

Immigration Detention in Australia

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Abstract

Immigration detention is used to regulate the entry of non-citizens who arrive in Australian territory without a valid visa, and remove non-citizens living in the community whose visa is no longer valid. Immigration detention persists as a key element of Australia's immigration policy with bipartisan support, despite not fulfilling its policy objectives. It also incurs high social and financial costs, and breaches international refugee law. This thesis explains the use of immigration detention in Australia, demonstrates the punitive consequences of immigration detention for detainees, and indicates the significance of the policy for Australian democracy.

The thesis provides three explanations for the social and political function of immigration detention in Australia. The first is a genetic explanation that locates immigration detention within a longer history of administrative detention in Australia. Aboriginal reserves, quarantine stations, and enemy alien internment camps are institutional predecessors to immigration detention. Wherever Australian governments considered particular categories of people as internal or external threats to the social and political health of the country, the strategy was to invoke administrative detention, and incarcerate those considered to pose the threat. There are also strong continuities in the character of these institutions.

Second, the thesis draws on social theories of incarceration, classification and control to explain how and why certain categories of people are subject to administrative detention. Since administrative detention is one of the powers of the Executive arm of government, and not the Judiciary, whole categories of people may be incarcerated, indefinitely and without trial. In any society, where particular groups are perceived as threats to social order, national security, or identity, administrative detention provides a convenient political and institutional practice to manage the problem.

The third explanation focuses on the contemporary politics of immigration detention in Australia. It is argued that immigration detention is deployed to respond to actual and perceived political anxieties about Australian identity, the impact of globalisation, and economic security for its citizens. In support of its policies, the Executive draws on populist ideas about immigration and protecting

the Australian people, and setting the conditions of membership to the Australian community.

The thesis demonstrates further that there has been an incremental consolidation of Executive power over immigration detention. Since 1992, the Executive has regularly amended the Migration Act 1958 to weaken the regulatory power of the courts and other organisations. As a result, detention staff have a high degree of discretion over the day-to-day conditions and treatment of detainees. One significant consequence of this trend is that detention centres, contrary to the legal fiction, have increasingly become punitive environments. When the empirical accounts of detention from detainees, staff, and outside observers are analysed, a clear pattern emerges of the harsh and often arbitrary treatment of detainees. These observations provide strong grounds for arguing that the conditions under which immigration detention occurs constitute a form of punishment. Furthermore, this punishment is not just intermittent, or the accidental result of poor policy implementation, but is intentional and systemic.

The implications of these findings for Australian democracy, its citizens, and those who aspire to be citizens are significant. By punishing detainees, immigration detention breaches the principle of separation of powers, whereby the Judiciary alone has the power and discretion to incarcerate for purposes of punishment. The thesis argues that Australia's political system has insufficient checks and balances to limit Executive power, particularly with regards to non-citizens.

For H.A. and Mrs S.

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Glossary

AAT	Administrative Appeals Tribunal
ABC	Australian Broadcasting Commission
ACHSSW	Australian Council of Heads of Schools of Social Work
ACM	Australasian Correctional Management
ADJR Act	Administrative Decisions (Judicial Review) Act
ANAO	Australian National Audit Office
COAG	Council of Australian Governments
CROC	United Nations Convention on the Rights of the Child
DEA	Department of Ethnic Affairs
DeHAG	Detention Health Advisory Group
DIAC	Department of Immigration and Citizenship
DILGEA	Department of Immigration, Local Government and Ethnic Affairs
DIMA	Department of Immigration and Multicultural Affairs
DIMIA	Department of Immigration, Multicultural and Indigenous Affairs
GSL	Global Solutions Limited
HREOC	Human Rights and Equal Opportunities Commission
ICCPR	International Covenant on Civil and Political Rights
INTERFET	International Force for East Timor
IOM	International Organisation for Migration
IRT	Immigration Review Tribunal
ITA	Immigration Transit Accommodation
MRT	Migration Review Tribunal
POW	Prisoner of War
RASSA	Refugee Advocacy Service of South Australia
RRT	Refugee Review Tribunal
SMH	Sydney Morning Herald
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

Introduction

Immigration detention is used to regulate the entry of non-citizens who arrive in Australian territory without a valid visa, and remove non-citizens living in the community whose visa is no longer valid. Immigration detention persists as a key element of Australia's immigration policy with bipartisan support, despite not fulfilling its policy objectives. It also incurs high social and financial costs, and breaches international refugee law. This thesis explains the use of immigration detention in Australia, demonstrates the punitive consequences of immigration detention for detainees, and indicates the significance of the policy for Australian democracy.

Immigration detention has been used since 1989 to control the entry of asylum seekers coming to Australia by boat, and became policy for all such unauthorised entrants in 1992. From the mid 1990s, two categories of people have been subject to immigration detention. The first category is people who arrive in Australia without a valid entry visa. This category includes asylum seekers, and foreign fishermen caught in Australian waters without permission. People in this category are detained until they are granted a visa, or are removed from the country. The second category is people who entered Australia with a valid visa that is no longer valid. This category includes visa overstayers, and people whose residency visa has been cancelled. These people are detained until they are removed.

There are several problems with the policy of immigration detention: the policy objectives are not met; the policy incurs a high social and financial cost; and it is contrary to international law. The continued use of immigration detention despite these problems raises the questions central to the inquiry of this thesis: why does immigration detention persist as a key aspect of Australia's immigration policy? Given the policy outcomes do not meet its objectives, immigration detention must serve other social and political functions. What, then, are the social and political functions of immigration detention in Australia?

Immigration detention is a form of administrative detention, and the thesis uses this broader category of incarceration as a conceptual framework to guide its inquiry. Administrative detention refers to all forms of incarceration by Executive,

rather than Judicial, order. This conceptual framework enables the development of three explanations for the social and political function of immigration detention in Australia. The first is a genetic explanation that locates immigration detention within a longer history of administrative detention in Australia. Aboriginal reserves, quarantine stations, and enemy alien internment camps are institutional predecessors to immigration detention. Wherever Australian governments considered particular categories of people as internal or external threats to the social and political health of the country, the strategy was to invoke administrative detention, and incarcerate those considered to pose the threat. There are also strong continuities in the character of these institutions.

Second, the thesis draws on social theories of incarceration, classification and control to explain how and why certain categories of people are subject to administrative detention. Since administrative detention is one of the powers of the Executive arm of government, and not the Judiciary, whole categories of people may be incarcerated, indefinitely and without trial. In any society, where particular groups are perceived as threats to social order, national security, or identity, administrative detention provides a convenient political and institutional practice to manage the problem.

The third explanation focuses on the contemporary politics of immigration detention in Australia. It is argued that immigration detention is deployed to respond to actual and perceived political anxieties about Australian identity, the impact of globalisation, and economic security for its citizens. In support of its policies, the Executive draws on populist ideas about immigration and protecting the Australian people, and setting the conditions of membership to the Australian community.

The conceptual framework also enables an examination of the consequences of immigration detention. The Australian constitution provides that the Executive can incarcerate certain categories of people, including non-citizens. It does, however, place certain constraints on administrative detention. Specifically, administrative detention must be for administrative purposes only, and may not be for the purposes of punishment. Since 1992, the Executive has repeatedly changed the policy to incrementally remove the power of the courts and other organisations to regulate the policy and practice of immigration detention. This

means that immigration detention centres have become largely unregulated sites, where the day-to-day conditions and treatment of detainees is left to the discretion of detention staff. When the empirical accounts of detention from detainees, staff, and outside observers are analysed, a clear pattern emerges of the harsh and often arbitrary treatment of detainees. These observations provide strong grounds for arguing that the conditions under which immigration detention occurs constitute a form of punishment. Furthermore, this punishment is not just intermittent, or the accidental result of poor policy implementation, but is intentional and systemic.

The implications of these findings for Australian democracy, its citizens, and those who aspire to be citizens are significant. By punishing detainees, immigration detention breaches the principle of separation of powers, whereby the Judiciary alone has the power and discretion to incarcerate for purposes of punishment. The thesis argues that Australia's political system has insufficient checks and balances to limit Executive power, particularly with regards to non-citizens.

The Chapters and Methods

This thesis is an interdisciplinary policy analysis. It is structured in four sections – covering policy analysis, history, theory and law – over seven chapters. The thesis draws on both primary and secondary sources. A synopsis of each chapter, including the methods used, is provided below.

The first section – chapters 1 and 2 – articulates the problem of immigration detention and evaluates scholarly research on the subject. Chapter 1 outlines the policy of immigration detention and the socio-political environment in which the policy has developed. It conducts a conventional policy analysis of immigration detention by assessing whether the policy objectives are met by the outcomes. This analysis concludes that the objectives are not achieved. In addition, it identifies three additional problems with the policy: that detention is harmful to the physical and mental health of detainees; that detention incurs high financial costs; and that detention infringes international refugee and human rights law. This chapter sets up one of the central inquiries of this thesis. Why does immigration detention persist as a key aspect of Australia's immigration policy? It

is argued that, given these problems, immigration detention must fulfil other social and political functions. What, then, are the social and political functions of immigration detention in Australia?

Chapter 2 conducts a review of the literature on immigration detention. The aim of this chapter is to ascertain how others have explained the function of immigration detention in Australia. It identifies two broad categories of scholarship on immigration detention. The first category includes social histories that seek to record the impact of immigration detention on detainees. This category draws heavily on the testimonies detainees, staff and others with experiences of detention. The second category includes social theories of immigration detention that reveal how people have sought to explain the function of immigration detention in Australia. This chapter identifies six sub-categories of explanations, including: ideas of racialism; fear of invasion; the idea of national will; states of exemption; economic insecurity and globalisation; and national histories of detention. Implicit in each of these explanations is the idea that immigration detention is not an anomaly in Australian society, but rather a symptom of persistent social concerns, preoccupations, and latent fears in Australia and throughout the Western world.

This chapter identifies two shortcomings within this body of literature. First, studies of immigration detention overwhelmingly focus on the detention of asylum seekers, largely ignoring the function and impact of detention on other categories of detainee. Second, these theories do not pay due regard to the fact that immigration detention is a form of administrative detention, and that this particular constitutional status has implications for the history, the theory and the law that applies to immigration detention. These omissions in the literature limit the degree to which a satisfactory explanation of immigration detention has been provided. Further research is needed that takes into account the different categories of people who are subject to immigration detention, and that recognises the status of immigration detention within the broader category of administrative detention.

