Article 34 of the Convention notes that any system which keeps a Convention refugee’s status in limbo is irreconcilable with the spirit of the Convention and is irreconcilable with the permanent status granted to all other Convention refugees in Australia.”²⁰
- The denial of permanent protection rights to those who have traveled through another country which is deemed to be of “effective protection” en route to Australia is arguably in contravention of article 31 of the 1951 Convention. The provision does not allow flexibility for individual cases, physical presence is not sufficient to constitute “settlement”, it discriminates against mode of arrival at the outset rather than primary or secondary movement and the penalties imposed are disproportionate, breaching minimum standards in the Convention.²¹
- Asylum seekers in detention are often denied legal advice or contact with family, friends and community that might aid their application. Restrictions are placed on the time in which applications can be lodged in order to receive full benefits.²²

Alternatives:

- **End the TPV system. Give all refugees immediate access to a permanent Protection Visa (PV).**
- **If the TPV system is to be maintained:**
 - **Increase resettlement services to TPV holders so that they are in-line with those granted to PV holders.**
 - **Allow all TPV holders to apply for a PV after 30 months (as was the case prior to September 2001).**
 - **Allow TPV holders to access family reunion rights and travel documents.**
 - **Redraft the current codification of Article 31 to ensure that refugees who travel through third countries are not disadvantaged in a manner that is inconsistent with the intent of the 1951 Convention.**

¹⁹ R. Mann, Temporary Protection Visa Holders in Queensland, Queensland Government, Multicultural Affairs Queensland, Department of Premier and Cabinet, 2001, p.33.

²⁰ S. Harris, ‘Why Temporary Protection Visas are a Raw Deal’, Refugee Advocate, National Council of Churches.

²¹ Refugee and Immigration Legal Centre (RILC), ‘Submission Concerning Article 31 of the Refugee Convention – “Non-Penalisation, Detention and Protection”’, Submission to the UNHCR, 2001.

²² US Committee for Refugees, ‘Sea Change: Australia’s New Approach to Asylum Seekers’, February 2002.

- **Inform all persons in immigration detention of their rights to seek asylum and obtain legal representation. Do not deny any such person access to friends, family and community members. Remove any time restrictions on applications.**²³

Detention

Detention is mandatory for all asylum seekers who arrived in Australia in an unauthorised manner until their claims for asylum are processed. Detention also applies to those whose claims have been denied and to asylum seekers, tourists, students and others in breach of their visa conditions. However, in practice the vast majority of those who breach their visa conditions are never detained.

Issues:

- A number of concerns have been raised by a Parliamentary Joint Standing Committee over the conditions in which asylum seekers are detained. Many of these concerns have been echoed by Human Rights organisations around Australia and the world. The concerns include:²⁴
 - Many detention centres, such as Woomera, are located in remote parts of the country making access to services and access for families extremely difficult.
 - Medical treatment is not always satisfactory, educational facilities are limited and the range of activities and recreational facilities are inadequate for the number of detainees, especially children and teenagers.
 - Doubts have been raised over the ability of ACM to effectively manage the centres, with reports of harsh treatment in some detention facilities. These concerns have been highlighted in a report by the Commonwealth Ombudsman.²⁵
- The UNHCR Executive Committee, the Parliamentary Joint Standing Committee and others have raised concerns over the effects of long term detention on asylum seekers, particularly children.²⁶
- Detention is not subject to judicial review and applies to all unauthorised arrivals for the entirety of the duration whilst their claims are processed, in all cases regardless of circumstance. This has raised concerns that detention is “arbitrary” and therefore in contravention of Article 9, Paragraph 1 of the International Covenant of Civil and Political Rights (ICCPR).²⁷
- The cost of detention (\$120 per person per day) is higher than alternatives.²⁸

²⁴ Joint Standing Committee on Foreign Affairs, Defence and Trade, Report on Visits to Immigration Detention Centres, Parliament of Australia, June 2001.

²⁵ UNCHR, ‘Watchdog slams Australian immigrant detention centres’, World News page, UNCHR web site, March 5, 2001, <http://www.unchr.ch>;

²⁶ Joint Standing Committee on Foreign Affairs, Defence and Trade, Report on Visits to Immigration Detention Centres, Parliament of Australia, June 2001; Conference of Leaders of Religious Institutes, ‘Policy Proposal for adjustments to Australia’s Asylum seeking process’, June 2001.

²⁷ Amnesty International, ‘Australia – A Continuing Shame: The mandatory detention of asylum-seekers’, June 1998, pp.13-18.

