

# DO ON-SHORE ASYLUM SEEKERS HAVE ECONOMIC AND SOCIAL RIGHTS? DEALING WITH THE MORAL CONTRADICTION OF LIBERAL DEMOCRACY

SAVITRI TAYLOR\*

*[Australia has restricted on-shore asylum seekers' access to work entitlements and publicly funded social assistance, leading to a marked erosion in their standard of living. It is argued in this article that Australia's actions place it in breach of its obligations under the International Covenant on Economic, Social and Cultural Rights ('ICESCR'). It is further argued that this situation has arisen because two competing moralities are embedded in the political traditions of liberal democratic states, leaving such states with no ready answer to the question of how they should treat non-members. Finally, the article puts the case for Australia choosing the morality to which the ICESCR gives legal expression and specifies exactly what that would involve in practical terms.]*

## CONTENTS

- I Introduction
- II Australian Practice
  - A The Protection Visa Application Determination System
  - B Treatment of Non-Detained Asylum Seekers
    - 1 Work Rights
    - 2 Asylum Seeker Assistance Scheme
    - 3 Medicare
    - 4 Other Sources of Social Assistance
      - (a) Victoria
      - (b) New South Wales and Queensland
    - 5 The Bottom Line
- III Australia's Obligation under the *International Covenant on Economic, Social and Cultural Rights*
  - A The Moral Basis of Human Rights Law
  - B The Nature of ICESCR Obligations
  - C Non-Discrimination
  - D The Right to an Adequate Standard of Living
  - E Australian Practice Evaluated
- IV Why Do We Do What We Do?
  - A Models of Democracy
  - B The Significance of Economic and Social Rights
  - C The Rights of Non-Citizens
- V Where Should We Go from Here?

---

\* LLB (Hons), BCom, PhD (Melbourne); Lecturer, School of Law and Legal Studies, La Trobe University.

## I INTRODUCTION

Every year Australia has to deal with thousands of non-citizens who arrive either on a temporary visa or without authorisation and then invoke treaty-based protection obligations (ie seek asylum).<sup>1</sup> Almost all of the asylum seekers who are unauthorised arrivals (about 11 per cent of the total)<sup>2</sup> are subject to mandatory detention until removed from Australia, deported or granted a substantive visa. However, other asylum seekers (the remaining 89 per cent) are usually granted 'bridging visas' and allowed to remain at liberty in the Australian community pending determination of their claims.<sup>3</sup>

This article examines the work entitlements and social assistance available to non-detained or on-shore asylum seekers in Australia, and demonstrates that Australia is in breach of its obligations under the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR')<sup>4</sup> in relation to these asylum seekers. It proceeds to explain, in terms of the political morality of liberal democratic states, why this situation has arisen. Furthermore, it puts the case for Australia respecting and protecting the ICESCR rights of asylum seekers, and specifies exactly what such respect and protection would involve in practical terms.

## II AUSTRALIAN PRACTICE

A *The Protection Visa Application Determination System*

At present Australia purports to give effect to its treaty-based protection obligations primarily through the mechanism of the protection visa. Protection visa decisions are made by officers of the Department of Immigration and Multicultural Affairs ('DIMA') in the first instance, subject to merits review by the Refugee Review Tribunal ('RRT') and judicial review by the courts.<sup>5</sup>

---

<sup>1</sup> 8257 new protection visa applications were made in 1998-99 (most recent figure available at time of writing): Department of Immigration and Multicultural Affairs, Annual Report 1998-99, Program 3: Refugee and Humanitarian, 20 October 1999 <[http://www.immi.gov.au/annual\\_report/annrep99/html/prog3\\_2a.htm](http://www.immi.gov.au/annual_report/annrep99/html/prog3_2a.htm)> at 13 December 2000.

<sup>2</sup> Immigration detainees accounted for 918 of the new protection visa applications made in 1998-99 (most recent figure available at time of writing): DIMA, 'Fact Sheet 70: Immigration Advice and Application Assistance Scheme', (2000) <<http://www.immi.gov.au/facts/70iaas.htm>> at 7 December 2000.

<sup>3</sup> The *Migration Act 1958* (Cth) provides that an 'unlawful non-citizen' (ie a non-citizen who is present in Australia without a current visa) must be kept in 'immigration detention' until removed from Australia, deported or granted a visa: ss 189 and 196(1). The visa granted need not be a substantive visa. It can be a bridging visa. The criteria for granting bridging visas are specified so that most unauthorised arrivals cannot meet them, but most other non-citizens can.

<sup>4</sup> Opened for signature 19 December 1966, 993 UNTS 3, 6 ILM 360 (entered into force generally 3 January 1976; entered into force for Australia 10 March 1976).

<sup>5</sup> Judicial review of RRT decisions is available from the Federal Court under the *Migration Act 1958* (Cth) pt 8. 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: *Australian Constitution* s 75(v).

A non-citizen who holds a substantive visa at the time of making a protection visa application is granted a 'Bridging Visa A' upon the expiration of the former, thus enabling him or her to remain at liberty in the community during the primary and RRT stages of protection visa application processing.<sup>6</sup> A further 'Bridging Visa A' is granted to cover any period of judicial review.<sup>7</sup> A 'visa overstayer'<sup>8</sup> who applies for a protection visa is normally granted a 'Bridging Visa C' or 'Bridging Visa E subclass 050' to cover the primary and RRT stages of protection visa application processing, as well as a further bridging visa of the same class to cover any period of judicial review.<sup>9</sup>

In order to be granted a protection visa at the primary or RRT stage, an applicant must be a 'refugee' to whom Australia owes protection obligations under the *Convention Relating to the Status of Refugees* ('*Refugees Convention*').<sup>10</sup> However, a protection visa applicant who does not meet this criterion is able, upon receiving an unfavourable decision from the RRT, to request exercise of the Minister for Immigration's non-compellable power under s 417 of the *Migration Act 1958* (Cth) to substitute for the decision of the RRT another more favourable decision. The Minister is able, inter alia, to use this power to grant a protection visa to a non-citizen to whom Australia owes a protection obligation under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>11</sup> or the *International Covenant on Civil and Political Rights* ('*ICCPR*'),<sup>12</sup> though not the *Refugees Convention*.<sup>13</sup>

A non-citizen seeking the Minister's intervention is granted a 'Bridging Visa E subclass 050' to cover the period (not covered by any other bridging visa):

---

<sup>6</sup> *Migration Regulations 1994* (Cth) sch 2 pt 010.

<sup>7</sup> *Migration Regulations 1994* (Cth) sch 2 cl 010.211(3)

<sup>8</sup> This is the term commonly used to describe a non-citizen who has remained in Australia after the expiration of a temporary visa.

<sup>9</sup> *Migration Regulations 1994* (Cth) sch 2 pts 030 and 050. *Migration Regulations 1994* (Cth) reg 2.20(7)–(11) renders those unauthorised arrivals, who make protection visa applications after detection and detention by DIMA, eligible for the grant of a 'Bridging Visa E subclass 051'. Because of the small numbers involved, the position of unauthorised arrivals released into the community will not be discussed.

<sup>10</sup> *Migration Act 1958* (Cth) s 36(2); *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, ATS 1954 No 5 (entered into force 22 April 1954). The *Refugees Convention* was amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267, 6 ILM 78 (entered into force 4 October 1967) ('*Refugees Protocol*').

<sup>11</sup> Opened for signature 10 December 1984, 1465 UNTS 85, 23 ILM 1027 (entered into force generally 26 June 1987; entered into force for Australia 7 September 1989).

<sup>12</sup> Opened for signature 16 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force generally 23 March 1976; entered into force for Australia 13 November 1980).

<sup>13</sup> Philip Ruddock, Commonwealth of Australia, *Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where It May Be in the Public Interest to Substitute a More Favourable Decision under Section 345, 351, 391, 417 or 454 of the Migration Act 1956* (Cth), MSI-225 (4 May 1999). The Guidelines are attached as appendix 9 to Commonwealth, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, Senate Legal and Constitutional References Committee (2000).

- (a) during which his or her protection visa application is being assessed by an officer against the Minister's guidelines for s 417 intervention (provided it is the first time such intervention has been sought in the case); or
- (b) during which the Minister is personally considering whether to exercise, or to consider the exercise of, the s 417 power.<sup>14</sup>

## B Treatment of Non-Detained Asylum Seekers

### 1 Work Rights

A non-detained protection visa applicant cannot work if his or her bridging visa is subject to a 'no work' condition. Prior to the amendment of the *Migration Regulations 1994* (Cth) ('*Migration Regulations*') in 1997, the rules governing the attachment of a 'no work' condition were as follows: a protection visa applicant eligible for the grant of a 'Bridging Visa A' was automatically granted one that was not subject to a 'no work' condition, and a protection visa applicant eligible for the grant of a 'Bridging Visa C' or 'Bridging Visa E subclass 050' could be granted one free of a 'no work' condition if he or she showed a compelling need to work.