The second section of the thesis – chapter 3 – provides a genetic explanation for immigration detention, by sketching a select history of administrative detention in Australia. Aboriginal reserves, quarantine stations and enemy alien internment

camps were three institutional predecessors to immigration detention. This chapter examines these three case studies in turn. In each, the policy is outlined and analysed with regard to the social context of the time. This chapter demonstrates that administrative detention has been used in Australia since white settlement to regulate the entry of people into the country, or remove people from the community. Each form of administrative detention is a response to specific temporal social anxieties, and incarceration of certain groups of people has been regarded as the solution to these anxieties.

The third section – chapters 4 and 5 – draws on social theory to develop a theoretical explanation for immigration detention. First, chapter 4 develops a theoretical explanation for administrative detention more generally. While judicial imprisonment has been examined in a large body of literature, administrative detention has received little theoretical attention. This chapter builds on the theories of Durkheim (1938), Douglas (1966), Goffman (1967), Rothman (1971), Foucault (1967, 1977, 1978) and Agamben (1998) to explain the social and political function of administrative detention. Three categories form the framework for this explanation – incarceration, classification and control – and describe the ‘how’, ‘who’ and ‘why’ of administrative detention.

Chapter 5 applies the framework developed in chapter 4 to immigration detention to explain how immigration detention responds to specific social and political needs in contemporary Australia. This chapter argues that theories of control best explain the social and political function of immigration detention. The chapter examines the architecture and geographical placement of immigration detention centres to explain the characteristics of this form of incarceration. It examines Australia’s visa system using theories of classification and ambiguity, with reference to the work of Mary Douglas (1966). Finally, the chapter investigates aspects of the policy and practice of immigration detention with particular reference to theories about control. It explains how the policy of immigration detention is grounded in the idea that control of Australia’s national borders is possible, and that populist notions about migration policy consider the Executive best placed to implement this control. It also examines common-sense ideas of the ‘rules’ for entry into Australia and the consequences of breaking these rules,

and the effect Australia's migration laws have on immigration bureaucracy and the implementation of detention policy.

Finally, the fourth section – chapters 6 and 7 – examines the consequences and significance of immigration detention for immigration detainees, and for Australia's democracy. Chapter 6 describes how, since the policy of immigration detention was introduced in 1992, the government has incrementally removed the power of the courts and other organisations to regulate its implementation. It also outlines the dominance of the Executive over the Parliament with regards to immigration detention policy, the pressure of the Executive over the Refugee Review Tribunal (RRT), and the broad ministerial powers of discretion. This chapter argues that the Executive has achieved a high degree of control over the policy and practice of immigration detention, and that the Judiciary, the Parliament, and other political mechanisms are inadequate to provide sufficient checks and balances on the policy and practice of immigration detention.

Chapter 7 explains the consequences and significance of the policy and practice of immigration detention for detainees, and more generally, for Australia's democracy. Under Australia's constitution, the Executive has the power to incarcerate people, including non-citizens. This power, however, is limited by the principle of the separation of powers: specifically, administrative detention must be for administrative purposes only, and not for purposes of punishment. This chapter analyses subjective and objective accounts of immigration detention from detainees, staff, and others involved in detention. It argues that, contrary to the legal fiction, punishment in detention is systematic. The removal of measures of regulation and accountability from immigration detention policy means that, within the centres, staff have a high degree of discretion over the day-to-day conditions and treatment of detainees. As a result, immigration detention centres are control regimes with punitive effects. This finding is significant for Australian democracy, its citizens, and those who aspire to be its citizens. With immigration detention, the Executive breaches the limitations placed upon it by the constitution. That it is able to do so indicates that there are insufficient checks and balances to limit the power of the Executive regarding the detention of non-citizens.

Terminology

Some notes about terminology are important here. This thesis is a study of administrative detention. The terms ‘executive detention’ or ‘extrajudicial detention’ have been used in different contexts to describe the same form of incarceration. While the terms ‘administrative’ and ‘executive’ in this context can be used interchangeably, the term ‘administrative’ more precisely refers to the implementation of the laws. The term ‘extrajudicial’ is more problematic because it defines this form of incarceration by what it is not, rather than what it is.

Secondly, for reasons of simplicity, the terms ‘immigration detention centres’ or ‘detention centres’ are used throughout the thesis to describe all the single-purpose detention facilities. The official names of these institutions vary: for example, the official name for Baxter is Baxter Immigration Reception and Processing Centre. Similarly, Maribyrnong is officially Maribyrnong Immigration Detention Facility. Other multi-purpose facilities used for immigration detention purposes, such as community detention facilities or immigration transit accommodation centres at airports, are identified as such.

A third note on terminology concerns the department responsible for this area of administration. At the time of submission of this thesis, the name of the department is the Department of Immigration and Citizenship (DIAC). Over the course of the policy of immigration detention, the Department has changed its name six times: the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) (1987-1993); the Department of Ethnic Affairs (DEA) (1993-1996); the Department of Immigration and Multicultural Affairs (DIMA) (1996-2001); the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) (2001-2006); back to the Department of Immigration and Multicultural Affairs (DIMA) (2006-2007); and finally to the current name DIAC in 2007. To avoid confusion this thesis uses the terms ‘the Department of Immigration’ or simply ‘the Department’, unless a different name is used in a quote from another source. Similarly, the minister is referred to simply as the ‘Minister for Immigration’. In the reference list, the name of the department at the time that the publication is produced is adhered to.

Recent Changes to the Policy

Since 2005, a number of aspects of the policy of immigration detention have been amended with the aim of making the policy more humane. From 2005 children and their primary carer are no longer held in detention centres, and are instead accommodated in residential housing facilities. In January 2008 the detention aspects of the Pacific Solution were abolished, although since December 2008 all asylum seekers who arrive in Australia by boat are detained on Christmas Island. In July 2008 a limit of three months was placed on length of time people could be held in detention. While these changes have been promoted as the abolition of the policy of mandatory detention (Evans 2008), the same categories of people are still detained on a mandatory basis. The only significant change since 2008 has been that the length of time spent in detention has been reduced. Both major parties and a large section of the Australian community support the continued use of the policy. Investigation into the 'enduring nature' (Rothman 1971) of immigration detention is as relevant following these minor amendments as ever.

Chapter 1

The Policy of Immigration Detention in Australia

This chapter sets out the problem that forms the starting-point for this thesis. It conducts a conventional policy analysis of immigration detention, and demonstrates that the policy objectives are not matched by the outcomes. In addition, it outlines some of the unintended costs of the policy of immigration detention. This exercise raises questions about the persistence of immigration detention as a key part of Australia's immigration policy.

The chapter has three main sections. The first section outlines the policy of immigration detention, explains the policy of mandatory detention, and provides a socio-political context for the introduction and evolution for the policy. This section places emphasis on the fact that immigration detention is a form of administrative detention. The second section conducts a conventional policy analysis of immigration detention, by weighing the policy objectives by its outcomes. This section demonstrates that the policy of immigration detention cannot be satisfactorily explained by such an exercise. The objectives of the policy of immigration detention are not matched by the outcomes. Different methods of analysis are needed to explain the policy of immigration detention.

The third section examines three of the more controversial aspects of the policy.

The first of these is the impact of immigration detention on the mental and physical health of the detainees. Many studies have demonstrated that long-term detention has a detrimental impact on the health and well-being of detainees, and this section outlines key findings from this research. The second aspect is the high economic costs of immigration detention, and this section outlines some of these costs. Finally, this section examines the issue that the policy of immigration detention in Australia is inconsistent with international refugee and human rights laws, and outlines key areas of divergence between Australian and international law.

The purpose of this chapter is to demonstrate why an explanation of the social and political function of immigration detention is not provided by a conventional policy analysis, and that an alternative explanation is needed. By demonstrating

the limitations of a conventional policy analysis, this chapter argues that a further interdisciplinary analysis that draws on history, social and political theory is required to explain the phenomenon of immigration detention in Australia.

The Policy of Immigration Detention

Who is Subject to Immigration Detention?

Immigration detention was originally deployed in 1989 by the Hawke Labor government to detain asylum seekers, but in the 1990s its function was extended to detain other categories of people as well. Specifically, two categories of non-citizen may be subject to immigration detention.

The first category is non-citizens who have entered Australian territory without a valid entry visa. This category includes two sub-groups: asylum seekers, and illegal foreign fishermen. Asylum seekers subject to immigration detention are usually those who have arrived in Australia by boat. For asylum seekers travelling to Australia by airplane, the barrier to entry is usually at the point of departure: comprehensive immigration checks by Australian 'Airline Liaison Officers' at international airports mean that very few people without valid entry visas make it to Australia by airplane. Asylum seekers who do arrive in Australia by airplane often come with a valid entry visa – such as a student, tourist or business visa – and apply for asylum once they have entered the country. Therefore, most asylum seekers travelling by airplane enter the country with a valid entry visa, and are therefore not subject to detention, regardless of whether or not the entry visa was an honest indication of their purpose for coming to Australia.

The policy is outlined in the *Migration Act 1958* where section 176 provides that:

the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in immigration detention until he or she:

- (a) leaves Australia; or
- (b) is given a visa.

Section 177 defines a ‘designated person’ as ‘a non-citizen who:

- (b) has not presented a visa; and
- (c) is in the migration zone; and
- (d) has not been granted a visa.

For most asylum seekers who enter Australia by boat, the circumstances under which they have left their home country often means that they have been unable to secure official documentation. Indeed, many do not own passports, identity papers or travel documents, which are required to secure an entry visa for Australia. The United Nations High Commissioner for Refugees (UNHCR) recognises the difficulty for many asylum seekers to secure such documentation from countries in which they are subject to persecution (UNHCR n.d.). This subsequently leads to difficulties in getting travel visas and problems with false passports. It also predetermines the method of travel to Australia, and often the only option available to asylum seekers is to engage a ‘people smuggler’ to bring them to Australia by boat.