²⁸ The per day cost comes from Department of Immigration, Multicultural and Indigenous Affairs, ‘January 2002 Rebuttals to False Information Relating to Immigration Detention’, DIMIA web site, http://www.minister.immi.gov.au/detention/rebuttal_290102.htm, February 2002.

- Private contracts for running detention centres have led to commercial in confidence agreements that limit public accountability.
- There remain many people in detention whose claims for asylum have been refused, but who cannot be repatriated to their home countries. It is unclear what the long-term status of these people is.
- The introduction to the UNHCR Guidelines on the detention of asylum seekers states that detention should only be resorted to in “cases of **necessity**” (emphasis in original). Guideline 2 states that “As a general principle asylum-seekers should not be detained”. Guideline 6 states that “**minors who are asylum-seekers should not be detained**” (emphasis in original) as it breaches Articles 2,3,9,22 and 37 of the Convention on the Rights of the Child (CROC).²⁹
- The Government and others have claimed that allowing asylum seekers to live in the community whilst their claims are processed incurs an unduly high risk that these people will disappear into the community. However, this ignores the fact that asylum seekers who arrive in Australia on valid papers are currently released on bridging visas. The evidence suggests that this group has a far lower rate of acceptance than do unauthorised arrivals suggesting the risk of flight amongst unauthorised arrivals would be lower.³⁰ This differential treatment also appears to be in contravention of Article 31 of the 1951 Refugee Convention, which states that asylum seekers should not be penalised due to the way in which they arrive in a country.³¹

Alternatives:

- **All unauthorised asylum seekers to be subject to compulsory processing (mandatory detention) for an initial period to allow identity, criminal and health checks to be performed. Priority to be given to unaccompanied minors and families with children.**
- **Processing to take place in minimum security facilities, such as the centre to be established at Christmas Island outlined under the following section on ‘Processing’. (see Appendix 3 for international comparisons).**
- **Asylum seekers to be automatically released from detention after health, criminal and identity checks have been performed, or after a predetermined period, unless a court order is granted to maintain an individual in detention. Such court orders would be conditional on establishing a specific threat to the community due to the health, criminal background or specific flight risk of the individual concerned.**
- **Asylum seekers who have satisfied health and criminal check, but who are yet to have their claims processed, are to be released into the community. Community alternatives are cheaper and provide better opportunities to access services, education and employment. This would also improve opportunities for asylum seekers to be immersed within Australian culture. Alternatives include:**
 - **Community Parole – Parole systems are currently in operation in all states and territories and can be easily replicated. Under a community parole system community organisations, families or individuals will be able to volunteer to house asylum seekers whilst their claims are processed. This may include relatives of the asylum seeker who**

²⁹Conference of Leaders of Religious Institutes, ‘Policy Proposal for adjustments to Australia’s Asylum seeking process’, June 2001, Section 2.4.

³⁰UNHCR, Convention and Protocol relating to the status of refugees, August 1996.

already have residency in Australia. These organisations or individuals will have responsibility to ensure that asylum seekers report regularly to DIMIA officials, attend official appointments and hearings, and do not travel outside proscribed boundaries without permission (eg state, city, town). A parole system could incorporate a notion of bail where asylum seekers had the financial resources to make this practical. This would be appropriate for those not considered to be a flight risk.³²

- **Home detention** – Home detention is currently in operation in NSW, Qld, WA, SA and the NT. This would involve more intensive monitoring of asylum seekers, both through personal contact and electronic surveillance. Asylum seekers would need to coordinate excursions from their residence with a case worker. Monitoring can be adjusted to account for an individual’s flight risk.³³
- **Transitional Housing** – Transitional houses have been developed by the NSW Department of Correctional Services for criminal offenders. This involves creating a secure premise with appropriate monitoring systems that can house people of various flight-risks.³⁴

Alternative	Cost ³⁵	Possible Additional Costs
Community Parole	\$5.39	Living allowance. Financial assistance to organisations or individuals housing asylum seekers. Other transitional services.
Home Detention	\$58.83	Living allowance. Housing costs may be met by community organisations/individuals. Other transitional services.
Transitional Housing	\$95.89	Living allowance. Housing costs already included. Other transitional services.
Detention	\$120	It is unclear if this incorporates additional security costs associated with unrest.

Additional Costs	Cost ³⁶	Note

³²Based on information from CLRI, ‘Policy Proposal for adjustments to Australia’s Asylum seeking process’, June 2001, Section 3.

³³Based on information from CLRI, ‘Policy Proposal for adjustments to Australia’s Asylum seeking process’, June 2001, Section 3. However, these figures are only indicative and any alternative proposal will have to be independently costed.