In 1997 the *Migration Regulations* were amended to provide as follows:<sup>15</sup> a 'Bridging Visa A' granted to a protection visa applicant must have a 'no work' condition attached, unless the protection visa application was made within 45 days of entering Australia *or* the applicant has been waiting more than six months for a primary decision on a protection visa application made outside the 45 day period;<sup>16</sup> a 'Bridging Visa C' or 'Bridging Visa E subclass 050' granted to a protection visa applicant must have a 'no work' condition attached, unless the protection visa application was made within 45 days of entering Australia<sup>17</sup> *and* the applicant has a compelling need to work.<sup>18</sup>

The Minister for Immigration is able, by notice in the *Commonwealth of Australia Gazette*, to declare that members of a particular group are exempted from the 45 day cut-off.<sup>19</sup> This mechanism was supposedly put in place to deal with cases in which a protection visa application is based on a significant change of circumstance in the applicant's country of origin, that change having occurred

---

<sup>14</sup> *Migration Regulations 1994* (Cth) sch 2 cl 050.212(6)(a) and (b).

<sup>15</sup> These provisions apply in relation to persons making applications for protection visas on or after 1 July 1997.

<sup>16</sup> *Migration Regulations 1994* (Cth) sch 2 cl 010.611.

<sup>17</sup> Individuals unable to prove that they have been in Australia less than 45 days before applying for a protection visa are refused work rights: Martin Clutterbuck, 'A Place to Call Home?' (2000) 13(4) *Parity* 16, 17, citing the incident of an asylum seeker from Sierra Leone who arrived in Australia as a ship stowaway.

<sup>18</sup> *Migration Regulations 1994* (Cth) sch 2 cl 030.212(3) and 030.6 ('Bridging Visa C') and cl 050.613A(1) ('Bridging Visa E subclass 050'). A person is considered to have a compelling need to work if he or she is experiencing financial hardship: *Migration Regulations 1994* (Cth) reg 1.08(a).

<sup>19</sup> *Migration Regulations 1994* (Cth) sch 2 cl 010.611(2)(c)(i) ('Bridging visa A'), sch 2 cl 030.212(3)(b)(ii) ('Bridging visa C') and sch 2 cl 050.613A(1)(c) ('Bridging Visa E subclass 050').

after the 45-day period.<sup>20</sup> As at 1 July 2000 the only gazettal which had ever been made was in relation to a very small group of Kosovars.<sup>21</sup> Individuals affected by a significant change in circumstance who are not members of a gazetted group cannot be given permission to work, but do receive priority processing of their protection visa applications at both primary and RRT stages.<sup>22</sup>

A person who seeks judicial review of an RRT determination receives a new bridging visa, of the same class as previously held, to cover the period of judicial review. Grants of 'bridging visas' A and C to cover the period of judicial review are governed by the same rules regarding work permission as apply at the administrative stages. By contrast, a 'Bridging Visa E subclass 050' granted to cover the period of judicial review must have a 'no work' condition attached.<sup>23</sup>

Finally, a 'Bridging Visa E subclass 050' granted for the purpose of enabling a protection visa applicant to remain at liberty in the community pending possible s 417 intervention must have a 'no work' condition attached, unless the protection visa application was made within 45 days of entering Australia (or exemption has been made), the applicant has a compelling need to work *and* 'the Minister is personally considering whether to exercise' the Minister's s 417 power.<sup>24</sup> Since consideration of whether to exercise this power is discretionary, the Minister rarely engages in such consideration.

As a result of the rules outlined above, only 60 per cent of non-detained protection visa applicants have permission to work.<sup>25</sup> Moreover, many of those who do have permission to work experience difficulties in actually finding work, especially if they are in poor health or have poor English language skills.<sup>26</sup> The most that those with work permission can usually obtain is a few hours of work per week for a few weeks at a time, with pay and conditions often exploitative of

<sup>20</sup> DIMA, 'Fact Sheet 42: Assistance for Asylum Seekers in Australia', (2000) <<http://www.immi.gov.au/facts/42assist.htm>> at 7 December 2000 ('DIMA Fact Sheet 42').

<sup>21</sup> This was accomplished by the gazettal under the *Migration Regulations 1994* (Cth) sch 2 cl 030.212(3)(b)(ii) of a group described as former 'temporary safe haven' visa holders, who had been permitted to make protection visa applications under *Migration Act 1958* (Cth) s 91L: Commonwealth of Australia, *Government Gazette*, Special Gazette S 218 (28 April 2000).

<sup>22</sup> DIMA Fact Sheet 42, above n 20; Ministerial Direction 16 of 1999 made under the *Migration Act 1958* (Cth) s 499. The Direction was tabled in both houses of the Federal Parliament pursuant to s 499(3): Commonwealth, *Votes and Proceedings of the House of Representatives*, 21 June 1999, 620: Commonwealth, *Journals of the Senate*, 21 June 1999, 999.

<sup>23</sup> *Migration Regulations 1994* (Cth) sch 2 cl 050.612A. This provision was introduced with effect from 1 July 1998.

<sup>24</sup> *Migration Regulations 1994* (Cth) sch 2 cl 050.612A and 050.613A.

<sup>25</sup> Commonwealth, *Parliamentary Debates: Consideration of Budget Estimates*, Senate Legal and Constitutional Legislation Committee, 2 June 1999, L&C 340 (Evidence of Philippa Goodwin, Acting First Assistant Secretary, Refugees and Humanitarian Division, DIMA).

<sup>26</sup> Sherron Dunbar, 'Refugees and Asylum Seekers: Time to Accept Responsibility' (2000) 13(4) *Parity* 10, 11; Gail Johnston and Elaine Prest, 'Welcome to the Lucky Country?' (2000) 13(4) *Parity* 13, 13. See also submissions made to the Senate Legal and Constitutional References Committee: *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000).

their precarious situation.<sup>27</sup> The result is that there are many non-detained asylum seekers who are unable to support themselves while awaiting final resolution of their protection claims. This could be a period of months or years.<sup>28</sup>

## 2 *Asylum Seeker Assistance Scheme*

An Australian citizen or permanent resident who has inadequate means of support will usually fall within one of the categories of persons entitled to a social security payment under the *Social Security Act 1991* (Cth).<sup>29</sup> If all else fails, an Australian citizen or permanent resident in such circumstances is able to seek exercise of the discretion of the Secretary of the Commonwealth Department of Family and Community Services to make a Centrelink payment known as a 'special benefit' payment.<sup>30</sup> It should be noted also that persons receiving Centrelink payments are usually eligible for a Pensioner Concession Card, a Health Care Card or a Commonwealth Seniors Health Care Card.<sup>31</sup> These concession cards entitle their holders to extra subsidies under the Pharmaceutical Benefits Scheme ('PBS').<sup>32</sup> Of even greater significance, however, is the fact that State, Territory and local governments, and community sector and private sector organisations have chosen to make possession of one of these cards the usual prerequisite for receipt of concessions from them.<sup>33</sup> For example, some of these concession cards entitle the holder to concession fares on public transport.

Until mid-1991, on-shore asylum seekers were eligible for 'special benefit' payments.<sup>34</sup> In mid-1991, however, the *Social Security Act 1991* (Cth) took away

---

<sup>27</sup> Dunbar, above n 26; Johnston and Prest, above n 26; Interview with Gaby Heuft, Joint Co-ordinator, Refugee Claimants Support Centre (telephone interview, 5 July 2000); Sylvia Winton, 'No Dough, No Go!' (2000) 13(4) *Parity* 18, 18.

<sup>28</sup> In 1998–99, 70 per cent of primary decisions in non-detention cases were made within the target time of 90 days from the lodgment of the protection visa application: DIMA, *Annual Report 1998–99*, above n 1. In 1998–99, 78.86 per cent of the RRT's non-detention cases were decided within the target time of 118 days: RRT, *Annual Report 1998–99*, 13 October 2000 <<http://www.rrt.gov.au/anlrpt99.html>> at 7 December 2000. It should be kept in mind that in the remainder of cases, the time taken between application and decision at these administrative stages was probably considerably longer. The average time between application and resolution in Federal Court matters involving review of DIMA decisions was about six months in 1998–99: DIMA, 'Fact Sheet 86: Litigation Involving Migration Decisions', (2000) <<http://www.immi.gov.au/facts/86litig.htm>> at 7 December 2000. The time taken in any particular case might, of course, have been considerably less or considerably more than the average. Finally, persons seeking the Minister's intervention under *Migration Act 1958* (Cth) s 417 usually wait many months for an outcome: Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 1999, 12304 (Andrew Theophanous, Member for Calwell, Independent).

<sup>29</sup> Hereinafter referred to as a 'Centrelink payment'.

<sup>30</sup> *Social Security Act 1991* (Cth) s 729.

<sup>31</sup> Centrelink, 'Concession Cards' (2000) <[http://www.centrelink.gov.au/internet/internet.nsf/payments/conc\\_cards.htm](http://www.centrelink.gov.au/internet/internet.nsf/payments/conc_cards.htm)> at 10 July 2000.

<sup>32</sup> *Ibid.* PBS is explained in Part II(B)(3) below.