There are generally three stages of the asylum application process. First, the asylum seeker submits an application for refugee status, and must undergo health and security checks. The second stage is the application process itself, which may be a long procedure extending from a matter of weeks to – in rare cases – five or more years, and might include a number of court appeals. The third stage occurs if an asylum seeker is found not to have a substantial claim for refugee status, in which case they are held in detention before deportation. It is not unusual for host countries to detain asylum seekers on their arrival in order to complete health, security and identity checks, or to hold them after the last review has failed and they are removed from the country. Australia is the only country in which asylum seekers are held in detention for the second stage of this process.

Until 2005 the detention of asylum seekers applied equally to adults and children. This meant that children, including unaccompanied minors, were detained until they were granted protection or deported. This also includes children born in Australia: section 177 of the *Migration Act* states that the definition of a ‘designated person’ also includes ‘a non-citizen born in Australia whose mother is a designated person’. In 2005 the law was altered so that children and their primary

carer could stay for the length of their detention in immigration residential housing facilities.

Foreign fishermen subject to immigration detention are those who have been caught fishing in Australian territorial waters, which is illegal. They are usually young men from Indonesia or other South-East Asian nations. Until 2006, fishermen were first 'detained' on their boat moored in Broome or Darwin harbour, sometimes for weeks, until they were moved to facilities on shore. Two detention centres are used exclusively for fishermen – Willie Creek near Broome or Northern Detention Centre in Darwin – until they are removed from the country, or are charged with an offence and transferred to the prison system. The policy of detention of foreign fishermen is outlined in section 84 of the *Fisheries Management Act 1991*. Section 84(ia) provides a fisheries officer power to 'detain a person in Australia or a Territory for the purposes of determining during the period of detention whether or not to charge the person with an offence'.

The Australian government started to detain foreign fishermen after a 1979 agreement between Australia and Indonesia that expanded Australia's maritime territory into traditional fishing grounds of Indonesia. The numbers detained dramatically increased in 2001 after the introduction of the *2001 Border Protection (Validation and Enforcement Powers) Act* which gave the Australian defence force powers to pursue, board, search and detain vessels outside Australian waters, and to detain people they suspect of illegal activities (Balint 2005: 84). According to Balint (2005: 87), because of differences in state jurisdiction, all fishermen in Broome are usually charged with trespassing offences and transferred to prison, while in Darwin it is usually only the captain who is charged. The penalty is a fine, but because the amount is out of the reach of fishermen, they 'pay off' their fine with a prison sentence at a set amount each day. In 2005, the average length of detention for fishermen found guilty of offences was 27 days before being transferred to prison (Balint 2005). Among these groups there are often youths under the age of eighteen.

The second category people subject to immigration detention are non-citizens who have been living in the community on a valid visa, but this visa is no longer valid. Again, this category includes two sub-groups. The first is non-citizens who have overstayed their visa, such as a business, tourist or student visa. When

detected, these people are removed from the community and detained until they are deported. Usually the detention of this group is only for a short time – a matter of hours or a few days – until they are placed on a flight home. The detention of unauthorised non-citizens is outlined in sections 188-199 of the *Migration Act*. Specifically, section 189(1) states ‘if an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person’.

The second sub-group is non-citizens who have had their visa cancelled for a breach of the conditions of the visa. This can include, for example, international students who have been found to be working for more hours than their visa allows. It also includes permanent residents who have breached the conditions of their visa, often the result of being convicted and sentenced to a crime for longer than one year, or shorter sentences for a cumulated total of two years. It also includes, in rare cases, cancellation of a residency visa as the result of a discretionary decision by the Minister for Immigration, based on ‘character grounds’. Again, this sub-group is removed from the community or transferred from prison to detention, and are detained until they are deported.

The Australian government has always deported people on character grounds. As discussed in chapter 3, this was the reason cited for the deportation of thousands of people from Australia after the two world wars. In 1983, the Labor government set a time limit of 10 years of residence during which deportation was possible, as outlined in sections 200 and 201 of the *Migration Act*. After 10 years, even without citizenship, the individual was considered an ‘absorbed person’ and would be no longer liable for deportation (Nicholls 2007: 150). In 1996 this policy was reversed, and section 501 was introduced to the *Migration Act* which overrides the considerations of length of residency in sections 200 and 201. From 1996 non-citizens have been deported on character grounds with no consideration of how long they have lived in the country (Nicholls 2007: 151).

Of the 3,977 people taken into immigration detention during 2008–09: 1,372 (34.5%) were people who had been living in the community but overstayed or breached visa conditions resulting in a visa cancellation; 176 (4.4%) were foreign fishermen; 1,566 (39.4%) were unauthorised arrivals consisting of 523 (13.2%) by

air and 1043 (26.2%) by boat; and 863 (21.7%) were in other categories (DIAC 2009a: 136).

The Length of Detention

The policy of mandatory detention introduced in 1992 contained a time limit for detention of 273 days, or 9 months. This time limit was removed from the law in 1994. Unlike prisoners in the judicial carceral system, immigration detainees do not know the length of their incarceration. In August 2004, the High Court ruled in *Al-Kateb* that detainees could be detained indefinitely if they could not be granted a visa, and could not be removed from the country.

So far, the longest serving adult detainee, Peter Qasim, was released in 2005, aged 31, after more than 7 years in detention. The Human Rights and Equal Opportunities Commission (HREOC) report *A Last Resort?* (2004) found that, at December 2003, the average length of detention for a child was one year, eight months and 11 days. The longest-serving child detainee was released in 2004 after five years, five months and 20 days.

Immigration Detention as Administrative Detention

Immigration detention is a form of administrative detention, that is, incarceration by Executive order. Administrative detention has a different constitutional status to judicial incarceration, and is therefore subject to different legal parameters. Chapter III of the Australian constitution outlines the principle of the separation of powers between the Executive, the legislature, and the Judiciary. Section 51 of the constitution grants the Executive the power to make laws with regards to 'aliens', including the incarceration of aliens if the incarceration is for administrative purposes only. Only the Judiciary has the power to incarcerate for purposes of punishment.

There are a number of other important differences between administrative detention and judicial imprisonment. The decision to detain people in administrative detention is a quite different from the processes of imprisonment in the judicial system. In the latter, imprisonment occurs only after a substantial process of laying charges, trials and sentencing. In contrast, people are subject to administrative detention without rigorous investigation into whether the detention is correct and justified. As explained above, section 189(1) of the *Migration Act*

states that people ‘must’ be detained if a migration officer ‘reasonably suspects’ that they are an unauthorised non-citizen, with no onus on the authorities to conduct further investigation into whether the detention is correct. In the judicial system, people are imprisoned because of something they have done, while people are subject to administrative detention because they meet certain administrative criteria. In some cases, this means people may be detained because of who they are. Unlike prisoners in the judicial system, immigration detainees are not informed of the length of their sentence before incarceration. Indeed, the ruling of *Al-Kateb* (2005) established that it is not unconstitutional for detainees to be held indefinitely. Finally, the conditions of administrative detention are not subject to the same regulations as judicial imprisonment. Judicial imprisonment is regulated by well-established procedures with a view to afford accountability and transparency of the prison and the experiences of prisoners. As discussed throughout this thesis, all forms of administrative detention in Australia have been characterised by a lack of accountability and transparency.

The Detention Centres

Mainland Detention Centres

Since 1989, Australia has had nine detention centres on the mainland operating at different times: Port Hedland (WA), Curtin (WA), Woomera (SA), Villawood (NSW), Maribyrnong (VIC), Baxter (SA), Perth (WA), Northern (NT), and Willie Creek (WA). At the time of submission, only four mainland centres remain operational: Villawood (in the western suburbs of Sydney), Maribyrnong (in the northern suburbs of Melbourne), Perth (at the Perth airport), and Northern (near Darwin). Villawood and Maribyrnong are used to accommodate asylum seekers, visa overstayers and visa cancellations. Perth accommodates visa overstayers, visa cancellations, and people refused entry to Australia. Northern detention centre is used exclusively for foreign fishermen. In addition, two Immigration Transit Accommodation (ITA) facilities at Brisbane and Melbourne airports were opened in November 2007 and June 2008 respectively. Another ITA is planned for Adelaide airport.

Villawood, Maribyrnong and Perth detention centres are ‘metropolitan’ centres. Many of the other centres – which have either been closed or ‘mothballed’ – were located a long way from metropolitan centres. Port Hedland detention centre was

the first centre to be used specifically for the detention of boat people. Port Hedland is equidistant from Perth and Darwin on the far north coast of Western Australia. Woomera detention centre is located outside the small desert town of Woomera, 500 km north of Adelaide and 180 km north of Port Augusta. Baxter detention centre is outside Port Augusta, a drive of three and a half hours from Adelaide. As discussed further in chapter 5, the sites for the centres are significant. Port Hedland, as described above, was chosen specifically because of its distance from the main metropolitan centres, making visits by friends, lawyers, and the media difficult. The Woomera and Baxter detention centres achieved the same purpose. Known as ‘desert camps’, these latter sites are isolated and in desolate surroundings. Baxter in particular was notoriously difficult to enter. Once the visitor had made the long journey to the centre, strict and often arbitrary security regulations made visits difficult (Mares 2002, Keogh 2003).

Offshore Detention Centres – The ‘Pacific Solution’

The Pacific Solution is an umbrella term encompassing a number of border control strategies aimed at denying entry of asylum seekers coming to Australia by boat. The Pacific Solution was introduced in 2001 after the *Tampa* affair (explained below). One of the key strategies of the Pacific Solution was the ‘offshore’ detention of asylum seekers who arrived in Australian territorial waters, but did not make it to the mainland. The detention aspect of the Pacific Solution was extremely controversial, and was officially abolished in January 2008 as one of the first major acts by the newly elected Labor government.

Under the Pacific Solution asylum seekers were accommodated in three detention centres: Topside and State House detention centres in Nauru, and a small detention centre on Manus Island, Papua New Guinea. The use of these facilities for Australian purposes was the result of an agreement that involved significant financial compensation to the two countries. The small island nation of Nauru faced bankruptcy before agreeing to accommodate Australia’s asylum seekers in return for a large increase in aid funding each year for the duration of the policy. Like the desert camps in Australia, these detention centres were hard and expensive to travel to for lawyers, advocates or the media. Also like the desert camps, the conditions of these centres were harsh. The centres on Nauru, for example, had running water for only a few hours a day (Briskman et al. 2008:

116). The conditions of these detention centres is discussed in more detail in chapter 5.