³⁴Cost of each program is based on the cost of running the program to the NSW Department of Correctional Services as detailed by NSW Parliament Select Committee Report on the Increase in Prison Population. Quoted in CLRI, ‘Policy Proposal for adjustments to Australia’s Asylum seeking process’, June 2001, Section 3.1.22. Community Parole involves organisations or individuals taking responsibility for asylum seekers, possibly financially. Additional costs depend on the extent to which living costs are met by the Government or by those supporting asylum seekers.

³⁵Taken from Naomi Edwards, ‘Financial Analysis of Detention Centre Costs’ <http://www.users.bigpond.com/burnside/costs.htm>, January 2002.

Living Allowance	\$36	This includes money for housing.
Administrative cost	\$27	This relates to DIMIA's administration of the system and is unlikely to apply for Home Detention of Transitional Housing.

- **No unaccompanied minor to be held in detention. All unaccompanied minors to be automatically placed in foster or emergency accommodation with attention given to counseling, cultural, religious and ethic needs.**
- **Detention centres to be located in more populated centres and greater access granted to all members of the public, except where the privacy of detainees may be compromised.**
- **The end of the tendering process for managing detention centres with all detention centres to revert to public control and management.**
- **Centres to be divided into different sections so that children and families are separated from other asylum seekers in accordance with UNHCR Guidelines.³⁷**
- **The initial screening of all asylum-seekers at the beginning of detention to identify trauma and torture victims for treatment in accordance with UNHCR Guidelines.³⁸**
- **Children who are in detention to be offered mainstream education as soon as possible in accordance with UNHCR Guidelines.³⁹**

Processing

Recent legislative changes to the processing of asylum seekers have dramatically limited the right of appeal and given increased discretionary powers to the Minister. However, processing times have continued to remain unacceptably lengthy.

Issues:

- Length of processing leaves asylum seekers 'in limbo', unable to get on with their lives.
- Asylum seekers are often unable to access adequate legal representation, or do not have the skills to properly negotiate the legal system.
- Legislation has been introduced that dramatically limits asylum seekers' right to appeal their decision. Appeals can not consider the merits of the case, but only possible errors in law, and class actions have been disallowed.⁴⁰

³⁷Office of the UNHCR, 'UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers', February 1999, Guideline 10.

³⁸Office of the UNHCR, 'UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers', February 1999, Guideline 6.

³⁹Restrictions have been introduced through Migration Legislation Amendment (Judicial Review) Act 1998 and Migration Legislation Amendment Act (No.1) 2001, US Committee for Refugees, 'Sea Change: Australia's New Approach to Asylum Seekers', February 2002, p.37; DIMA, 'Refugee and Humanitarian Issues: Australia's Response', October 2001, p.24.

Alternatives:

- **Restore Christmas Island to Australia’s immigration zone**
- **Establish processing centre on Christmas Island for initial processing of asylum seekers.**
- **Transfer resources currently directed towards detention centres and the Pacific Solution to speed up processing.⁴¹**
- **Claims for asylum to be classified according to one of the following;**
 - **i) claims for asylum definitely recognised: asylum seekers released immediately into the community on Protection Visa.**
 - **ii) claims for asylum are obviously baseless, asylum rejected: asylum seekers to be held in detention until deportation can be arranged.**
 - **iii) claims for asylum are not immediately verifiable, asylum seekers released into the community whilst claims are further processed unless it can be shown that there is a potential threat to the community in which case detention will apply.**
- **Reevaluate the powers of the Minister and the right of appeal granted to asylum seekers to ensure they are consistent with the doctrine of the separation of powers and due process. Ensure that asylum seekers can appeal on the basis that there has been an error in establishing the facts of the case, not only in relation to errors in law.**

Pacific Solution

Following the Tampa crisis the Government has denied access to any asylum seeker traveling by boat to Australia. Instead these people have been intercepted by the Royal Australian Navy and taken to Pacific Islands where their claims for refugee status are processed by the UNHCR.