<sup>33</sup> *Ibid.*

<sup>34</sup> Nikki Barrowclough, 'Lost in Limbo', *Good Weekend: The Age* (Melbourne), 7 August 1993, 22.

that eligibility.<sup>35</sup> The flow-on effect was the immediate overburdening of various emergency housing and relief agencies.<sup>36</sup> These agencies responded by lobbying for the introduction of new income support arrangements for on-shore asylum seekers.<sup>37</sup>

Since January 1993,<sup>38</sup> there has been in place a DIMA-funded national scheme called the Asylum Seekers Assistance Scheme ('ASAS') administered by the Australian Red Cross.<sup>39</sup> DIMA funds pay for casework (that is, assessment, information and referral) with eligible asylum seekers and for the payment to eligible asylum seekers of an allowance of up to 89 per cent of the social security 'special benefit' rate, depending on the degree of need.<sup>40</sup>

ASAS cannot be accessed by a person who is 'a spouse, de facto, or sponsored fiancé(e) of a permanent resident or citizen of Australia or New Zealand' or by a person who is 'eligible for other Commonwealth Government or overseas government income support payments'.<sup>41</sup> Those not excluded from ASAS by these rules only become eligible for assistance if they are still awaiting a primary stage decision six months after lodging their protection visa application.<sup>42</sup>

There is provision for exemption from the restrictions on access outlined above for asylum seekers 'in financial hardship who are unable to meet their basic needs and who have no continuing and adequate support'.<sup>43</sup> Those who receive exemptions usually fall into one of the following categories: persons over 65 years of age, persons unable to work for physical or mental health reasons, parents of children under 18 years of age and women with high risk pregnancies.<sup>44</sup>

Between October 1996 and 30 June 1999, ASAS could not be accessed beyond the primary stage of the protection visa determination process under any

---

<sup>35</sup> Ibid; *Social Security Act 1991* (Cth) s 729(2)(f)(i)-(v).

<sup>36</sup> Commonwealth, *Parliamentary Debates, Reference: Social Security Legislation (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996*, Senate Legal and Constitutional Legislation Committee, 6 June 1996, L&C 13 (evidence of Merle Mitchell, Board Member, Australian Council of Social Services).

<sup>37</sup> Ibid.

<sup>38</sup> Barrowclough, above n 34.

<sup>39</sup> However, not all State and Territory Red Cross offices are involved in the administration of the scheme. For example, Australian Red Cross Victoria administers ASAS payments to eligible asylum seekers in Tasmania: DIMA Fact Sheet 42, above n 20.

<sup>40</sup> Commonwealth, *Parliamentary Debates, Consideration of Additional Estimates*, Legal and Constitutional Legislation Committee, 9 February 1999, L&C 177 (evidence of Jenny Bedlington, First Assistant Secretary, Refugees and Humanitarian Division, DIMA). An important point to note is that ASAS payments are not Centrelink payments, so where the receipt of a Centrelink payment is an eligibility criterion for another form of social assistance, asylum seekers cannot qualify.

<sup>41</sup> Letter from Bruce McEwan, Acting Assistant Director, Migration Agents and Assistance Section, DIMA (25 November 1999). See also DIMA Fact Sheet 42, above n 20.

<sup>42</sup> Ibid.

<sup>43</sup> DIMA Fact Sheet 42, above n 20.

<sup>44</sup> Australian Red Cross Victoria, *Asylum Seeker Assistance Scheme (ASAS)* (leaflet provided by Australian Red Cross Victoria on 7 June 2000) (copy on file with author).

circumstances.<sup>45</sup> Since 1 July 1999, access has been given to persons awaiting an RRT decision if they meet the exemption criteria outlined above.<sup>46</sup> However, there remains an absolute bar on access to ASAS beyond the RRT stage.

### 3 Medicare

Protection visa applicants with permission to work are presently given access to Medicare benefits.<sup>47</sup> Access to Medicare carries with it access to PBS, which caps the cost to the consumer of pharmaceuticals. It should be noted, however, that the Commonwealth Parliament has just passed the Migration Legislation Amendment (Parents and Other Measures) Bill 2000 ('Migration Bill 2000'), which will, upon commencement, amend the *Health Insurance Act 1973* (Cth) so as to prevent protection visa applicants, who are or have been parent visa applicants, from accessing Medicare.<sup>48</sup>

Asylum seekers eligible for ASAS are, through that scheme, also given access to those medical services necessary for diagnosis of medical conditions, access to specialist and hospital treatment of urgent or life threatening conditions, as well as access to subsidised pharmaceuticals through nominated pharmacies. This access is unaffected by the Migration Bill 2000.<sup>49</sup>

### 4 Other Sources of Social Assistance

Other social assistance available to non-detained asylum seekers varies greatly from State to State and from region to region within a given State. This section focuses on the situation in the author's home State, Victoria, but also considers briefly the situation in the two other States that are host to significant numbers of non-detained asylum seekers, namely New South Wales and Queensland. The section focuses, furthermore, on the capital cities of the States named, since asylum seekers rarely venture further afield.<sup>50</sup> Those who do usually return once they discover that social assistance, legal advice and other

---

<sup>45</sup> Commonwealth, *Official Committee Hansard: Consideration of Budget Estimates*, Senate Legal and Constitutional Committee, 2 June 1999, L&C 340 (Evidence of Ms Goodwin, DIMA).

<sup>46</sup> DIMA Fact Sheet 42, above n 20.

<sup>47</sup> *Ibid.* Medicare is Australia's taxpayer-funded 'universal' health insurance scheme, which ensures that Australian citizens, Australian permanent residents and certain other Australian residents are able to access medical services without payment. See generally the Health Insurance Commission's web site <<http://www.hic.gov.au/corporate/index.htm>> at 13 December 2000.

<sup>48</sup> Commonwealth, *Parliamentary Debates*, Senate, 9 October 2000, 18146 (Senator Kay Patterson, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs). The original version of the Bill purported to prevent all new protection visa applicants from accessing Medicare under any circumstances. However, the Government reconsidered (presumably in light of the Senate response) and amended the provision to its present form.

<sup>49</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 7 June 2000, 17164 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

<sup>50</sup> Interview with Gaby Heuft, above n 27.

forms of assistance are even harder to obtain in rural and regional areas than in capital cities.<sup>51</sup>

(a) *Victoria*

The hardest thing for persons of low or no income to access is secure housing. In Victoria, the State Government, through the Transitional Housing Management ('THM') Program, funds some community sector agencies to provide housing information and referral, transitional housing (that is, housing for a period of up to three months paying rent calculated as a percentage of income)<sup>52</sup> and financial assistance (for example, bond payment) to persons who face a 'housing crisis'.<sup>53</sup> There is also a Commonwealth–State program called the Supported Accommodation Assistance Program ('SAAP'), which funds some community sector agencies and some local governments to provide similar services to the THM Program, as well as case work support, to persons facing a housing crisis. Asylum seekers are potentially eligible to access both the THM Program and SAAP, however, their needs usually outlast the assistance which can be provided under those programs.<sup>54</sup> Persons in need of low cost housing on a long-term basis can apply to rent public housing from the Victorian Department of Human Services, Office of Housing.<sup>55</sup> Again, asylum seekers are potentially eligible, but in practice few manage to access public housing.<sup>56</sup> Churches also own housing, which they make available to persons in need. Asylum seekers are potentially able to access this housing stock also, and some do.<sup>57</sup> Ultimately, however, there are many asylum seekers who are unable to access housing assistance of any kind. There are two main reasons. The first is that many programs have eligibility criteria which asylum seekers cannot meet (for example, that they be receiving a Centrelink payment). The second is that the demand for housing assistance greatly exceeds supply, so that whether an asylum seeker gets a share of this very limited resource often depends on whether the decision-maker in question has an understanding of, and sympathy for, the particular plight of asylum seekers.

---

<sup>51</sup> Ibid.

<sup>52</sup> Free in the case of those earning no income: Interview with Alison Dyson, Housing Information and Referral Worker, Westernport Accommodation and Youth Support Service (WAYYS) (telephone interview, 28 June 2000).

<sup>53</sup> See Department of Human Services Victoria, *Transitional Housing Management Program*, 2 February 1999 <<http://hna.fhh.vic.gov.au/hous/homecon.html>> at 7 December 2000.

<sup>54</sup> Interview with Alison Dyson, above n 52; Ndungi wa Mungai, 'Homeless Asylum Seekers: Hidden and Vulnerable' (2000) 13(4) *Parity* 14, 15.

<sup>55</sup> The provision of public housing in Victoria and other States and Territories is partly funded by the Commonwealth Government: Department of Human Services Victoria, *Office of Housing*, 7 August 2000 <<http://hnb.dhs.vic.gov.au/ooh/oohninte.nsf/frameset/Ooh?OpenDocument>> at 7 December 2000.

<sup>56</sup> Interview with Alison Dyson, above n 52; Ndungi, above n 54.

<sup>57</sup> Dunbar, above n 26; Ndungi, above n 54. The Uniting Church has an asylum seeker project on foot through which asylum seekers are provided with emergency accommodation in two houses owned by it. Asylum seeker specific projects are, however, the exception rather than the rule: Interview with Grant Mitchell, Asylum Seeker Support Worker, (institution anonymous) (telephone interview, 26 July 2000).