The Pacific Solution was abolished in January 2008. To June 2007, 1,547 asylum seekers had had their visas processed on either Manus Island or Nauru. 986 people, or 63.7%, were assessed to be refugees (Gauthier 2007: 55). Unlike the application process in Australia, offshore asylum seekers may only apply for refugee status, and not for a residency visa as well. This means that if asylum seekers are found to be refugees, they still have to find a country that is willing to resettle them. From the outset Australia said that it would not resettle any found to be refugees, but in fact it resettled 616, or 57.9% of the total of those resettled (Gauthier 2007: 55). New Zealand resettled 401, or 36.5%, and the remainder (47) were resettled in Sweden, Canada, Denmark and Norway.

Offshore applications were processed by Australian immigration officials or the International Organisation for Migration (IOM). The UNHCR was involved in initial processing of applications in 2001 before withdrawing its services. Asylum seekers whose applications for protection were processed as part of the Pacific Solution were not granted the same rights to appeal as those processed on mainland Australia. Specifically, there was only one stage of the refugee determination process, and if they are not granted refugee status from their initial interview, there was no avenue for appeal. This meant that the multiple stages of review available to asylum seekers processed on the mainland, including the Refugee Review Tribunal, the Administrative Appeals Tribunal or the courts were not available to them. In addition, access to the asylum seekers by lawyers, advocates and the media was restricted by the governments of Nauru or PNG, who could simply refuse to grant entry visas to those whom they didn't want to visit (see chapter 5).

Furthermore, Crock (2003) notes a disparity between the recognition rates between UNHCR and the Department of Immigration, with the Department approving fewer applications for asylum. Of Iraqi asylum seekers processed by the UNHCR on Nauru as of July 2002, 84% were assessed to be refugees. In May 2002, the Department's recognition rate of Iraqis on Nauru was about 53%, and on Manus Island 76% (Crock 2003: 88). This disparity suggests that the UNHCR was more generous in its determination decisions than the Australian authorities

on Nauru and Manus Island. This disparity could either mean, as Taylor (2005: 61) suggests, that the UNHCR granted asylum to people who did not meet the refugee criteria, or that the Department of Immigration was rejecting people who did. That the recognition rates of Iraqi applicants in Australia processed within the same time period was over 80% (Crock 2003: 88) indicates the latter is more likely.

Christmas Island

Christmas Island is an Australian territory situated 2600 kilometres north-west of Perth and just 300 kilometres south of Indonesia. Being so close to Indonesia, the island has been the destination of many boats of asylum seekers. It has two sites used for immigration detention purposes: Phosphate Hill, and North West Point Immigration Reception and Processing Centre. There is also Immigration Residential Housing available on the island. The North West Point detention centre was opened in December 2008, is a purpose-built facility to accommodate 500 detainees with a 'surge capacity' of up to 800 detainees. Like Baxter, North West Point was purpose built for detention purposes. It opened in December 2008 with accommodation for 500 people, with a surge capacity of 800 people. In December 2009 plans for its expansion were announced due to an unexpected large number of boat arrivals (DIAC 2009b).

The North West Point and other detention centres on Christmas Island take the place of the detention centres on Nauru and Manus Island, in that they accommodate all asylum seekers who arrive in Australian territory – but do not make it to the mainland – by boat. Far from the Australian mainland, it has the same access difficulties as the Pacific Solution centres. Like the Pacific Solution Centres, too, asylum seekers processed on Christmas Island do not have access to the same review procedures as asylum seekers processed on the mainland. In place of the mainland review stages, asylum seekers on Christmas Island who have had their applications rejected are able to have 'independent review' of their cases. Asylum seekers found to be refugees are resettled on the mainland.

Immigration Residential Housing

In 2005 the policy of mandatory detention was changed so that children and their primary carers would be accommodated in immigration residential housing, rather

than within detention centres. There are currently two residential housing sites on the mainland in Sydney and Perth, and one on Christmas Island. Similar facilities at Woomera and Port Hedland have been closed but may be re-opened if required. The Perth and Sydney facilities consist of two and four adjacent houses respectively that can house two families each. Detainees in residential housing are still under surveillance, and are escorted to the supermarket and other community facilities such as libraries and the local swimming pool. Nevertheless, within these facilities, detainees are able to live relatively autonomously, may cook their own food, and follow routines that are more suitable for raising children.

The Use of Non-Immigration Facilities for Immigration Detention

Non-immigration facilities are also used for immigration detention purposes, including prisons, psychiatric institutions, hotels and motels, apartments, hospitals, private homes and foster care arrangements. In these alternative facilities, detainees are kept under guard. In addition, foreign fishermen are often detained on their boat before being transferred to Northern detention centre.

Other Onshore Asylum Seekers and Irregular Migrants

Asylum seekers arriving by boat constitute a very small percentage of people who arrive or are living in Australia without a valid visa. The overwhelming majority of onshore asylum seekers arrive not by boat but by airplane. The total number of onshore asylum seekers, however, is only a fraction of the people who have overstayed the length of their visa and are living in the community without permission to do so.

The table below shows the numbers of people arriving by boat and plane without permission between 1994 and 2005, and the number of people who overstayed their temporary visa:

Year	Plane arrivals	Boat arrivals	Overstayers
1994-95	485	1,071	-
1995-96	663	589	-
1996-97	1,350	365	45,100
1997-98	1,550	157	51,000
1998-99	2,106	920	53,143
1999-2000	1,695	4,175	58,745
2000-01	1,508	4,141	60,102
2001-02	1,277	1,193	60,000
2002-03	937	14	59,800
2003-04	1,241	82	51,000
2004-05	1,632	0	47,800

(Crock et al. 2006: 31, no statistics for visa overstayers in 1994-96).

In 2008, 4,768 asylum seekers arrived in Australia by plane, compared with 161 who arrived by boat (Harvey 2009). There are a number of barriers to entering Australia by plane in order to seek asylum. Airline Liaison Officers check visas and passports of passengers at large international airports such as Bangkok and Kuala Lumpur before they board the plane to Australia, and airlines are fined up to \$10,000 for every person they allow to come to Australia without a visa. In 2008-09, Airline Liaison Officers prevented 155 people from travelling to Australia by (DIAC 2009a: 112). At Australian airports, all non-citizens undergo a comprehensive immigration check. For this reason, the majority of asylum seekers who arrive by plane travel with a tourist, student or business visa, and then request asylum once they have entered the country. The recognition rates for asylum seekers who arrive by plane are much lower than those who arrive by boat. Generally 90-95% of boat arrivals are granted refugee status, while only 40-60% of plane arrivals are found to meet the definition of a refugee.

Asylum seekers who arrive by plane, however, are not automatically detained. Instead, the majority are granted bridging visas, allowing them to live in the community until their applications for protection are assessed. The paradox in this policy is that people who arrive in Australia on false pretences are treated much better than people who are compelled to travel to Australia by boat, despite being less likely to fulfil the criteria of a refugee (see Mares 2002: 71).

No matter how they arrive in Australia, the numbers of onshore asylum seekers are insignificant compared with the numbers of people without a valid visa living in the community. Crock, Saul and Dastyari (2006: 27) estimate that in recent years Australia has had a population of between 50,000 and 60,000 people living

in Australia without a valid visa. Approximately two thirds are people who have overstayed tourist visas. While many of these people will only overstay their visa by a day or two, in 2005 32% of visa overstayers had been in Australia for over ten years. Since the mid 1990s the Department of Immigration has been much more intent on identifying and removing visa overstayers. In 2008-09, the Department located and removed 11,428 visa overstayers from Australia (DIAC 2009a: 122).

The Private Management of Detention Centres

Until 1998, Australian Protective Services, a government agency, managed the security at detention centres. Other services were provided either by the Department of Immigration or individual contractors. From February 1998, the security and provision of other services was contracted out to private companies. The first company to win the tender to manage the centres was Australasian Correctional Management (ACM). In 2003, after much controversy about the centres, ACM's contract was not renewed, and in 2004 Group 4 Falck Global Solutions took over the management. Between 2004 and 2009, although essentially under the same parent company, Group 4 Falck Global Solutions changed its name to Global Solutions Limited (GSL) and subsequently to G4S. In 2009, Serco replaced G4S, winning a five-year contract to manage the centres.

The primary business of ACM and G4S is running prisons. ACM, a subsidiary of the US company Wackenhut, has a number of prisons in Australia and the United States. Group 4 Falck, a Danish company, runs many prisons in Europe. Many of the detention staff have been recruited from staff previously employed in prisons, and, as explained in chapter 7, this affects their interaction with detainees. Serco implements government services more generally. In Australia, it provides garrison and port services to the Australian Defence Force, operates traffic safety cameras in Victoria, and manages two prisons in Queensland and Western Australia.

In 2005, the Australian National Audit Office (ANAO) conducted an audit on the contract between the Department of Immigration and GSL, the then service provider. The ANAO (2005: 18-19) found, among other things, 'the Contract does not establish clear expectations for the level and quality of services to be delivered; mechanisms to protect the Commonwealth's interests are not clear; and

there is insufficient information about the quality of services being delivered and their costs to allow a value-for-money calculation'. In addition, vague wording within the contract makes evaluation of whether the standards of the contract have been met difficult (ANAO 2005: 16):

In developing the Contract, DIMIA sought to establish a range of standards and measures by which to measure performance. Schedule 3 of the Contract lists 148 standards and 243 measures and Schedule 2 contains more than 300 descriptions of detention services. The ANAO found that terms such as 'timely', 'appropriate', 'relevant', 'adequate' and 'as soon as possible' are used in the standards and/or measures and these are not defined to allow their assessment. The standards also contain conditions and provisos, which mean that proving that the standard should have been met in a particular instance would be difficult.

The ANAO (2005: 17) report also raised questions as to why the costs of detention and their management increased at the same time that the numbers of detainees decreased. While in opposition, the federal Labor party was vocal in its opposition to private management of the centres, but chose to persist with this management model after its election to government in 2007, despite the centres being under tender at the time.