Issues:

- As a result of the Pacific Solution the cost of processing asylum seekers is currently estimated at \$482 million this financial year. This is more than double the previous Budget estimate (provided in May) of \$232 million. This has raised concerns within the Federal Parliament that the Pacific Solution is unsustainable in the long term.⁴²
- Concerns have been expressed by Oxfam Community Aid Abroad that Australia has inappropriately used its aid budget to achieve expedient political objectives, placing the overall program’s legitimacy in doubt. The Pacific Solution has seen Nauru receive \$30 million and Papua New Guinea receive \$1 million and “technical and other assistance” to aid the PNG Government address its own ‘illegal’ movement of people. AusAID officials have also admitted pushing through a \$34 million aid package to PNG in just two-weeks during the 2001 election campaign, raising doubts as to whether the aid was part of the deal to house asylum seekers in PNG.⁴³ In addition the Australian Government has paid for the construction and operation of all detention centres in Pacific nations. Over \$100 million has already been allocated to establishing and maintaining processing facilities. This is expected to rise as more

⁴¹Metherell & Clennell, ‘Pacific solution ‘worth it’ at twice the price’, Sydney Morning Herald, February 14, 2002.

⁴²Papua New Guinea Post-Courier Online, ‘\$A34m Aust aid to PNG was rushed – Labor MP’, <http://www.postcourier.com.pg/20020222/news03>, 2002.

asylum seekers are relocated to these camps. In the case of Nauru this represents a significant proportion of GDP and almost 10 times the aid planned for in the Budget.⁴⁴

- Serious concerns have been raised over the Australian Government's attempts to curtail access to asylum seekers in detention. There have been protests from the International Federation of Journalists, the Australian Journalists' Union and the editors of *The Age* and *The Sydney Morning Herald* amongst others, and concerns have been raised by the UNHCR, over the restrictions placed on the media. Journalists are not allowed to speak to detainees face-to-face. Guards frequently hang hessian over the fence of detention centres such as Woomera to obscure the view. After a volleyball game was organised for asylum seekers housed in Nauru, to which the media were invited, the Australian Government expressed its displeasure. Nauru has since denied media access to the asylum seekers, a policy also implemented in PNG. During the recent Woomera crisis the media were forced to move a kilometer back from the centre resulting in the arrest of an ABC journalist. These restrictions have since been claimed to be more stringent than those applying to media access to 'Camp X-ray' in Guantanamo Bay, Cuba. This level of secrecy has serious implications for Australian democracy and runs counter to the UNHCR's international media policy.⁴⁵
- Concerns have been raised over the use of naval resources to prevent the arrival of asylum seekers to Australian, as part of 'Border Protection'. This has led to reported tension within the Australian Defence Forces (ADF) with contradictory positions held by senior officers over events leading up to the election. Former senior ADF officers have criticised the Government's "politicisation" of the ADF.⁴⁶
- The current arrangements do not solve the problem of where those found to be genuine refugees are eventually housed.
- Australia's has shifted its own humanitarian responsibilities to other countries (such as New Zealand) who have agreed to accept asylum seekers from the Pacific Solution.
- Australia was involved in establishing and funding the processing centre in Jakarta. Yet Australia has refused to accept refugees from Jakarta believing that this would encourage more asylum seekers to come through Indonesia to Australia. In a burden sharing agreement Australia has since agreed to take some processed refugees, although to date it has accepted only one.⁴⁷ 30 refugees who recently drowned off the coast of Indonesia had previously been accepted as refugees by the UNHCR but had not been accepted by any third country for resettlement.⁴⁸

⁴⁴Oxfam Community Aid Abroad, *Adrift in the Pacific: The implications of Australia's Pacific Refugee Solution*, February 2002, pp.9-11.

⁴⁵Sydney Morning Herald, 'Nobody mention the war, the captives or the asylum seekers', January 29, 2002; Sydney Morning Herald, 'A tale of two jails: Woomera and Camp X-Ray', January 29, 2002; Hudson, 'Media united in outrage over Woomera arrest, restrictions', *The Age*, January 29, 2002; UNHCR, 'International journalists' group criticizes Australia over media restrictions at asylum centre', World News page, UNCHR web site, January 29, 2002, <http://www.unchr.ch>; ABC radio, 'Detention centre crisis continues', AM program, January 28, 2002.

⁴⁶Secombe, 'Houston, we have a problem: you're too truthful', *Sydney Morning Herald*, February 22, 2002; ABC Radio, 'Government accused of politicising the Navy', PM program, February 14, 2002.

⁴⁷US Committee for Refugees, 'Sea Change: Australia's New Approach to Asylum Seekers', February 2002, pp.14-5.