Turning now from housing to other survival needs, the Australian Red Cross provides 'limited material aid and "one off" emergency relief' to asylum seekers who are in need but ineligible for ASAS.<sup>58</sup> It also attempts to provide a referral service for such asylum seekers.<sup>59</sup>

Melbourne has an Asylum Seekers Centre which operates under the auspices of the Anglican Diocese of Melbourne, but it is non-denominational and funded by private and church donations (in cash and kind).<sup>60</sup> The Melbourne Asylum Seekers Centre is basically a one-person operation opening its doors only on Mondays. It has chosen to focus on the regular weekly provision of food and other necessities to asylum seekers.<sup>61</sup> However, it also provides asylum seekers with information about, and referrals to, free services provided by medical practitioners and others.<sup>62</sup>

There are many organisations, not specific to asylum seekers, that provide assistance to asylum seekers in Victoria, notably the Anglican Church, the Catholic Church, the Salvation Army, the Uniting Church and their respective agencies.<sup>63</sup> A comprehensive survey of these sources of assistance is beyond the scope of this article. Instead, the better than average assistance available to asylum seekers in the City of Greater Dandenong will be considered in detail. Asylum seekers living in the City of Greater Dandenong may, if they are lucky, stumble across the Springvale Community Aid and Advice Bureau ('SCAAB'). This community sector organisation draws on a variety of Commonwealth, State and local government funding sources, as well as on private donations and volunteer workers, to provide immigration advice, tenancy advice, consumer advice, financial counselling and many other services under the one roof.<sup>64</sup> SCAAB workers have always assisted anyone who approaches them, including asylum seekers, to the greatest extent possible under the eligibility criteria specified by the funding source in question.<sup>65</sup>

An out-posted ASAS worker and an out-posted worker of Hanover Welfare Services (a THM provider) also operate out of SCAAB premises.<sup>66</sup> However,

---

<sup>58</sup> Ndungi, above n 54.

<sup>59</sup> Ibid. However, in the author's view, the Australian Red Cross has not done as much as it could to research the sources of assistance that are available or to record the information that individual workers have gathered in a form easily accessible by fellow workers and those outside the organisation.

<sup>60</sup> Interview with David Spitteler, Coordinator, Melbourne Asylum Seekers Centre (telephone interview, 22 June 2000).

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Commonwealth, *Parliamentary Debates, Reference: Operation of Australia's Refugee and Humanitarian Program*, Senate Legal and Constitutional References Committee, 26 July 1999, L&C 346 (evidence of Rex Fisher, Refugee and Multicultural Field Worker, Uniting Church, and Etervina Groenen, East Timor Asylum Seeker Project Worker, Uniting Church); Ndungi, above n 54; Interview with David Spitteler, above n 60; Interview with Grant Mitchell, above n 57.

<sup>64</sup> Interview with Sherron Dunbar, Social Worker, Springvale Community Aid and Advice Bureau (telephone interview, 28 June 2000).

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

many of the asylum seekers who turn up at SCAAB do not manage to get access to ASAS or the THM program. Fortunately for these individuals, SCAAB itself is able to provide emergency housing and emergency relief (food vouchers, travel cards and so on) to some of its clients.<sup>67</sup> Several asylum seekers have benefited from SCAAB's provision of emergency housing and emergency relief over extended periods of time, but many more cannot be provided material aid because of resource constraints.<sup>68</sup> SCAAB assists the latter group of asylum seekers to make contact with other organisations within the City of Greater Dandenong that provide material aid. There are several such organisations.<sup>69</sup> Some are more willing than others to assist asylum seekers, with the attitudes of the particular decision-maker often being as important a factor as the organisation's official ethos.<sup>70</sup> However, even those who are willing to assist simply do not have the ability to meet all the survival needs of a given asylum seeker over an extended period of time.<sup>71</sup>

For those asylum seekers with serious psychological problems arising from past torture and trauma, counselling may be available from the Victorian Foundation for Survivors of Torture.<sup>72</sup> However, asylum seekers without access to Medicare or ASAS find it very difficult to get ordinary health care needs met. Hospitals will always provide emergency care, but then present a bill for services rendered.

(b) *New South Wales and Queensland*

As in Victoria, the hardest thing for asylum seekers in New South Wales and Queensland to access is secure housing. As in Victoria, they are disadvantaged in their attempts to obtain housing assistance from government and community sources by factors such as eligibility criteria that have been formulated in ways that preclude asylum seekers from satisfying them.<sup>73</sup>

Turning now from housing to other survival needs, the Australian Red Cross in New South Wales and Queensland assists asylum seekers ineligible for ASAS to the extent that it is able — in Queensland this means not very much at all.

In Sydney there is the Asylum Seekers Centre (open Monday through Friday) which operates under the auspices of the Jesuit Refugee Service. It is funded by the Sisters of Mercy, the Good Shepherd Sisters and public donations, and is

---

<sup>67</sup> Ibid.

<sup>68</sup> Ibid. The increasing numbers of asylum seekers in need, as a result of the Commonwealth Government policy measures described above, recently prompted SCAAB to set up an emergency relief fund earmarked for asylum seekers and funded entirely by donations from SCAAB staff and others: SCAAB, *29<sup>th</sup> Annual Report* (1999) 8.

<sup>69</sup> For example, Anglicare, the Benevolent Society (a panel of mainly church representatives), the Christian Resource Centre, the Keysborough Learning Centre (Catholic church agency), the Salvation Army and the Society of St Vincent de Paul: Interview with Sherron Dunbar, above n 64.

<sup>70</sup> Interview with Sherron Dunbar, above n 64.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Interview with an anonymous employee of the Sydney Asylum Seekers Centre (telephone interview, 15 June 2000); Interview with Gaby Heuft, above n 27.

largely operated by volunteer workers.<sup>74</sup> The Sydney Asylum Seekers Centre directly provides asylum seekers with food, clothing and other necessities only occasionally, but it does directly provide services such as English language and job search training on a regular basis.<sup>75</sup> The greater part of what the Sydney Asylum Seekers Centre does is to provide asylum seekers with referral and advocacy services directed at facilitating access to free services provided by welfare agencies, medical practitioners and others.<sup>76</sup>

In Brisbane there is the Refugee Claimants Support Centre (formerly the Brisbane Asylum Seekers Centre), which is open three days a week. The Refugee Claimants Support Centre relies on funding from the Good Shepherd Sisters and other donors, and the hard work of a great many volunteers.<sup>77</sup> It provides the same services as the Sydney Asylum Seekers Centre, and more besides.<sup>78</sup> For example, it directly provides food and other material aid on a regular basis to several of its clients, as well as emergency accommodation on its own large premises to clients in need of it.<sup>79</sup>

An assortment of other organisations, including Anglicare, Lifeline Brisbane, the Society of St Vincent de Paul, Mission Australia and the Salvation Army, also contribute to meeting the survival needs of asylum seekers in New South Wales and Queensland on an emergency basis.<sup>80</sup> However, as in Victoria, all of them are increasingly over-stretched and are simply unable — sometimes also unwilling — to commit themselves to providing for the survival needs of a given asylum seeker over the long haul.<sup>81</sup>

The health care needs of asylum seekers without Medicare or ASAS access are met, if at all, by the Service for Treatment and Rehabilitation of Torture and Trauma Survivors (NSW), the Queensland Program of Assistance to Survivors of Torture and Trauma, and medical practitioners and hospitals providing free service either by intent or by default.<sup>82</sup>

---

<sup>74</sup> Interview with an anonymous employee, above n 73.

<sup>75</sup> Sydney Asylum Seekers Centre, Submission No 68, *Submissions to Senate Legal and Constitutional References Committee: Inquiry into the Operation of Australia's Refugee and Humanitarian Program* (1999) vol 4, 811; Interview with an anonymous employee, above n 73.

<sup>76</sup> Sydney Asylum Seekers Centre, above n 75; Interview with an anonymous employee, above n 73.

<sup>77</sup> Interview with Gaby Heuft, above n 27.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid; Society of St Vincent de Paul (NSW), Submission No 59, *Submissions to Senate Legal and Constitutional References Committee: Inquiry into the Operation of Australia's Refugee and Humanitarian Program* (1999) vol 3, 392; Interview with an anonymous employee, above n 73.

<sup>81</sup> Winton, above n 27, 19; Interview with Gaby Heuft, above n 27.

<sup>82</sup> Interview with an anonymous employee, above n 73; Interview with Gaby Heuft, above n 27.

5 *The Bottom Line*

Many non-detained asylum seekers do not have access to work rights, ASAS or Medicare. Often they are also unable to access State, Territory or local government funded social assistance because this assistance is tied to eligibility criteria which asylum seekers cannot meet, for example, possession of a Health Care Card.

Some of these asylum seekers manage to survive with the help of relatives, friends or their respective migrant communities. However, not all asylum seekers have access to such sources of support. Even if an asylum seeker has relatives or friends in Australia, or finds an established community of persons from his or her country of origin in Australia, those persons may not be able to afford to provide material assistance, may be unwilling to provide assistance from the outset, or may tire of doing so over the longer term.<sup>83</sup> Moreover, the reasons for the asylum seeker's flight from his or her country of origin may well be such that he or she cannot turn to such persons for help.<sup>84</sup>

The many asylum seekers without personal support networks must find other means of meeting their survival needs. This is no easy task. As one interviewee put it, '[i]f you were an asylum seeker arriving in Australia you would have one hell of a time trying to work out where to go. There might be help right next door to you but you wouldn't know it was there.'<sup>85</sup> Because of its international profile and its role in administering ASAS, most asylum seekers do manage to find their way to the Red Cross. The Australian Red Cross attempts to assist asylum seekers who are ineligible for ASAS by providing some material aid itself and, even more importantly, by referring them on to other sources of assistance.