A Short History of Immigration Detention

The policy of immigration detention was first implemented in November 1989, and evolved throughout the 1990s and 2000s in response to both domestic and international socio-political concerns. This section provides a brief outline of the development of the policy with regard to the social and political issues that have formed the background for immigration detention. There are many studies that conduct a more comprehensive history of the policy, including Crock, Saul and Dastyari (2006), McMaster (2001), Brennan (2003), and Mares (2002). Nevertheless, for the purposes of this thesis, it is important to review briefly the social and political circumstances that have been instrumental to immigration detention.

The 'first wave' of boat arrivals during the late 1970s, was of people from southern Vietnam seeking protection from the communist regime. Although there was disquiet among sections of the community about the potential of being

'swamped' by 'Asian hoards' (see Rodd 2006), the Vietnamese asylum seekers fit neatly in to the classic Cold War paradigm, and justified Australia's broader international relations approach (Brennan 2003: 32). The Vietnamese asylum seekers were accommodated within the community or in migrant reception centres or hostels until granted protection.

Between 1989 and 1995, a 'second wave' of boats, carrying approximately 2000 Cambodian and Chinese asylum seekers, arrived in Australia. It was in response to this second wave of boats that immigration detention was first implemented. The arrival of the Cambodians in particular elicited a very different political response in Australia to the arrival of the Vietnamese. The Cambodian boat arrivals embarrassed the Hawke Labor government, which had recently played a leading role in negotiating a United Nations peace agreement for Cambodia. The arrival of asylum seekers from Cambodia undermined the government's claims that the peace process had been successful (McMaster 2001, Brennan 2003). Crock and Saul (2002: 31) explain:

Although this UN operation was a significant foreign affairs achievement, it seems to have coloured Australia's approach to the Cambodian fugitives who arrived in Australia from 1989. It is from this time that Australia's hostility towards – and obsession with – boat people began.

In November 1989 the federal government requisitioned disused single men's quarters from Mount Newman Mining company in Port Hedland in the far north of Western Australia, and turned it into the first immigration detention centre. The choice of Port Hedland for the centre was ostensibly because it was convenient as the site of a number of boat arrivals, and had an international airport. Being equidistant from Perth and Darwin, however, Port Hedland had the added advantage of limiting the access to detainees by lawyers and the media.

The legislation that implemented the policy of mandatory detention was introduced into Parliament during a court case challenging the legality of the Cambodian's detention. In the case *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) (hereafter, *Lim*), the applicants were Cambodian asylum seekers who had been detained in Port Hedland since 1989, without the *Migration Act* authorising their detention. Two days before the court reached its decision, the Parliament passed legislation that amended the *Migration*

Act to provide for mandatory detention. The legislation also ensured that no court could order the release of an immigration detainee (see Dunn and Howard 2003: 48). The court did rule that before the legislation was passed on 5 May 1992, prior detention was unlawful. The Parliament responded by legislating that compensation would be capped at \$1 per day (Brennan 2003: 34). The *Lim* case is discussed in more detail in chapters 6 and 7.

The ‘third wave’ of boats, carrying approximately 2000 asylum seekers from Vietnam and China, arrived between 1994 and 1998. These people were fleeing the ‘Comprehensive Plan of Action’ that was repatriating Vietnam refugees who had been living in camps in southern China. The Australian government considered China a ‘safe third country’ and therefore considered that this group did not warrant Australian protection (Brennan 2003: 40). These asylum seekers were detained, before most were removed from Australia.

In 1996, the Liberal-National Coalition (the Coalition) under Prime Minister John Howard took office. In opposition, the Coalition had always given the policy of immigration detention its full support. In government, the Coalition continued to implement the policy with regards to asylum seekers with little alteration to the Labor strategy, until broad changes were introduced in 2001. In 1996, however, the Coalition government implemented an agenda of actively detaining and deporting people who were in Australia but whose visas were no longer valid. This entailed a wide-scale crackdown on the people who had entered Australia with valid entry visas that had expired, or the conditions of which had been breached. Crock, Saul and Dastyari (2006: 27) estimate that in recent years Australia has had a population of between 50,000 and 60,000 people living in Australia without a valid visa.

At this time, too, the new Coalition government agenda introduced section 501 to the *Migration Act*, which allowed for the cancellation of the visas of permanent residents on ‘character grounds’. As described above, previous government policy had been to consider permanent residents who had lived in Australia for longer than ten years as ‘absorbed persons’, and they were treated as citizens with regards to any criminal conviction. From 1996, the new Minister for Immigration Philip Ruddock began to cancel the permanent residency visas for those who had been convicted of a crime and sentenced to longer than one year, or multiple sentences

for a cumulated total of two years, no matter how long they had lived in the country. These people were detained before being deported.

Indonesian fishermen have been detained intermittently since 1979 (Balint 2005), but in the 1990s their detention was pursued with more energy. As explained above, fishermen are detained in two facilities in Broome or Darwin until they are convicted and transferred to prisons. In 1997, fishermen who pleaded guilty spent an average of 27 days in detention prior to their transfer to prison (Balint 2005: 87). In 2001, the *Border Protection (Validation and Enforcement Powers) Bill (2001)* (see below) gave the Australian Defence Force extra powers to board, search and detain vessels outside territorial waters that they suspected of illegal activities. Since 2001, record numbers of fishermen have been detained (Balint 2005: 85).

In 1999, a 'fourth wave' of asylum seekers began arriving by boat from the Middle East and Pakistan. Most of these people were fleeing the Taliban regime in Afghanistan and Saddam Hussein's regime in Iraq. This category of asylum seekers was significant for a number of reasons, and was to have a large impact on Australian refugee policy. This was the largest group of people to come by boat, and for the first time in 1999-2000 boat arrivals surpassed air arrivals as the most popular way to seek asylum. In that year, 4,175 people arrived without visas on 74 boats. The following year 2000-01, 4,141 people arrived on 54 boats. Furthermore, unlike the second and third waves of asylum seekers, social and political unrest in the Middle East meant that it was likely that their claims for asylum would meet the requirement of the *1951 United Nations Convention Relating to the Status of Refugees* (hereafter, the *Refugee Convention*).

In 2001, various domestic and international events led to the Coalition government dramatically strengthening its strategy of border protection. The *Tampa* affair was the catalyst for this change. Throughout 2001, the Coalition government had been trailing in the polls, and with an election due by the end of the year, it looked as if the government would not be re-elected for a third term. On 26 August, the *MV Tampa*, a Norwegian freighter, rescued 433 Afghani asylum seekers from their distressed vessel, and, at threat of suicide by some asylum seekers, requested permission to land at Christmas Island. The Coalition, supported by the Labor opposition, refused permission to land, arguing what would become the key phrase of the 2001 election campaign: 'We will decide who

comes to this country and the circumstances in which they come'. After a stand-off, Nauru and Papua New Guinea were approached by Australia and agreed to accommodate the asylum seekers while their applications for protection were processed.

The offshore detention of asylum seekers on Nauru and PNG became part of the 'Pacific Solution', which referred to a package of strategies designed to deter and deny asylum seekers from Australia. Other parts of the package included the excision of Christmas Island and over 4000 other islands from Australia's migration zone, meaning that any asylum seeker who did not reach the Australian mainland would be detained and processed in Nauru or PNG, and potentially would not be resettled in Australia. The Pacific Solution also included so-called 'upstream disruption' that involved cooperation between Australian and Indonesian intelligence to sabotage Indonesian people smuggling efforts. It also included 'Operation Relex', where Coastguard and the Australian Navy are engaged to monitor and prevent boats of asylum seekers from entering Australian territorial waters.

Throughout the 1990s, detention centres became the sites for protests by asylum seekers against the length of time it was taking to process their applications for protection, against the lack of information they were given about the progress of their applications, and against the conditions of detention and the treatment from guards. The most dramatic of these protests was the January 2002 hunger strike involving over 40 detainees, including children, who sewed their lips together, dug graves, and lay in these graves in the heat. These protests caught the attention of the media and many Australians, and stimulated an organic grassroots community campaign against the conditions of detention (Mares 2002, O'Neill 2008). Two other events were significant in raising public awareness about the policy and practice of detention. In 2001, an ABC Four Corners program (Whitmont 2001) showing contraband footage of a six-year-old child, Shayan Badraie, in a catatonic state in Villawood detention centre, motivated a specific campaign against the detention of children (O'Neill 2008). In 2005, the story of the wrongful detention of Cornelia Rau arguably solidified public and political concern about immigration detention (Briskman et al. 2008, O'Neill 2008). Rau, a German national with permanent residency, was detained for 10 months in various immigration facilities

including Baxter detention centre, suspected of being in Australia without a valid visa. Suffering schizophrenia, Rau spent much of her time in solitary confinement as punishment for bad behaviour. Her detention was only brought to an end when other detainees, concerned that Rau was obviously unwell and not receiving the care she needed, brought her situation to the attention of refugee advocates. The Palmer (2005) inquiry into the Rau case was scathing about the procedures within the immigration department that had led to Rau's detention.

In 2005, in the wake of the Rau affair and after pressure from federal Liberal backbench Members of Parliament, the policy was amended to allow children and their families to be removed from detention centres and accommodated in immigration residential housing facilities. In November 2007, the Labor Party under Prime Minister Kevin Rudd was elected to government. In 2008, two further major changes to immigration detention policy were implemented. In January 2008, the new Minister Chris Evans (2008) announced the abolition of the Pacific Solution. This was not entirely correct: the final remaining detention centre in Nauru was closed, but other aspects of the Pacific Solution remain, including the excision of islands from the migration zone. Indeed, the Labor government completed construction of North West Point detention centre at Christmas Island that was originally a Coalition initiative. The Christmas Island centre was opened in December 2008, to accommodate a 'fifth wave' of boat arrivals carrying asylum seekers from Sri Lanka and Afghanistan from October 2008. At the end of 2009, plans were announced for further expansion of the centre to accommodate up to 1600 detainees (DIAC 2009b).

The second change to immigration detention policy was the repeal of the policy of mandatory detention in July 2008. Asylum seekers would only be detained for initial health, security and identity checks for a maximum of three months, after which time they would be accommodated within the community for the duration of the processing of their application. Again, in reality the change of practice did not quite fulfil the rhetoric. All categories of people previously subject to immigration detention are still subject to immigration detention on a mandatory basis, but efforts are made to reduce the duration of their detention. The Commonwealth Ombudsman has the task of conducting a review of any case where a detainee has spent longer than three months in detention, and may order

his or her release. The ‘fifth wave’ of asylum seekers have had their protection visas processed much faster than in previous years, although many detainees – particularly those other than asylum seekers – are still in detention for longer than three months.