⁴⁸UNCHR, 'Refugees desperate as anti-terrorism measures, politics block way to Australia', World News page, UNCHR web site, October 27, 2001, <http://www.unchr.ch>;

- The Pacific Solution has caused criticism from other leaders in the region, church leaders and non-government organisations for being “big brother” and breaching the “dignity” of smaller island states.⁴⁹
- Health concerns have been raised over the conditions on Pacific Islands, particularly Manus Island in PNG where it alleged there has been a severe outbreak of malaria.⁵⁰

Alternatives:

- **End Pacific Solution and enter into multilateral negotiations not only with Indonesia, but also with source countries such as Afghanistan and resettlement countries in the developed world. Recognise that a solution to people-smuggling must address unauthorised migration more generally and address the overwhelming problem of refugees. Any agreement is likely to include a commitment by Australia to:**
 - **Increase funding to countries of first asylum, the UNCHR, countries of transit and countries in crises to enable these countries and organisations to provide refuge as close to the asylum seekers home country as possible.**
 - **Increase the number of refugees Australia and other developed nations accept through the resettlement program. Most countries receive the majority of their refugees as unauthorised arrivals due to their direct land access to destabilised regions.⁵¹ Therefore, it must be recognised that countries like Australia, which are protected by natural barriers, must accept a greater responsibility for offering resettlement places.**
 - **Accept a greater number of refugees from processing centres in our region, particularly Indonesia. This would also give asylum seekers an incentive to seek out UNHCR assistance at an earlier point in their journey.⁵²**
 - **Make a commitment to process all claims for asylum and grant protection to any asylum seeker making valid claims for refugee status in accord with the letter and intent of Article 31 of the 1951 Refugee Convention. This must include processing the claims of those intercepted on route to Australia in Australian jurisdiction.**
 - **Facilitate voluntary repatriation of refugees living in Australia where conditions in the home country have improved. This is in keeping with UNHCR standards that emphasise the right of refugees to return to their home countries once the threat to their safety has been removed. No refugee should be forced or pressured to leave the country.**
 - **Rescind amendments to the Migration Act that remove parts of Australia from the Migration Zone.**
- **Allegations have been made that people-smugglers known to both the Australian and Indonesian authorities have been able to continue operating due to a lack of legislation**

⁴⁹Oxfam Community Aid Abroad, Adrift in the Pacific: The implications of Australia’s Pacific Refugee Solution, February 2002, p.7.

⁵⁰Pacific Island News Association, ‘Moves to close Manus Island asylum seeker center’, February 13 2002, <http://pidp.eastwestcenter.org/pireport/2002/February/02-13-02.htm>.

⁵¹Despite increased numbers in recent years the ratio of refugees and asylum seekers in the Australian population is only 1:1,130, compared with 1:572 in the US, 1:117 in Switzerland and 1:456 in Germany. The greatest numbers of asylum seekers are in the developing world. Tanzania hosted over 500,000 in 2000, while Pakistan hosted about 2 million prior to September 11, 2001. US Committee for Refugees, ‘Sea Change: Australia’s New Approach to Asylum Seekers’, February 2002, p.9.

⁵²P. Mares ‘A Humane Alternative’, The Age, November 14, 2001.

prohibiting people smuggling outside Australia.⁵³ In order to overcome this it is necessary to assist Indonesia and other countries in the region to develop a cooperative legal framework to enable the identification, arrest and prosecution of suspected people smugglers. The financial burden of any such initiative should be borne by Australia.

Structure of Humanitarian Program

The humanitarian program is divided into two sections, an onshore component which provides for those who apply once they are in Australia (both those who arrived on a valid visa and those who arrived in an unauthorised manner); and an offshore component. The offshore component is divided into a refuge section (4,000 places) for those identified as refugees by the UNHCR in other countries, and a special humanitarian classification for those deemed by Australia to be in special need, although not necessarily refugees. The special humanitarian program and the onshore program are linked so that combined they amount to the remaining 8,000 places within the total quota of 12,000 places.⁵⁴

Issues:

- The off shore program has given 50% of places to those from one country - Yugoslavia, suggesting that not all refugees have equal access to the program.⁵⁵
- Australia has consistently failed to fill its 12,000 humanitarian places.⁵⁶
- The distribution of off shore grants between regions is made at the discretion of the Minister⁵⁷ and therefore may not reflect the changing needs of refugees.
- The total number of refugees taken has remained static for a decade, and in fact decreased since the early 1980s, despite increasing numbers of refugees world-wide. While Australia claims that it takes the second highest number of refugees per capita in the world, this figure is deceptive because it relates solely to the offshore program. When Australia's total refugee intake is compared to other OECD countries we rank 14th out of 29.⁵⁸
- On shore applicants are granted protection at the expense of those in the special humanitarian program, pitting the interests of different groups against each other.⁵⁹
- People given entry through the special humanitarian program are not, according to the Government's own criteria, refugees, although they may be deserving of humanitarian assistance. As onshore applicants take the places of those under the Special Humanitarian program it is also misleading to suggest that they take the place of the "most needy refugees".⁶⁰

⁵³Clennell, 'Failure to act on smuggler blamed for 350 boat deaths', Sydney Morning Herald, February 25, 2002.