In Victoria, New South Wales and Queensland, but not in the other States and Territories, there are agencies specific to asylum seekers which operate to provide some assistance themselves, refer asylum seekers to other sources of assistance, and advocate on their behalf. The author has not attempted to ascertain what proportion of asylum seekers are aware of the existence of these agencies, but suspects that it would certainly not be the entirety. It should also be kept in mind that many asylum seekers may be wary of presenting themselves at an asylum seeker specific agency for fear of who may observe them doing so.<sup>86</sup>

There are churches and church-affiliated agencies and, to a lesser extent, non-church community sector organisations that also provide assistance to asylum seekers in the community. They draw on their own resources or beg for resources from others in order to provide accommodation, food, clothing and emotional support to asylum seekers in need. However, two consistent themes emerge. First, many church and other community sector organisations do not assist asylum seekers because their assistance eligibility criteria assume a client

---

<sup>83</sup> Interview with Alison Dyson, above n 52; Interview with Gaby Heuft, above n 27; Interview with Grant Mitchell, above n 57.

<sup>84</sup> Interview with an anonymous employee, above n 73; Interview with Gaby Heuft, above n 27.

<sup>85</sup> Interview with Sherron Dunbar, above n 64.

<sup>86</sup> Interview with Gaby Heuft, above n 27.

profile which many asylum seekers cannot fit. For example, they assume that clients will either be working or be in receipt of a Centrelink payment. Second, church and other community sector organisations, already struggling to meet the welfare needs of low income Australian citizens and permanent residents, are unable, and sometimes unwilling, to fully compensate for the state's failure to meet the needs of asylum seekers.<sup>87</sup>

The combination of all of these factors has meant that the increasing restrictions placed by the Commonwealth Government on asylum seekers' access to work entitlements and publicly funded social assistance have not been off-set by other sources, leading to a marked erosion in the standard of living of asylum seekers.<sup>88</sup> Securing affordable accommodation is the biggest challenge for most asylum seekers, and many experience periods of homelessness.<sup>89</sup> Other survival needs are a little more easily met, but usually involve an asylum seeker making the rounds of the various community sector welfare agencies, obtaining just enough in the way of food vouchers and other handouts to continue leading a miserable and degraded existence.<sup>90</sup> Those who manage best are those with the good fortune to encounter an organisation or an individual with both a good knowledge of available sources of assistance and a willingness to advocate on their behalf.<sup>91</sup> Not surprisingly, the physical and mental health of asylum seekers, in many cases undermined already by their home country experiences, tends to deteriorate markedly over the period of time they spend in the community waiting for their protection visa applications to be determined.<sup>92</sup> It does not help, of course, that basic health care is as difficult for many asylum seekers to access as everything else.

---

<sup>87</sup> Ndungi, above n 54; Johnston and Prest, above n 26; Winton, above n 27, 19; Queensland Refugee Claimants Interagency Group, Submission No 64, *Submissions to Senate Legal and Constitutional References Committee: Inquiry into the Operation of Australia's Refugee and Humanitarian Program* (1999) vol 4, 778–9; Interview with Grant Mitchell, above n 57.

<sup>88</sup> Interview with Gaby Heuft, above n 27.

<sup>89</sup> Society of St Vincent de Paul (NSW), above n 80, 397; Interview with an anonymous employee, above n 73; Ndungi, above n 54, 14–15; Dunbar, above n 26; Johnston and Prest, above n 26; Interview with Gaby Heuft, above n 27; Interview with Grant Mitchell, above n 57.

<sup>90</sup> Interview with Gaby Heuft, above n 27; Interview with Sherron Dunbar, above n 64; Interview with Alison Dyson, above n 52. The practical difficulties involved in 'doing the rounds' can be immense for those with no means of transport and/or in poor health: Interview with Grant Mitchell, above n 57.

<sup>91</sup> Interview with anonymous employee, above n 73; Interview with Alison Dyson, above n 52; Interview with Grant Mitchell, above n 57.

<sup>92</sup> Queensland Refugee Claimants Interagency Group, above n 87, 776–7; Interview with Sherron Dunbar, above n 64; Interview with Grant Mitchell, above n 57.

### III AUSTRALIA'S OBLIGATION UNDER THE *INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*

#### A *The Moral Basis of Human Rights Law*

As is well-known, the Universal Declaration of Human Rights ('UDHR')<sup>93</sup> is parent to both the *ICCPR* and the *ICESCR*. Although practical politics dictated the distribution of UDHR rights between the two covenants, the division was 'accompanied by a strong endorsement both of the interdependence of the human rights distributed between them, and of the unity of purpose of the treaties.'<sup>94</sup> The underlying morality of both treaties, as articulated in their almost identical preambles, is a universalist morality based on the premise that all human beings are of inherent and equal worth. In general terms, as Oscar Schachter points out, accepting the inherent and equal worth of all human beings means following Immanuel Kant's prescription of treating every human being as an end not a means.<sup>95</sup> David Feldman states the same proposition in a different way, saying 'there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity.'<sup>96</sup> The rights set out in both the *ICCPR* and the *ICESCR* are the rights that must be accorded to each human being by all other human beings in order for the inherent worth of the individual to be upheld.

#### B *The Nature of ICESCR Obligations*

*ICESCR* article 2(1) provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

*ICESCR* article 4 provides:

The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society.

The obligation imposed by article 2(1) is greater, and the derogation permitted by article 4 is less, than may at first be apparent. As interpreted by the United

<sup>93</sup> GA Res 217A, 3 UN GAOR (183<sup>rd</sup> plen mtg), UN Doc A/Res/217 (1948).

<sup>94</sup> Craig Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall Law Journal* 769, 791.

<sup>95</sup> Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 *American Journal of International Law* 848, 849.

<sup>96</sup> David Feldman, 'Human Dignity as a Legal Value — Part I' [1999] *Public Law* 682, 690–1.

Nations Committee on Economic, Social and Cultural Rights,<sup>97</sup> article 2(1) imposes a ‘minimum core obligation’ on states to realise *immediately* ‘minimum essential levels of each of the rights’ contained in the *ICESCR*.<sup>98</sup> Developed countries, such as Australia, certainly cannot plead lack of resources as an excuse for failing to meet this minimum core obligation. But, beyond satisfaction of the minimum core obligation, even developed countries may be able to plead lack of resources as a reason for failing, at a given point in time, to realise *fully* the rights contained in the *ICESCR*.<sup>99</sup> However, such a plea will not avail in the absence of proof. Deliberate backward steps, in particular, must be ‘fully justified’.<sup>100</sup> While its wording is vague, it is unlikely that the reference in article 4 to limitations ‘for the purpose of promoting the general welfare in a democratic society’ could be relied upon except in extraordinary circumstances involving, for example, a threat to national security.<sup>101</sup>

### C *Non-Discrimination*

*ICESCR* article 2 continues as follows:

- (2) The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status.
- (3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

When the words of article 2(2) are read together with the words of article 2(1), it becomes obvious that immediate realisation of the obligation of non-discrimination is required.<sup>102</sup> Moreover, when articles 2(2) and 2(3) are read together, giving the terms used their ‘ordinary meaning’ and keeping in mind the *ICESCR*’s ‘object and purpose’<sup>103</sup> (that is, the protection of the individual), it becomes equally obvious that a state may not discriminate against non-

---

<sup>97</sup> For an argument justifying the significant weight given to the Committee’s interpretations see Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995) 3–4.

<sup>98</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties’ Obligations*, UN Doc E/1991/23 [9]–[10].

<sup>99</sup> Craven, above n 97, 132–3.

<sup>100</sup> *Ibid* 131–2.

<sup>101</sup> Kerry McCarron, ‘The Schengen Convention as a Violation of International Law and the Need for Centralised Adjudication on the Validity of National and Multilateral Asylum Policies for Members of the United Nations’ (1995) 18 *Boston College International and Comparative Law Review* 401, 419, 424.

<sup>102</sup> Craven, above n 97, 181.

<sup>103</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1989, 1155 UNTS 331, 8 ILM 679, art 31(1) (entered into force 27 January 1980) (‘*VCLT*’), which is reflective of the customary international law rule.

nationals<sup>104</sup> in giving effect to *ICESCR* rights. The only exception to this proposition is one upon which Australia, without question a *developed* country, cannot rely. Unfortunately, this is not the end of the matter. The employment and social assistance regulations of many states do draw distinctions between nationals and non-nationals, and this practice cannot simply be disregarded in the interpretation of the *ICESCR*.<sup>105</sup> The solution to the conundrum lies in noting that the principle of non-discrimination does not require that all individuals be treated identically.<sup>106</sup> A difference in treatment does not violate the principle of non-discrimination if there is an ‘objective and reasonable justification’ for it.<sup>107</sup> The important point is that such a justification will not exist if the aim sought to be achieved by the difference in treatment is not legitimate, or if the effects of the difference in treatment are disproportionate to the aim.<sup>108</sup> This, at least, is the view taken of the principle of non-discrimination in the sphere of civil and political rights. The Committee on Economic, Social and Cultural Rights has taken a cautious approach to the whole issue.<sup>109</sup> However, the following proposition emerges with reasonable clarity: there can be no justification for differential treatment which involves denying to non-nationals the minimum essential levels of *ICESCR* rights necessary for survival.<sup>110</sup>

#### D *The Right to an Adequate Standard of Living*

The key right contained in the *ICESCR* is ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing’ specified in article 11.<sup>111</sup> Article 11 not only encompasses, but goes beyond, many of the more detailed rights contained in other articles of the *ICESCR*.<sup>112</sup> Nevertheless, it is worthwhile drawing attention to some of those more detailed rights.