Policy Analysis

This section undertakes a conventional policy analysis on the policy of immigration detention. Do the outcomes of the policy match the stated objectives? The policy of mandatory detention has three key stated objectives. First, immigration detention acts to *control the borders* against the entry of people coming into the country, and facilitates the removal of non-citizens who are no longer eligible to stay in Australia. Second, with regard to asylum seekers, detention facilitates the *efficient administration* of their applications. Third, detention acts as a *deterrent* to others who might enter the country with the same methods and intention.

Control of Borders

The first objective of immigration detention is to control the movement of certain categories of people over Australia’s national borders. It does this by regulating the entry into the country of people without permission to do so, and by enabling the removal of people who are no longer eligible to stay (DIAC 2010).

As a procedure that facilitates the control of people’s movement over Australia’s national borders, immigration detention is effective. It operates in different ways for different categories of detainee. For people who have overstayed their visa and are caught by authorities, immigration detention effectively functions to facilitate their removal from Australia by removing them from the community and making them available for deportation. For visa overstayers this process is often quite quick, and the person is most often deported within days. The number of visa overstayers that are detained and deported, however, is a small percentage of the estimated 50,000 who are estimated to be living in Australia on any given day (Crock et al. 2006). Immigration detention, then, is effective at facilitating the deportation of only those visa overstayers that are apprehended by authorities.

For people who have had their visas cancelled, immigration detention is also effective in facilitating their removal from the country. The problem with the detention of people who have had their visas cancelled is that, in some cases, the process of seeking agreement from the country to which the person will be deported and securing their travel documents can take a long time. This is particularly true for people who have spent the majority of their lives in Australia, and very little time in their country of nationality. The ethics of detaining these people for considerable lengths of time – many of whom have been transferred directly from the prison system after serving a sentence for their crime – is questionable. Yet, unarguably, the function of control is achieved.

For asylum seekers who come by boat, however, immigration detention does not control entry to Australia. Other border control strategies are far more effective at this, including checking systems at international airports, and the ‘upstream disruption’ operations targeting people smuggling in Indonesia. The arrival of asylum seekers in Australia is contingent more on ‘push factors’ regarding the conditions in their home country, than the ‘deter and deny’ immigration policies in Australia. In other words, asylum seekers who really want to come to Australia will come, and immigration detention has no effect of control over this (see Richardson 2008). Furthermore, by far the majority of asylum seekers who come to Australia by boat are eventually granted refugee status, and are resettled in the community. For asylum seekers, then, immigration detention does not control their entry into Australia, but it does control every aspect of the lives of asylum seekers immediately after arrival in Australia. This aspect of control must be distinguished from control of national borders, and is explored in depth in chapter 5.

Administration

The second policy objective is that immigration detention facilitates the efficient administration of the visa status of detainees. This objective applies solely to the detention of asylum seekers. The idea is that asylum seekers are always available for interviews with the Department or to answer any questions that might arrive through their application process, which would, in theory, speed up the application process. Secondary to this function is that immigration detention provides against absconding.

A Joint Standing Committee in 1994 first raised the question of whether immigration detention facilitated the efficient processing of applications for asylum. The subsequent report *Asylum, Border Controls and Detention* (1994) argued that the fact that lawyers and public servants had to travel across the country to hear applications in remote locations was inefficient at best. The report stated that ‘the delays in primary processing of boat arrivals prior to 1992 were entirely unacceptable and never ought to be repeated’ (cited in Brennan 2003: 92). The question of the efficacy of immigration detention to facilitate efficient administration has had continued relevance for Woomera, Baxter, the Pacific Solution centres and those on Christmas Island. These are the centres where asylum seekers are most likely to be accommodated, with the metropolitan centres mostly used for visa overstayers and others waiting deportation. It is difficult to see how the location of Christmas Island is amenable to the efficient administration of detainees’ applications for protection.

Often the lack of information given to asylum seekers about the application process and, if necessary and if it is available to them, their rights to appeal an unfavourable decision, has drawn out the length of their detention. Detainees were often not told that they needed a lawyer, nor given the contact details or the resources to do so (Briskman et al. 2008: 66-68). The Refugee Advocacy Service of South Australia’s (RASSA) submission to the People’s Inquiry into Detention (Briskman et al. 2008: 69) recalls some further problems for lawyers in accessing detainees that highlights the bureaucratic nature of the centres:

RASSA is required to write letters to DIMIA seeking access for a visit several days in advance. If a detainee hears about their visit whilst lawyers are actually there, the person is generally refused access to the lawyers. At times permission has been granted and then cancelled abruptly. Lawyers are not allowed entry into the actual compounds so are not able to access detainees who may be ill. We are unable to provide legal assistance until they sign an authority for us to act for them. If they are unable to sign an authority, due for instance to their mental illness, detainees may never get assistance. On one occasion DIMIA refused to allow us to use a room at Baxter to obtain an independent psychiatric assessment. On occasions detainees have missed critical deadlines for filing appeals due to delays occasioned by DIMIA in faxing relevant appeal notices.

A secondary aspect of this objective is that immigration detention keeps asylum seekers from absconding. Studies into the risk of absconding in both Australia and overseas demonstrate that the risks are very low. The Asylum Seeker Project (ASP 2003), that provides support to asylum seekers who have been released from detention and live in the community, argue that not one asylum seeker has absconded, including those who were eventually failed all avenues of appeal and were removed from Australia. This supports the Department's evidence in 1997 that until that date, not a single asylum seeker had absconded (cited in ASP 2003). Bruegel and Natamba's (2001) research in the UK found that of 100 bailed asylum seekers of a group judged at a high risk of absconding because of the length of their detention, between 8 and 10 (depending on the classification) absconded. These researchers contend that long periods of detention decrease trust in the immigration processing system and actually increase the risk of absconding if an asylum seeker is released before their status is finalised. In addition, they argue, the high financial and personal cost of detention is not proportionate to justify prevention of absconding of the low numbers of people who actually would (Bruegel and Natamba 2001). There are inherent disadvantages, too, for asylum seekers who abscond: they have no access to the services and financial support available to asylum seekers, and they would jeopardise their chance of becoming a citizen.

Deterrence

The third objective of the policy of mandatory detention is that it should act as a deterrent to people who wish to travel by boat to seek asylum in Australia. In 1992 the Minister for Immigration Gerry Hand (1992) explained to Parliament:

The government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.

In 2002, Prime Minister John Howard reiterated the deterrence objective of the policy. In response to a question about the costs of detention, Howard (2002) explained:

Well I think what you have to do is look at the deterrent effect of the policy. You've had no new arrivals for months. Now I'm not guaranteeing that that

will continue. I want to make that very clear. But we haven't had any new arrivals now for months so the impact of that on the overall cost is very significant indeed. The policy is working. The policy was to deter and deny, and that policy is working.

Howard (2005) repeated this objective a few years later, stating that 'mandatory detention is essential to maintain the deterrents that now exist for people to come to this country as illegal immigrants'.

Mandatory detention was introduced within the second wave of boat arrivals. Since then, a third, fourth and fifth wave of boats have brought substantially greater numbers of asylum seekers than Australia had previously experienced. The table below shows the number of boats and passengers who arrived in Australian waters between 1990 and October 24, 2009.

Year	No. of Boats	Passengers
1990	2	198
1991	6	214
1992	6	216
1993	3	81
1994	18	953
1995	7	237
1996	19	660
1997	11	339
1998	17	200
1999	86	3721
2000	51	2939
2001	43	5516
2002	1	1
2003	1	53
2004	1	15
2005	4	11
2006	6	60
2007	4	148
2008	7	161
2009*	36	1828
Total	330	17551

(Grattan and Murdoch 2009, *statistics until 24 October 2009)

As this table shows, the numbers of onshore asylum seekers has fluctuated over the last two decades. The biggest intake of onshore asylum seekers, however, was between 1999 and 2001, seven years *after* the introduction of mandatory detention.

These figures suggest that so-called ‘push’ factors – the political and social situations in asylum seeker’s home countries – outweigh the ‘push away’ factor of mandatory immigration detention. From 2002 until early 2006 a break in the boat arrivals stimulated public debate about the success of border protection policies. The same debate was raised again in 2009 when the numbers of onshore asylum seekers rose to an 8 year high. The Coalition has attributed the break in boat arrivals to their strong border protection policies while they were in government, and the rise in 2009 to a weakening of policies by the Labor government.

Richardson’s (2008) interviews with asylum seekers about their journeys to Australia reveals that the information that asylum seekers have about Australian migration policy is vastly different between individuals, depending on their country of origin, ethnicity, and level of education. Many asylum seekers did not choose Australia as their destination country, instead this decision was made by people smugglers, or determined by the amount of money they could afford to pay for the journey (Australia is cheaper to travel to than Europe or North America). Some asylum seekers, in particular some Hazaras from Afghanistan who have been allowed little or no formal education, were unaware of where Australia is or what language is spoken there, let alone anything about its immigration policy. Nor is it definite that asylum seekers who did know about immigration detention considered it a deterrence. Richardson (2008) notes that most of her interviewees who knew about detention before they arrived in Australia felt that detention was a fair process, and that Australia was a country that respected human rights, and that therefore they would be happy to be subject to detention for a reasonable period of time (see also Sultan and O’Sullivan 2001). Detention was also not considered a deterrent when compared with remaining in their home country.

International figures for asylum applications show that the rise and fall in numbers of onshore asylum seekers in Australia corresponds with the rise and fall in numbers of applications internationally. Between 2001 and 2006, applications for asylum in 50 industrialised countries fell by 49% (UNHCR 2006) to a 20-year low in 2006 (UNHCR 2009a). In 2007, 2008 (UNHCR 2009a) and the first half of 2009 (UNHCR 2009b), the numbers of asylum applications has risen by approximately 10% each year. The rise in applications in all industrialised

countries was due to an increase in applications from people from Iraq in 2007, and from Somalia and Afghanistan in 2008 (UNHCR 2009a: 4). These figures suggest that the deterrence value of immigration detention has little effect on the numbers of people seeking asylum in Australia, and that broader international patterns better explain the changes in numbers of onshore arrivals.