⁵⁴Department of Immigration and Multicultural Affairs (DIMA), 'Refugee and Humanitarian Issues: Australia's Response', October 2001.

⁵⁵Refugee and Immigration Legal Centre, 'Submission Concerning Article 31 of the Refugee Convention – "Non-Penalisation, Detention and Protection"', Submission to the UNHCR, 2001.

⁵⁶DIMIA web site, 'Australian Immigration Statistics', <http://www.immi.gov.au/statistics/refugee.htm>.

⁵⁷DIMA, 'Refugee and Humanitarian Issues: Australia's Response', October 2001, p.14.

⁵⁸MacCallum, 'Generous to Genuine Refugees? Not Quite', The Age, October 3, 2001.

⁵⁹DIMA, 'Refugee and Humanitarian Issues: Australia's Response', October 2001, p.15; RILC, 'Submission Concerning Article 31 of the Refugee Convention – "Non-Penalisation, Detention and Protection"', Submission to the UNHCR, 2001.

⁶⁰RILC, 'Submission Concerning Article 31 of the Refugee Convention – "Non-Penalisation, Detention and Protection"', Submission to the UNHCR, 2001.

Alternatives:

- **Restructure the off shore program to ensure that all places are filled by refugees identified by the UNHCR as being in most need.**
- **Enter multilateral negotiations to ensure that the international resettlement program works as effectively as possible.**
- **De-couple the onshore and offshore programs so that onshore refugees are not granted visas at the expense of those coming through the special humanitarian program from overseas.**
- **Make clear the qualifications necessary to enter the special humanitarian program, ensuring that all places in the off shore humanitarian program go to those in most need and that refugees currently resident in Australia have the opportunity to have relatives join them in Australia through the family reunion program.**
- Re-evaluate the total number of refugee places. Consider making the quota flexible so that it can be increased in times of humanitarian crisis (such as the recent crisis in Afghanistan).

Population and Migration Policy

Issues:

- Australia does not have a comprehensive population policy.
- The Migration Act, which regulates both the mainstream and humanitarian migration programs, has not been substantially reviewed since its introduction in 1958, before the end of the *White Australia* Policy.
- There has been little or no consideration of how the humanitarian program fits into a broader framework of migration.

Alternatives

- **Undertake a review of Australia's population policy through a consultative community process. Any such policy must take account of Australia's economic, ecological and social needs as well as the rapidly growing numbers of displaced people around the world. Such a policy would not necessarily set a numerical target but would seek to balance demographic and skills backgrounds of the population.**
- **Undertake a review of the Migration Act to ensure that it complies with the spirit of Australia's multicultural policies and with all UN Standards and Conventions.**
- **A population policy should take account of our responsibilities to the region and acknowledge the value of all people, from all backgrounds and ages.**

Other Recommendations to be Considered

- **Implement all outstanding recommendations from the Human Rights and Equal Opportunity Commission report, *Those Who Come Across the Sea*, 1998.**
- **Implement all outstanding recommendations from the Queensland Government report, *Temporary Protection Visa Holders in Queensland*, 2001.**
- **Implement all outstanding recommendations from the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Report on Visits to Immigration Detention Centres*, 2001.**
- **Implement all outstanding recommendations from the U.S. Committee for Refugees, *Sea Change: Australia's New Approach to Asylum Seekers*, 2002.**

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Appendix 1:

Visa Classifications.