---

<sup>104</sup> The national–non-national distinction is covered by the phrase ‘other status’ rather than the phrase ‘national or social origin’: see generally R B Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984).

<sup>105</sup> *VCLT*, above n 105, art 31(3); Craven, above n 97, 173–4.

<sup>106</sup> United Nations Human Rights Committee, *General Comment No 18: Non-Discrimination* (1989) [8] <<http://www.unhcr.org/refugees/comm/hrcom18.htm>> at 7 December 2000.

<sup>107</sup> Case ‘*Relating to Certain Aspects of the Laws on the Use of Language in Education in Belgium*’ (Merits) (1968) 6 Eur Ct HR 4 (‘*Belgian Linguistics Case*’). See summary in Vincent Berger, *Case Law of the European Court of Human Rights* (1989) vol 1, 18; United Nations Human Rights Committee, *General Comment No 18: Non-Discrimination*, above n 104, [13].

<sup>108</sup> *Belgian Linguistics Case*, above n 107.

<sup>109</sup> Ryszard Cholewinski, ‘Enforced Destitution of Asylum Seekers in the United Kingdom: The Denial of Fundamental Human Rights’ (1998) 10 *International Journal of Refugee Law* 462, 492–3; Craven, above n 97, 173–4.

<sup>110</sup> Cholewinski, above n 109, 493.

<sup>111</sup> Peter Bailey, ‘The Right to an Adequate Standard of Living: New Issues for Australian Law’ (1997) 4 *Australian Journal of Human Rights* 25, 26–7.

<sup>112</sup> *Ibid* 26–7, 33.

Components of an adequate standard of living listed in article 11 are inclusive, not exclusive, and other obvious components include adequate health care, the right to work and the right to social security when necessary.

*ICESCR* article 12 provides:

- (1) The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:  
...
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

A right to an adequate standard of living implies, of course, a corresponding right to the necessary means of achieving it.<sup>113</sup>

*ICESCR* article 6(1) accordingly provides:

The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right.

The income earned from work enables the individual to feed, clothe and house self and family. Of equal importance is the fact that working contributes enormously to the individual's sense of self-worth. However, since not everyone who wishes to work is able to get work, and not everyone who does work is able to derive an adequate standard of living therefrom, *ICESCR* article 9 provides for 'the right of everyone to social security, including social insurance'. A right to social security is necessary because individuals unable to support themselves and their dependants would otherwise be forced to beg or engage in other conduct destructive of their own and others' sense of their human dignity.

### E *Australian Practice Evaluated*

Australian citizens are free to work to support themselves, and have access to publicly funded social assistance if they cannot support themselves. The social assistance available to Australian citizens who are unable to support themselves is arguably insufficient to assure them of an adequate standard of living.<sup>114</sup> If this is so, the lesser social assistance made available to asylum seekers who are unable to support themselves must necessarily be insufficient to assure them of an adequate standard of living, and Australia may well be in breach of *ICESCR* article 11 in relation to both groups. However, rather than buying into arguments about how much is enough in absolute terms, the focus of the following analysis will be on whether Australia is in violation of *ICESCR* rights by reason of the

---

<sup>113</sup> Asbjørn Eide, 'The Right to an Adequate Standard of Living Including the Right to Food' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 89–90.

<sup>114</sup> Michael Raper, 'Reform Begins with Basic Rates', *The Australian* (Sydney) 30 March 2000, 11.

retrogressive measures taken in relation to the work rights and social assistance offered to asylum seekers and whether, more generally, Australia is in breach of its non-discrimination obligation under *ICESCR* article 2(2).

According to the Committee on Economic, Social and Cultural Rights,

[a] general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.<sup>115</sup>

This is an exact description of what has happened in Australia. Policy and legislative measures restricting asylum seekers' previous work entitlements and their previous access to income support have led to a decline in their standard of living.<sup>116</sup> Now that the Migration Bill 2000 has been passed, there will be a further decline. Moreover, there is no possibility of Australia being able to justify the retrogressive measures 'by reference to the totality of rights provided for in the Covenant and in the context of the full use of the maximum available resources'.<sup>117</sup> Australia is, therefore, in breach of articles 6, 9 and 11 of the *ICESCR* and may soon be, if it is not already, in breach of article 12.

Turning now to the issue of discrimination, asylum seekers are obviously being treated differently from Australian citizens. In the ordinary case, restrictions placed on the access of non-nationals to work and publicly funded social assistance may be justifiable on the basis that no single country has the resources to support the entire population of the world and that it is, therefore, reasonable to take the position that the primary responsibility for safeguarding the economic and social rights of a non-national lies with that individual's home country.<sup>118</sup> However, bona fide asylum seekers are, by definition, persons who do not have, or do not perceive themselves as having, the option of returning to their home country for the purpose of finding work or the option of turning to their home country for social assistance.<sup>119</sup> It is, therefore, unreasonable to subject them to the same restrictions as other non-nationals. The restrictions imposed on access to work and access to publicly funded social assistance by asylum seekers in the community have, of course, been introduced by the Australian Government as measures to discourage *abusive* protection visa applications by removing the main benefits previously obtainable by making

---

<sup>115</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing*, UN Doc E/1992/23 [11].

<sup>116</sup> See above Part II(B).

<sup>117</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations*, above n 98, [9].

<sup>118</sup> Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 34; Peter Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (1998) 78–9.

<sup>119</sup> Eide, 'Economic, Social and Cultural Rights as Human Rights', above n 118, 33.

such an application.<sup>120</sup> If it is accepted that deterrence of abusive applications is a legitimate aim,<sup>121</sup> the issue becomes one of ascertaining whether or not the means employed are proportionate to that aim.

In 1998–99, 8.5 per cent of non-detained protection visa applicants were successful at the primary stage.<sup>122</sup> In the same period, 8.7 per cent of non-detained protection visa applicants were successful at the RRT stage.<sup>123</sup> These applicants were, of course, bona fide asylum seekers. As for the rest, it cannot be assumed that they were all guilty of abusing the system. A few of them, presumably, would have succeeded upon invoking the Minister's s 417 discretion.<sup>124</sup> Many more are likely to have had genuine subjective reasons for seeking Australia's protection, though ultimately failing to meet the legal or policy criteria for provision of that protection.

The problem with the anti-abuse measures is that they necessarily hurt the bona fide asylum seekers as well as the abusive ones. For example, the reasoning behind the denial of work permission to a person who lodges a protection visa application after the 45 day cut off is that such a person is probably making an abusive application, since a bona fide applicant would have no reason to delay.<sup>125</sup> There are, however, several plausible reasons for delay in making a genuine application. It may take more than 45 days for an individual with protection needs to learn about the availability of the protection visa, or to overcome past traumatic experiences sufficiently to be able to face the process of making an application, or to obtain the expert assistance necessary to put together an application.<sup>126</sup> Alternatively, their protection needs may have arisen only after the 45 days have elapsed.<sup>127</sup> These sorts of situations arise often in practice,<sup>128</sup> yet the Minister for Immigration has only once used his power to make exemptions to the 45 day cut off.<sup>129</sup>

Similarly, denying asylum seekers income support equal to that available to Australian citizens as a means of discouraging abusive applications obviously

---

<sup>120</sup> Commonwealth, *Parliamentary Debates, Consideration of Estimates*, Senate Legal and Constitutional Legislation Committee, 11 June 1997, L&C 376–81 (evidence of Mark Sullivan, Deputy Secretary, DIMA); Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 1997, 5857–8 (Philip Ruddock, Minister for Immigration and Multicultural Affairs); Minister for Immigration and Multicultural Affairs, Commonwealth of Australia, *Limited Changes to Asylum Seeker Assistance Scheme*, Press Release, No 75/99, (11 May 1999).

<sup>121</sup> As is accepted, for example, by Cholewinski, above n 109, 480.

<sup>122</sup> Figure provided by DIMA on 23 October 2000 (copy on file with DIMA).

<sup>123</sup> Figure provided by DIMA on 23 October 2000 (copy on file with DIMA).

<sup>124</sup> Figures not available to the author.

<sup>125</sup> Commonwealth, *Parliamentary Debates, Consideration of Estimates*, above n 120, 377.

<sup>126</sup> See, eg, Australian Red Cross, Submission No 48, *Submissions to Senate Legal and Constitutional References Committee: Inquiry into the Operation of Australia's Refugee and Humanitarian Program* (1999) vol 3, 453.

<sup>127</sup> *Ibid.*

<sup>128</sup> See, eg, the case studies contained in submissions made to the Senate Legal and Constitutional References Committee: *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, above n 26.