Summary

This section has argued that of the three key objectives of immigration detention, only the objective of controlling entry and removal of people at the border is partially achieved. Immigration detention is effective at facilitating the removal of non-citizens who are detected living in the community without the correct visa. For unauthorised non-citizens entering the country, however, immigration detention does not control their arrival, but controls every aspect of their lives once they have entered. The objectives of efficient administration and deterrence are not met. The next section examines three other aspects of immigration detention that raise further questions about the policy. These aspects are not policy objectives but unintended outcomes of the policy that reveal the high cost of immigration detention.

The Physical and Mental Health Effects of Detention

One of the key negative outcomes of the policy of immigration detention is the devastating impact of detention on the lives of detainees. Many studies have outlined the effect of detention on the physical and mental health of detainees. A combination of long-term detention, the uncertainty about the length of detention, unhealthy conditions, and neglect and abuse by detention staff, all contribute to this negative outcome. This is especially, although not exclusively, true for asylum seekers, many of whom have previously experienced traumatic events that have impelled them to travel to Australia in the first place. This section is not intended to provide a comprehensive analysis of the experiences of detainees in detention. Many excellent studies already serve this function, as outlined in chapter 2, and some testimonies of the experiences of detention are included in chapter 7. It is important for the purpose of this chapter, however, to note two things: that immigration detention as it has been implemented in

Australia is harmful to detainees' health; and that this harm is widespread and affects nearly all people subject to immigration detention.

The physical health of detainees is affected by the conditions of detention, and the neglect and abusive treatment they receive from some detention staff. Inadequate facilities, including lack of adequate showers and toilets, crowded bedrooms discouraging sleep, and inadequate portions or quality of food, all compromise detainees' physical health (Briskman et al. 2008, Burnside 2003). In addition, detainees have reported a lack of accessible medical care, including the failure to properly diagnose a problem, as one detainee reported (Burnside 2003: 37):

Yesterday one of the detainees was severely ill. Since one week before he was suffering from his bladder. More than 20 times I took him to the nurse and the nurse just gave him Panadol tablets and directed him to drink more than 20 glasses of water a day. Despite blood coming through from his genital organ, they didn't take care of him. Any sort of illnesses, they give us Panadol tablets and direct us to drink twenty glasses of water. Even when I had a toothache they told me to drink twenty glasses of water, plus six more in the morning.

Medical care was also compromised by requirement for immigration detention to make a profit, as documented by Mares (2002: 41):

Dr Stephens attended one detainee who was suffering from painful gastric reflux. The patient had already been treated with the standard medication Zantac, but had not responded. So Dr Stephens wrote out a script for the more expensive drug Omeprazole, a more powerful medication...Two weeks later, the patient presented once again and the symptoms were undiminished. Upon inquiry, Dr Stephens discovered that his prescription had never been filled. He learnt that a sister in the clinic had torn up the script and thrown it in the bin, apparently because the medication was too expensive.

A former nurse at Woomera claimed that during his six months working in the centre, not one person was given glasses despite numerous people needing them, because the cost was deemed unnecessary (Briskman et al. 2008: 123). There are also cases of broken bones, tooth infections, and a burst appendix being left untreated (Briskman et al. 2008: 122-132). Briskman et al. (2008: 127) recall the case where a 14-year old Iranian boy suffered permanent blindness because

warnings from doctors that he needed urgent medical treatment were ignored. Many detainees also receive physical abuse from detention staff or from other detainees, as discussed in some detail in chapter 7. Detention centres have been at times violent environments, and sites of riots, protest, and heavy-handed discipline.

Much of the physical harm detainees suffer is self-inflicted, which points to the damaging effect of detention on the mental health of detainees. Studies by Steel and Silove (2001), Sultan and O'Sullivan (2001), Steel et al. (2004), Mares and Jureidini (2004), and Austin, Silove and Steel (2007) document the disproportionately high rates of mental illness within the centres. According to Steel et al. (2004), the rates of mental illness were 'many times higher' than the Australian population, and 'substantially higher' than the general refugee population (2004: 534). In their study of families who had been in detention longer than 2 years, all adults and children fulfilled the requirements for at least one psychiatric disorder, while 16 of the 19 children in the study presented with multiple psychiatric disorders. None of the adults in the study had experienced persistent thoughts of suicide before arriving in Australia, and now all but one had persistent thoughts of killing themselves (2004: 533). Over half the children in the study also experienced persistent suicidal thoughts (2004: 534).

Mares and Jureidini's (2004) study of children in detention supports these findings. All children aged 6 to 17 in their study fulfilled the criteria for major depression with suicidal thoughts. Other symptoms include trouble with sleeping, concentrating, and motivation to read or study. They expressed a sense of futility, hopelessness, and extreme boredom, withdrawal and emotional numbness. All reported graphic intrusive memories, often of parents who had self-harmed. All had witnessed attempted hangings, slashings and self-poisoning. Interestingly, only one child in the study reported troubling events on the boat journey to Australia, although all were asked about this (2004: 523). According to Mares and Jureidini (2004: 522), all the children were troubled by their experiences since arriving in Australia.

Self-harm and suicide attempts are frequent in detention centres. Psychologist Lyn Bender and psychiatric nurse Dr Glenda Koutroulis worked at Baxter detention centre for 6 weeks in March and April 2002. During that time, there were

incidents of self-harm every day, and 15 suicide attempts serious enough to require hospitalisation (Mares 2002: 56). In 2005, a Department of Immigration report obtained under freedom of information (Topsfield 2005) showed that nearly 900 detainees committed acts of self-harm or attempted suicide between 2002 and 2005. Between June 2003 and June 2004, 305 detainees self-harmed in Baxter alone. Dr Koutroulis (cited in Mares 2002: 56-7) reported that sometimes these actions were 'not taken seriously by the guards', and they were 'not always referred to the medical centre nurse or to the psychologist for attention'. She explained 'I can't think of any other place where I have worked where attempting to hang yourself would not be considered a serious suicide attempt'.

Like physical health problems, mental health problems were often not taken seriously by detention staff. Cornelia Rau, suffering schizophrenia, was put in isolation because detention staff considered her behaviour attention seeking (Palmer 2005). Until 2005, care by psychological and general health professionals was 'inadequate' (Palmer 2005): visits were rare, the health care professional had to deal with too many detainees in one visit, and detainees had to wait a long time for specialists. A former immigration department manager revealed that in 2000, ACM employed only one psychologist for all the detention centres in Australia (Briskman et al. 2008: 141). The Palmer Inquiry (2005: xii) found that 'the infrequency of the consulting psychiatrist's visits to Baxter constitutes a serious shortcoming', and recommended that 'more frequent, regular visits' by mental health practitioners would create a 'more effective system of care'.

Yet according to Mares and Jureidini (2004), Steel and colleagues (2004) and others (see Briskman et al. 2008, O'Neill 2008), the work done by mental health practitioners can only ease, but not cure, the symptoms of mental illness. The cause of the mental distress for most detainees is the system and condition of the detention itself. The causes are a combination of various factors; lack of communication and information on the progress of their application, the environment of a general lack of care and negative attitudes from the centre staff, and anxiety and guilt about families either inside detention or back at home, and the detention environment itself. Psychologist Jon Jureidini explained (Briskman et al. 2008: 139):

You could have the Rolls Royce of mental-health services in Baxter and I don't think it would make a scrap of difference, because the environment is so toxic that you can't treat anything meaningfully. Half a dozen of the most damaged people I've ever seen are the adults I've seen in Baxter and Woomera, both parents and single men.

Dr Fiona Hawker, who treated a number of detainees from Baxter detention centre, argued that the symptoms of mental illness of detainees were so similar in each patient that they can be attributed directly to the detention environment, and has called them 'Baxter Syndrome' (Miller 2008). Steel and Silove (2001) use the term 'Immigration Detention Stress Syndrome' in their research into mental health of detainees, illustrating both the consistency in symptoms and their cause.

There were 19 reported deaths in immigration detention between 1998 and 2008, 12 of them between January 2001 and June 2003 (Briskman et al. 2008: 243). Briskman et al. (2008: 243) note that, in contrast, between 1992 and 1999 there was only one death in detention, of an American man who died of liver disease only one day after being detained in 1998. Of the eighteen who died between 2000 and 2008, three died from suicide, two from depression-related problems, and three from medical neglect in detention. The eighteen also included two people who were being held in prisons, two women who drowned as part of an Operation Relex operation, and two Indonesian fishermen (Briskman et al. 2008: 243-253).

Since 2005 more emphasis has gone into the provision of physical and mental health services in detention, including the establishment of the Detention Health Advisory Group (DeHAG) within the Department of Immigration in 2006. After the first year of operation, DeHAG reported the development of a Detention Health Framework, the development of Health Standards, development of a Detention Health Data Set, a review of the Suicide and Self Harm Instrument and Protocol, and the establishment of the Infectious Diseases and Mental Health subgroups (DIAC 2007: 1). Many people who were detained in the late 1990s and early 2000s, however, will be permanently affected by their time in immigration detention.

The Economic Costs of Immigration Detention

Immigration detention is costly. An examination of the expenditure on this policy is important not only because of the costs involved, but also because of the economic environment in which they occur. The 1990s and first half of the 2000s were a time of careful government spending, with many cuts to public services and infrastructure, and an overall economic rationalist approach to fiscal management. Within this context, the high expenditure on immigration detention was inconsistent with the general trend. The costs of the policy of immigration detention are fourfold. Infrastructure expenses include the construction or leasing of buildings and the renovation and maintenance of these sites. Management costs include the contracting of a service provider and the administration of this contract. The Pacific Solution had its own costs including an increase in the aid to Nauru and Papua New Guinea as part of the incentive for their role in the strategy. Finally, there are the multiple associated costs, such as transportation of detainees, extra security and legal costs. This section is not intended to provide an exhaustive ledger of accounts; rather, it aims to demonstrate the disproportion between the millions of dollars spent on immigration detention and the ‘problem’ of asylum seekers that this money was directed to solve.