APPLICANT	EXAMPLE OF TYPE OF APPLICANT	VISA	DETENTION	LONG TERM STATUS	CHANGES SINCE 2001 LEGISLATION
1. Individuals who apply from home country or from country of first asylum	Individual from Afghanistan who is applying from Iran	Protection Visa	No	Protection Visa (permanent residence, work rights, social security benefits)	None
2. Individuals who originally entered Australia with valid visas and then applied in Australia	Individual from Afghanistan who came to Australia on a student visa before the Afghanistan issue and then applied	Protection Visa	No if individual applied when first visa was still valid Yes if individual applied after visa had expired	Protection Visa (permanent residence, work rights, social security benefits)	None
3. Individuals who have not entered Australia and apply outside of home country and outside of country of first asylum	Individual from Afghanistan who got to Indonesia and applied at UN camp	Temporary Protection Visa (451)- 5 years	UN Camps- eg. Indonesian processing centre	Protection Visa (permanent residence, work rights, social security benefits) after 4 and half years if protection is still needed	Used to be classified as Applicant 2 except Applicant 2 Detention not applicable
4. Individuals who apply in Australia but apply from outside of the migration zone (offshore) and have spent 7 days in a country where they could have sought asylum	Individual who was intercepted as part of the Pacific Solution on a boat from Indonesia	Temporary Protection Visa (447)- 3 years	Yes- as part of the Pacific Solution, detained off shore	Series of 3 year Temporary Protection Visa	Used to be classified as Applicant 5
5. Unauthorized individuals who apply within Australian migration zone (onshore) but have spent less than 7 days in a country where they could have sought protection	Individual who has come straight to Australia from Afghanistan	Temporary Protection Visa (785)	Yes	Can apply for Protection Visa (permanent residence, work rights, social security benefits) after 30 months	None
6. Unauthorized individuals who apply in Australia (onshore) but	Individual from Afghanistan who has come to Australia	Temporary Protection	Yes	Rolling Temporary Protection Visa	Used to be classified as Applicant 5

has spent 7 days or more in a country where they could have applied for asylum	from Indonesia by plane	Visa (785)			
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2.1. Comparison of entitlements for refugees

Refugees with permanent protection visas (PPV) are entitled to a suite of specialist settlement support from Commonwealth funded service providers and are eligible for all the benefits and entitlements that accrue to permanent residents. The following table compares the entitlements of refugees with TPVs and refugees with permanent residency.

%	Usual Entitlements of Refugees	Entitlements of Refugees with TPVs
Employment	Access to all employment assistance programs	Not eligible except for most basic services (eg touch screen job matching)
English Language Tuition	Free tuition under the Adult Migrant English Program, eligible for Advanced English for Migrants Program	Not eligible
Family Reunion	Eligible to apply to sponsor family members	Not eligible
Income Support	Eligible to apply for full range of social security benefits	Eligible for restricted entitlements – Special Benefit (paid at Newstart rates but subject to a more stringent income test). Rent Assistance, Maternity and Family Allowance, Family Tax Payment.
Health Assessment	Eligible	Eligible
Medicare	Eligible	Eligible
Residency	Granted Permanent Residency on determination of refugee status	Granted Temporary Visa, may apply for Permanent Residency after 30 months
Settlement Services	Eligible for assistance with orientation, accommodation, household formation etc Eligible for assistance from Migrant Resource Centre	Not eligible Not eligible
Tertiary Education	Eligible for HECS	Must pay full up-front fees
Torture & Trauma Counselling	Eligible	Eligible
Travel	May return if they travel overseas	No right to return
Working Rights	Right to work	Right to work

Community organisations funded by the Commonwealth to provide specialist support and assistance to migrants and refugees have been instructed by the Department of Immigration and Multicultural Affairs not to supply services to TPV entrants. The community organisations have no choice but to refer to any requests for assistance from TPV entrants to relevant State Government services and other community agencies.

Appendix 3: Sweden

Upon arrival in Sweden, an asylum seeker is taken to Carlslun Refugee Reception Centre, near Arlanda International Airport on the outskirts of Stockholm. There are no barbed wire fences, only special locks and alarms. Within the centre there is a medical service, family and individual accommodation, a group home for unaccompanied minors, offices for the Migration Board, and Carlslun Detention Centre. Those individuals being held at Carlslun Detention Centre have restricted access to only the inner part of the building.

There is a small yard for soccer and volleyball. There are game areas, mess hall, computer and TV rooms, bathrooms, laundry and a library. The kitchen is locked but access is granted on an individual basis. There are interview rooms, a nurse's room and a gym, which be may be used under supervision.

The rooms at the centre consist of a number of beds, a chest of drawers, a window and a tape player/radio. Each individual sharing the room has their own key to the room. Rooms for women and families also have bathrooms.

The reception area is open to asylum seekers and visitors, with two visiting rooms. Visiting hours are from 9 am until 4 pm with normal visits at a maximum of one hour per visit. Longer visits are granted for visiting children or if the asylum seeker is to be deported.

NGO's, their representatives, and the media have regular access to all areas of the centre. Detainees are permitted to speak to the media at their own decision.

There are no security guards, only a system of caseworkers who carry walkie-talkies and alarms at all times. There are periodic room searches and in some cases a body search is used but only with the completion of a consent form.

Upon first arrival at the centre, one of these caseworkers is immediately assigned to each asylum seeker. This caseworker explains the refugee determination process and an asylum seeker's rights during the time they awaiting a decision. The caseworker also ensures that asylum applications are processed correctly and that legal representation and interpreters are provided if necessary.