<sup>129</sup> See above n 21 and accompanying text.

harms bona fide asylum seekers as well. For example, protection visa applicants who pursue their claims beyond the RRT stage are denied access to any form of income support. The denial is based on the assumption that applicants who receive negative RRT decisions could have no legitimate reason for pursuing their claims any further.<sup>130</sup> The assumption is clearly false. Persons who are found not to be refugees may nevertheless fall within the guidelines for exercise of the Minister's s 417 power.<sup>131</sup> Such persons obviously have legitimate reason for seeking exercise of that power. What about asylum seekers who seek judicial review of RRT decisions? The fact that, in recent times, 18 per cent of applications for judicial review have resulted in remittal of the case to the RRT (either by consent or by court order) suggests that asylum seekers who refuse to accept negative RRT decisions may well have legitimate reasons for doing so.<sup>132</sup>

Even if an asylum seeker eventually obtains a positive refugee status determination, the grant of a protection visa may be delayed by months while DIMA ascertains whether the asylum seeker meets the health and public interest criteria for the grant of that visa. It is also increasingly common for an asylum seeker who receives a *positive* RRT decision to be kept waiting for a protection visa while the Minister seeks judicial review of the RRT decision. The period which elapses between the making of a positive refugee status determination and the actual grant of a protection visa is a period during which any 'no work' condition attached to the asylum seeker's bridging visa continues to be applicable,<sup>133</sup> as does any existing ASAS ineligibility. The anti-abuse rationale sounds a bit thin in such circumstances.

It may well be that, practically speaking, anti-abuse measures cannot be more precisely targeted to impact only on abusive asylum seekers. However, deliberately sacrificing the innocent in pursuit of the guilty cannot be a means proportionate to the aim, because it is inconsistent with the moral basis of human rights law which demands that every human being be treated as an end and not a means.

Next, consider whether denying asthmatic children, pregnant women and diabetic old people in the asylum seeker population the same access to health services and medications as Australian citizens<sup>134</sup> is a proportionate means of discouraging the making of abusive protection visa applications. It seems astounding that anybody could conclude that it is. The members of the

---

<sup>130</sup> Minister for Immigration and Multicultural Affairs, *Limited Changes to Asylum Seeker Assistance Scheme*, above n 120.

<sup>131</sup> See above Part II(A).

<sup>132</sup> Commonwealth, *Parliamentary Debates*, Senate, 1 December 1998, 998 (Senator Bartlett).

<sup>133</sup> South Brisbane Immigration and Community Legal Service, Supplementary Submission No 61A, *Submissions to Senate Legal and Constitutional References Committee: Inquiry into the Operation of Australia's Refugee and Humanitarian Program* (1999) vol 3, 663.

<sup>134</sup> Case examples given by Alison Dyson and Gaby Heuft: Interview with Alison Dyson, above n 52; Interview with Gaby Heuft, above n 27.

Committee on Economic, Social and Cultural Rights certainly would not come to such a conclusion.<sup>135</sup>

Finally, as noted previously, the Committee on Economic, Social and Cultural Rights has yet to be convinced that any policy objective is so important that refusing to meet the basic survival needs of particular individuals (as is happening in relation to some asylum seekers in Australia) can be considered a proportionate means of achieving that objective. Australia is, therefore, in breach of the non-discrimination obligation in *ICESCR* article 2(2).

#### IV WHY DO WE DO WHAT WE DO?

##### A *Models of Democracy*

Australia is usually described as a 'liberal democratic state'. As John Uhr has pointed out, however, this is a description that covers a wide spectrum of democratic structures.<sup>136</sup> Where within the spectrum does Australia fall?

The essence of democracy is a belief in the right of the members of a community to govern themselves. Republican models of democracy emphasise 'the community' and are underpinned by a communitarian political philosophy. According to communitarians, a community is a group of individuals who consider themselves to be in special relationship to each other, because of things they have in common. What is had in common is usually one or more of geographic location, blood, culture, history or values. Republicans value active citizen participation in the determination and achievement of the community's common good. Moreover, they consider the political will of the community (as expressed in its laws) to be the final arbiter of the common good and the only possible source of individual rights.<sup>137</sup> Republicanism is, in a sense, radical democracy.

Political liberalism, on the other hand, is based on the notion that citizens have some fundamental pre-political moral rights that cannot be extinguished by laws passed by a political majority, because, for example, it is inconceivable that an individual would participate in a social contract providing such power to

---

<sup>135</sup> See, eg, Committee on Economic Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4 [34] which states:

In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a state policy; and abstaining from imposing discriminatory practices related to women's health status and needs.

<sup>136</sup> John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998) 9.

<sup>137</sup> Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (1998) 242.

Parliament or other law-making authorities.<sup>138</sup> Liberal democratic models of democracy therefore provide minority members of the political community some degree of protection against oppressive action by legislatures controlled by the democratically elected representatives of an antagonistic majority.

The United States of America is a political community that emphasises the 'liberal' aspect of liberal democracy. By contrast, the Australian political community has tended to place greater emphasis on the pursuit of the common good.<sup>139</sup> Although Australia still considers itself to be a liberal democracy, the Australian model of democracy leans closer to republican or communitarian models of democracy than does the US model.

### B *The Significance of Economic and Social Rights*

From a democratic perspective it is important that all members of the political community be able *in practice* to participate effectively and equally in the political process. Since persons engaged in a daily struggle to meet basic survival needs would not have the practical ability to engage in political participation, it is necessary to ensure that all members of the political community are freed from that struggle to a certain minimum extent.<sup>140</sup> However, the republican or communitarian concern with economic and social rights usually goes beyond this. Communitarians believe that the special relations between members of a community are the source of mutual moral obligation. Among other things, all members should both contribute to, and be able to participate equally in, the economic and social goods of the community.

The significance accorded to economic and social rights by liberalism is far more contested. Civil and political rights are often stated to be the only true liberal rights, because the implementation of civil and political rights simply require governments to 'refrain from' certain conduct, while the implementation of economic and social rights requires governments to engage in active societal intervention. The factual assertion is, of course, one that does not stand up to scrutiny. As those trying to put in place a functioning legal system, court system and penal system in places such as Kosovo and East Timor will testify, positive governmental action and enormous societal expenditure is required to give full effect to many civil and political rights. It is simply the case that Western liberals tend to be culturally blind to this fact, while having no such blindness when it comes to the implementation of economic and social rights.<sup>141</sup>

Factual quibbles aside, well-developed theories of political liberalism do, in fact, accord an important place to economic and social rights. The point of liberalism's insistence on the existence of pre-political moral rights is that of acknowledging and upholding the inherent and equal dignity of every citizen *as a human being*. The historical process through which liberalism emerged led to

<sup>138</sup> Ibid; Justice John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 170.

<sup>139</sup> See, eg, Frank Brennan, *Legislating Liberty: A Bill of Rights for Australia?* (1998) 47.

<sup>140</sup> K D Ewing, 'Social Rights and Constitutional Law' [1999] *Public Law* 104, 105, 114–5.

<sup>141</sup> Bailey, above n 111, 29.

classic liberalism focusing on those rights which are necessary to ensure that each individual can pursue his or her own vision of the good life without interference or persecution by the state. However, as James Fox points out:

Were some people assumed not to possess inherent dignity, no questions would arise about their freedom, at least not as a first order question. If we assumed that dignity were earned and not inherent, then all sorts of violations of freedom would be allowed, at least until people had passed the tests for earning dignity. But in a world where citizens are presumed equal in dignity there will always be some issue about the base level of freedom attaching to that dignity.<sup>142</sup>

In order to acknowledge and uphold the inherent and equal dignity of every individual, a liberal society must do more than merely assert that individuals are free to pursue their personal good. In the words of Oscar Schachter:

Few will dispute that a person in abject condition, deprived of adequate means of subsistence, or denied the opportunity to work, suffers a profound affront to his sense of dignity and intrinsic worth. Economic and social arrangements cannot therefore be excluded from a consideration of the demands of dignity. At the least, it requires recognition of a minimal concept of distributive justice that would require satisfaction of the basic needs of everyone.<sup>143</sup>

Even if the primacy of the classic liberal rights is assumed, a liberal society ought to ensure that each individual has the physical capacity to meaningfully exercise those rights. We are, therefore, again led to the conclusion that a liberal society must ensure that the basic survival needs of individuals are being met.<sup>144</sup>

The Australian attitude to economic and social rights is more communitarian than liberal in flavour. In the words of Tim Costello:

The shared table dream is the Australian dream. .... The desire of most Australians to narrow the gap between rich and poor should not be understood as simply a wish for material levelling but as a cultural and spiritual aspiration to build inclusive communities that converse across this common table.<sup>145</sup>

### C *The Rights of Non-Citizens*

The notion of *universal* human rights was born of the liberal tradition. However, the democratic tradition suggests that, unlike minority members, non-members of the self-governing community should not be able to trump the will of the majority of members by invoking moral rights.<sup>146</sup> Liberal democratic states usually manage to minimise overt clashes between liberal values and democratic values by the simple expedient of assuming a situation in which the

---

<sup>142</sup> James Fox, 'Liberalism, Democratic Citizenship and Welfare Reform: The Troubling Case of Workfare' (1996) 74 *Washington University Law Quarterly* 103, 129.

<sup>143</sup> Schachter, above n 95, 851.

<sup>144</sup> Fox, above n 142, 130–1.

<sup>145</sup> Tim Costello, 'Sharing Preserves the Magic Pudding', *The Australian* (Sydney), 22 June 2000, 15.

<sup>146</sup> Bruce Ackerman, *Social Justice in the Liberal State* (1980) 70–1.

terms ‘person’ and ‘citizen’ (that is, ‘member’) can be used synonymously.<sup>147</sup> In other words, although liberal democratic states freely use the universalist language of human rights, they do so on the assumption of a closed society.<sup>148</sup> This is the easy ‘out’ in the attempt to bind together two political traditions that cannot be completely reconciled. It is an ‘out’ that is not available when liberal democratic states are forced to confront the issue of how they should treat a ‘person’ who is not also a ‘member’. In the end, how a liberal democratic state treats non-members comes down to a choice between two possible social moralities.

Particularism is a moral perspective usually associated with the more extreme republican or communitarian models of democracy. It treats group membership (being, in this context, membership of the political community) as the only source of moral rights.<sup>149</sup> Picking up Tim Costello’s ‘common table’ analogy, imagine that there is one pie – the welfare pie – on the table. More people at the table means smaller slices of pie all round.<sup>150</sup> Where the pie is being shared with other members of the community, this mathematical reality is compensated for by the fact that sharing increases social trust and thereby strengthens community.<sup>151</sup> But why should non-members, especially if their presence at the table is uninvited and their contribution to the making of the pie is nil, be given a share of pie at all, if it means less pie for members of the community?<sup>152</sup>

Particularism is a moral perspective quite obviously at odds with the universalist morality which is implicit in the liberal tradition and underpins international human rights law.<sup>153</sup> It is a moral perspective based on the assumption that an individual does not have inherent moral worth, but rather, gains moral worth through group membership. If this assumption is accepted, members of a given community can invoke moral rights against other members of the community. However, non-members cannot intelligibly do the same, and must content themselves with appealing to the compassion and generosity of members.

---

<sup>147</sup> Australia’s recent report to the Committee on Economic, Social and Cultural Rights under the *ICESCR* provides an instructive illustration of this tendency. The report often uses universal terms such as ‘person’ when what is meant is ‘citizen’ or ‘permanent resident’: *Australia’s Report Under the International Covenant on Economic, Social and Cultural Rights 1990–1997*, UN Doc E/1994/104/Add.22, [126]–[166], discussing art 9.

<sup>148</sup> See, eg, Seyla Benhabib, ‘Citizens, Residents, and Aliens in a Changing World: Political Membership in the Global Era’ (1999) 66 *Social Research* 709; Christian Joppke, ‘Asylum and State Sovereignty: A Comparison of the United States, Germany, and Britain’ (1997) 30(3) *Comparative Political Studies* 259; Daniel Warner, ‘The Refugee State and State Protection’ in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 255–6.

<sup>149</sup> Communitarians have little liking for the language of rights, but a person to whom an obligation is owed can reasonably be described as having a ‘right’.

<sup>150</sup> Schuck, above n 118, 256.

<sup>151</sup> Costello, above n 145.

<sup>152</sup> Grete Brochmann, ‘Immigration Control, the Welfare State and Xenophobia Towards an Integrated Europe’ (1993) 18 *Migration* 5, 17–18.

<sup>153</sup> See above Part III(A).

Many of those currently involved in assisting asylum seekers articulate their mission in ways that make it clear that their focus is on assisting *human beings* in need in a way which upholds their human dignity.<sup>154</sup> In other words, their personal morality is universalist. However, the vast majority of Australians probably have not thought through the issues sufficiently to belong to either the universalist or the particularist camp. Rather, it is probably the case that, in relation to any given matter, they can be persuaded by appeals to either universalist morality or particularist morality, because both have cultural resonance.

One interviewee observed:

In the past year or two with this particular government and with the rules and regulations changing and with the bad media campaigns and with Mr Ruddock always being in the media and raving on about queue jumpers and illegals and smugglers and shopping for the best country, it's become really ... The general community is very suspicious and community organisations that were created to assist people in need become suspicious. There is a change in attitude that is really tangible.<sup>155</sup>

She went on to say:

When they hear about the 45 day rule and the non-issuing of work permits the first reaction is people say 'That's good'. ... Then we tell them that these people are left without any support; that there's no help available; that there are people that are starving, that are in danger of being homeless all the time; that there are children involved; then the shock sets in. 'What! Doesn't the government assist them? Don't they get looked after?'<sup>156</sup>

In the absence of clear moral consensus, the sensible course of action for a government trying to ensure re-election is to pursue policies which can most easily be framed in terms of voter self-interest. It is not surprising then, that while as individuals our morality may be universalist, particularist or confused, our government's treatment of on-shore asylum seekers is reflective of moral particularism.

## V WHERE SHOULD WE GO FROM HERE?

In order to ensure that our society is heading towards a future that we actually want, it is necessary, both individually and collectively, to make a considered moral choice. For those for whom moral particularism is not inherently repugnant, here is the argument from self-interest for rejecting it.

The catch with particularism is this: if an individual's worth is dependent on membership of the group, his or her rights are more or less safe in proportion to

---

<sup>154</sup> For example, this came through in several of the interviews conducted: Interview with an anonymous employee, above n 73; Interview with Sherron Dunbar, above n 64; Interview with Alison Dyson, above n 52; Interview with Gaby Heuft, above n 27.

<sup>155</sup> Interview with Gaby Heuft, above n 27.

<sup>156</sup> Ibid. The latter response may, of course, spring from humanitarian impulse rather than from universalist moral reasoning.

his or her perceived importance within the group and his or her vulnerability to being defined out of the group. Not one of us can be confident that we are forever safe from experiencing the dark side of particularism. In the oft-quoted words of one who warned against undue complacency:

First they came for the Jews and I did not speak out —  
because I was not a Jew.  
Then they came for the Communists and I did not speak out —  
because I was not a Communist.  
Then they came for the trade unionists and I did not speak out —  
because I was not a trade unionist.  
Then they came for me—and there was no one left to speak out for me.<sup>157</sup>

If it seems melodramatic to be issuing such a warning in the Australian context, consider the following instead. In 1993, the Labor Government amended the *Social Security Act 1991* (Cth) to provide that persons granted Australian permanent residence would not be able to access the full range of social security benefits for a six month period.<sup>158</sup> In 1997, the Coalition Government increased the waiting period to two years and applied it to an even greater number of benefits.<sup>159</sup> In 1998, the same Government introduced the mutual obligation initiative. Persons aged 18–24, who had been on benefit payments for more than six months, were required to participate in the ‘Work for the Dole Program’ or face the loss of benefit payments.<sup>160</sup> Since the introduction of the mutual obligation initiative, the trend has been to extend its application to more and more categories of welfare recipients and to increase the number of hours of work required of participants.<sup>161</sup> In short, it is clear from the evidence already available that, in the face of political or economic difficulty, the outer reaches of our sense of allegiance and relational obligation, that is, our sense of community, *contracts*. Permanent residents have already dropped off the edge. As for citizens, we have stopped assuming their automatic membership of our moral community and have started distinguishing between those who demonstrate their commitment to the community and those who do not. We are already catching glimpses of the future to which particularism is leading us. Is it really the future we want?

---

<sup>157</sup> Attributed to Paster Niemoeller (Dutch victim of the Nazis), as quoted by Margaret Piper, ‘Australia’s Refugee Policy’ (Paper presented at the Sydney Institute, Sydney, 4 April 2000).

<sup>158</sup> David Leser, ‘Welcome to Australia’, *Good Weekend: The Age* (Melbourne), 12 September 1998, 16. In the *Social Security Legislation Amendment Act 1993* (Cth): s 31, amending s 539 of the principal act, extends the waiting period for jobsearch; s 33, amending s 621 of the principal act, extends the waiting period for the newstart allowance; s 37, amending s 694 of the principal act, extends the waiting period for sickness allowance.

<sup>159</sup> Leser, above n 158, 16.

<sup>160</sup> Richard Curtain, *Mutual Obligation: Intention and Practice in Australia Compared with the UK and the USA* (27 August 1999) 3–4, available on the Commonwealth Department of Family and Community Services web site <<http://www.facs.gov.au>> at 7 December 2000. In the face of criticism, training options were later added.

<sup>161</sup> *Ibid.*

The image which dominates our minds and dictates our treatment of on-shore asylum seekers seems to be the image of ‘mass invasion’ by the world’s poor, pulled towards us by any perceived weakening in our determination to keep them out. If the world’s poor were all to descend upon Australia, the Australian welfare state would, of course, crumble under the weight of the demands placed upon it. If such a scenario were likely, we might well be facing a situation in which ‘the consequences of a compromise in decision-making in public life (settling for the second best rather than the ideal) can result in a better outcome than that which would come from adopting the best abstract moral principle.’<sup>162</sup> The fact of the matter, however, is that such a scenario is not at all likely. As Saskia Sassen demonstrates, no matter how easy it is to do so, most of the nationals of poor countries do not emigrate, and do not wish to emigrate, to wealthier countries.<sup>163</sup>

The conclusion then is that, from every possible perspective, Australian society has much to gain and little to lose by committing itself to respecting and protecting the *ICESCR* rights of on-shore asylum seekers. At a minimum, Australia should allow all adult asylum seekers to work and should give all asylum seekers access to Centrelink payments, Medicare and other social assistance on the same footing as Australia citizens.

---

<sup>162</sup> W G Hayden, ‘Politics, Public Responsibility and the Ethical Imperative’ in Noel Preston, Charles Sampford and C-A Bois (eds), *Ethics and Political Practice: Perspectives on Legislative Ethics* (1998) 54.

<sup>163</sup> Saskia Sassen, *Guests and Aliens* (1999) xiv.