All asylum seekers who arrive without documentation are detained until their identity has been investigated. This can take up to two months. However, those who do not require increased supervision are not held in strict detention (such as centres here in Australia). Consequently, families, single women and unaccompanied youths are signed into Carlsun and subsequently released into the Regional refugee centres after two weeks or less.

Children under 18 years of age are only permitted to be held in detention for a maximum of 3 days. In extreme cases, this can be extended to 6 days. For the entire year of 1999, no children were held in detention for more than 4 days.

If there are questionable aspects to an asylum seeker's identity, such as past criminal behavior, particularly in instances where national security is a threat, maximum detention is 6 months.

If a family's identity cannot be ascertained or there is a question as to a threat to national security, one parent is held in detention, while the other parent and the children are released into a group home. There is access to regular visitation and telephone contact. These cases are given first priority so as to ensure family solidarity.

All detainees are aware of their rights while in detention and they are also aware of the length of time they will be held. There is opportunity to appeal the decision to be detained. The average stay in a detention centre is 47 days.

Only detainees who pose a physical threat to other detainees or staff can be placed in solitary confinement and that must be by the decision of the police. It should be noted that solitary confinement has never been used at Carlslun detention centre but law permits it for extreme cases.

If at any point in the process, it is determined that an individual has arrived on false documents, he or she may be detained again at the Carlslun Detention Centre. After consultations with their caseworker, the individual will either be detained or will be required to report to the authorities one to three times per week.

After two weeks or as soon as the initial application is completed, and health and support needs are assessed, the asylum seeker is moved from Carlslun Refugee Reception Centre to one of Sweden's regional refugee centres. These regional centres are a group of flats and apartments in small communities close to a central office reception. All residents of the centres are free to move around the community with minimal supervision. In group homes, everyone is involved in food preparation and there are regular group meetings to decide on all issues. There is access to childcare and recreational activities.

Seekers living in the centre are required to visit the reception office caseworkers at least monthly to receive allowance, news on their application, and monthly need and risk assessments. Counseling and referral for medical care is also provided by caseworkers at the reception office. Emergency medical, dental procedure and prescriptions are provided to asylum seekers for approximately AUS\$10, and all asylum seeker children are provided with the same medical coverage as Swedish children.

All asylum seekers are issued general identity cards while their applications are being processed; the identity card affords limited access to housing, work, study and services. If the caseworker assesses that a seeker's application will take more than four months to process, the applicant is entitled to work. If they have enough money to provide their own housing, they must do so, but seekers are offered free housing until that time.

(extracts from Grant Mitchell, "Asylum Seekers in Sweden : An Integrated Approach to reception, detention, determination, integration and return", Asylum Seeker Project, Hotham Mission, Melbourne 2001)

NB: The Government has suggested that Sweden is not an appropriate international comparison for the following reasons:

"The Swedish approach relies heavily on the identity card system. It is virtually impossible to gain lawful employment or to access education, health and other services without a card.

All asylum seekers released into the community are issued with identity cards which enable the Swedish Government to minimise the risk of absconding."

- DIMA web site 'Unauthorised arrivals and detention – Information paper', October, 2001.

However, this neglects the fact that Australia has similar systems, such as the Medicare card and photo licences, to access services, although these are not as comprehensive as an identity card. Further, Australia already allows most asylum seekers to live in the community whilst their claims are processed. These asylum seekers, who made a claim having arrived on valid papers, are significantly less likely on average to be accepted. Therefore, any flight risk would surely be higher in the case of those not subject to mandatory detention than to those who are suggesting that the real reason for enforcing detention is not a fear of flight per se. See report for details.

Appendix 4:
Summary of Unauthorised Boat Arrivals 1989-90 – 2000-01.

Arrivals 13,489
 Australian births 109
Total boat people 13,598

Year	Number of boats	Total arrivals	Min/max on board
1989-90	3	224	26/119
1990-91	5	158	3/77
1991-92	3	78	10/56
1992-93	4	194	2/113
1993-94	6	194	4/58
1994-95	21	1071	5/118
1995-96	14	589	4/86
1996-97	13	365	4/139
1997-98	13	157	3/30
1998-99	42	920	2/112
1999-00	75	4175	3/353
2000-01	54	4141	2/231
01-to-date	6	1212	60/359
Totals	261	13,489	2/359

- DIMIA web site, 'Summary of unauthorised boat arrivals', http://www.immi.gov.au/facts/74unauthorised_summary.htm