Two centres have been built specifically for immigration detention. Baxter detention centre opened in 2002 and closed in 2007. It cost \$44 million to build. The North West Point detention centre on Christmas Island was completed in 2008, and cost \$400 million to construct. Part of the reason for the high expense is that all building materials, and the construction workers, have to come from the mainland. It was reported that in 2009 it operated at \$45 million over its budget. Of this extra money, \$11 million went towards general running costs, and \$34 million was spent on expansion of infrastructure in the island (Narushima 2009). Further expansion of the centre planned for 2010 to accommodate the unexpected large numbers of asylum seekers is planned to cost \$50 million (SMH 2009).

In 2004, government figures estimated the cost of detention as approximately \$87 million per year for accommodation, staff, and other administrative costs (DIMA 2005). Even unused facilities require funding. Woomera detention centre, despite being ‘mothballed’ in 2003, costs \$260,000 each year to ‘secure and maintain’.

Until the centre was officially closed in 2007, its lights were turned on each night so that the full-time security guard could see any trespassers (*Advertiser* 2005). Manus Island, empty from 2004, was kept ready for detainees at \$2 million until 2007 (Gauthier 2007).

From its start in 2001 until 2007, Gauthier (2007: 4) estimated that the Pacific Solution cost \$1 billion. This figure includes at least \$100 million on increased activities by the Defence department; \$200 million payment to the International Organisation for Migration (IOM) to manage the centres; \$396 million for the construction of the Christmas Island detention centre; at least \$253 million (to 2006) for the management and operation of the Nauru and Manus Island centres; cost of charter flights for asylum seekers (\$5 million for 2005-06 alone); and a five-fold increase in aid to \$123 million between 2001 and 2006. The table below outlines the costs of managing the Pacific Solution Detention Centres (figures in AUD\$ millions):

	2001-02	2002-03	2003-04	2004-05	2005-06
Nauru	48.5	45	33.5	34.4	23.7
Manus	29.4	20.6	6.2	1.8	2.2

(Gauthier 2007: 31, from Budget Estimates Hearings 2006)

Gauthier (2007: 4) notes that if the 1,700 asylum seekers processed in the Pacific Solution were instead processed at Villawood, the total cost would have been \$35 million. The mainland and Christmas Island detention centres are managed by a private company. In 2009, Serco took over management of seven detention centres with a five-year contract worth \$370 million (Serco 2009).

An Australian National Audit Office (ANAO) report in 2005 was critical of the contract between DIAC and the then management company GSL. It found that the operating costs of the centres (at \$100 million per year) and the costs of the administration of the contract (\$20 million per year) had risen under the contract, despite a decrease in the actual numbers of detainees, and that DIAC did not have a management report that explained the increase in costs (ANAO 2005: 17).

Other costs associated with 'Enforcement of Immigration Law' in 2004-05 include \$39.4 million to prevent unlawful entry, \$34.9 million for onshore

detection, \$36 million for removals and \$56 million for litigation expenses (DIMA 2005: 466). As well, there is the expense of transporting detainees between centres by private jet, and the chartering of thousands of flights for deportation. Security guards are employed to watch over detainees when they receive hospital treatment. Glenside psychiatric hospital in Adelaide was used to treat detainees from Baxter detention centre, and two guards were employed for each patient. In June 2005, there were 9 patients undergoing psychiatric care, costing \$150,000 per month for the security. Maintenance for damage is also expensive; according to the ANAO (2005: 16), riots, arson and violence inside the centres cost the department \$16.9 million between 2000 and 2005.

The issues of quality of care raised in the ANAO report are most apparent in the compensation payments to those who have experienced wrongful detention or ill treatment during their stay. According to Kerr, Dodson and Glendinning (2005), up to 2005 the government had paid almost \$1 million in compensation to 11 people held in wrongful detention. Cornelia Rau was paid \$2.6 million as compensation for 10 months of wrongful detention. Eleven-year old Shayan Badraie, who experienced severe trauma as a result of his time at Woomera and Villawood detention centres, was paid \$400,000 compensation. Shayan began his time in detention in November 2000. In that month ACM, then managing the detention centres, made a profit of \$401,000 for Woomera alone, with an underspending of \$147,589 in health (Glendinning 2005). The Immigration Department spent \$1.53 million on legal fees defending this case (Topsfield 2006).

Until 2009, in order to retrieve some of these costs, detainees were billed for their stay in detention at \$125.40 per day. This amounted to \$45,144 for a year in detention, and it was not unusual for long-term detainees or families to have debts of over \$200,000 dollars (Evans 2009). At 30 June 2007, the total of detention debts owed by 406 people was \$8,095,271 (ANAO 2008: 2). Of this amount, the ANAO (2008: 2) estimated that \$4.8 million was 'unlikely to be collected'. The ANAO report (2008: 3-4) also found that DIAC was not required to inform detainees that they were incurring a debt until they were invoiced after leaving detention. Similarly, DIAC was not required to inform former detainees that their debt could be written off and the process for requesting such a waiver (ANAO 2008: 16). In June 2009 this policy was abolished for asylum seekers and people

awaiting deportation, and outstanding debts were written off. Foreign fishermen and people smugglers, however, still incur a debt (Evans 2009). It is worth noting that the only other regime to charge people for their incarceration has been Nazi Germany.

To put the economic costs of immigration detention in perspective, in 2009 the Council of Australian Governments (COAG: 2009) announced it would spend \$400 million over two years for repairs and maintenance of up to 2,500 public housing dwellings. This is the same amount it took to construct the North West Point detention centre. In the 2009 Federal Budget, the federal government committed \$1 billion towards closing the gap in educational attainment and employment participation of Indigenous Australians (Gillard 2009). This is the same amount spent on processing 1,547 applications for asylum in the Pacific Solution.

Nevertheless, the high economic costs the immigration detention did not undermine political support for the policy. On local ABC radio in 2001, in response to a caller asking about the ‘expensive solution’ to the asylum seeker problem, then Prime Minister Howard (2001b) reasoned:

There’s a very big issue of principle involved in this and I don’t think it ought to be assessed just on their cost considerations. That would be very short sighted and not the sort of thing a government should do.

This section has outlined the economic costs in building, maintaining and managing onshore and offshore detention centres, and shown them to be a very expensive solution to the asylum seeker ‘problem’. What has become clear from this examination is that, as former Prime Minister Howard argued, the concern is for ‘principle’ rather than economic efficiency. Considering the high economic costs, it is vital to determine what this ‘principle’ is, and why it is worth such a high cost.

The International Law on Immigration Detention

The immigration detention of asylum seekers – in particular, the mandatory aspect of this detention – contravenes a number of Australia’s international human rights obligations. This section outlines two key breaches of international law: the principle of non-discrimination of asylum seekers, and the principle against

arbitrary detention. While the former applies exclusively to asylum seekers, the latter principle applies to all categories of people subject to immigration detention.

The legislative basis for Australia's domestic policies on asylum seekers comes from the *1951 Geneva Convention Relating to the Status of Refugees*, and the *1967 New York Protocol Relating to the Status of Refugees* (referred to together as the *Refugee Convention*). Australia became a signatory to the *Convention* in 1954, and the *Protocol* in 1973. The *Refugee Convention* has three key principles. First, it provides a definition of a refugee, which Australia employs directly to determine refugee status. Article 1(2) of the *Refugee Convention* defines a refugee as a person who:

Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Second, article 33(1) of the *Refugee Convention* outlines the principle of *non-refoulement*, or non-return. This is the principle that refugees must not be sent back to a place where they have a reasonable fear of persecution. The principle of *non-refoulement* acts in lieu of obliging states to resettle refugees; while everyone has the right to seek asylum, signatory states are not obliged to offer resettlement, but they must not return them to a situation that places them in danger.

A third principle of the *Refugee Convention* is pertinent to this discussion. Article 31(1) upholds the principle of non-discrimination based on entry to the country in which they seek protection:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom would be threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The indefinite detention of asylum seekers *is* arguably a ‘penalty’, and therefore a breach of article 31(1) of the *Refugee Convention*. In addition, that the detention of asylum seekers is mandatory only for people who arrive in Australia by boat, but not for people who arrive by plane (who may or may not ‘present themselves without delay’) is evidence of a failure on Australia’s part to honour the spirit, if not the letter, of the *Convention*.

The principle against arbitrary detention is another area in which immigration detention breaches of international laws. Three international conventions outline the laws against arbitrary detention. The *International Covenant on Civil and Political Rights* (ICCPR), article 9(1), prohibits arbitrary detention, and states that a detained person must be able to take proceeding before a court that has the power to determine the lawfulness of their detention and order release when it is considered unlawful. The *Universal Declaration on Human Rights* prohibits arbitrary detention in article 3, the right to liberty, and article 9, the prohibition on arbitrary detention. Similarly, principle 11(1) of the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, guarantees the right to be brought before a judge or judicial officer, in order to assess whether the arrest is lawful, necessary, and to safeguard the well-being of the detainee.

The definition of arbitrary detention is broadly defined. The UN Human Rights Committee recognises that the prohibition against arbitrary detention refers not only to detention that is against the law but also to detention that is not just, appropriate, predictable and necessary in all the circumstances of the case. This definition is supported by the UN Working Group on Arbitrary Detention, whose guidelines state that detention may be considered arbitrary if it is not subject to judicial review or other appropriate review mechanisms, or it is for an excessive or unlimited period of time. In the case of *A v Australia* (1997), in which a Cambodian asylum seeker took Australia to the UN Human Rights Committee, the Committee found that the mandatory detention of the claimant was indeed arbitrary.

Does breaching international law matter? The *Vienna Convention on the Law of Treaties* states that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’ (article 26). Furthermore, a state ‘may not invoke the provisions of its internal law as a justification for its failure to perform

a treaty' (article 27). With the emphasis on 'good faith', international law has no means by which to enforce its legislation. Yet fulfilling international human rights obligations is important not only from a moral viewpoint, but also because of the leverage it provides Australia negotiate in other international forums. In examining the dramatic shift in asylum policy in 2001 and the impact this had on Australia's international reputation, Jupp (2002: 197) observed:

In so far as its policy was understood overseas, Australia had been accepted as a pioneer in effective multiculturalism, as a safe haven for thousands of refugees, as a pioneer in settlement services and as a humane liberal democracy. In a few short months, this reputation was destroyed. In the global village, media reports were almost uniformly critical ... If Australia retained international influence it was among those pressing for a revision of the UN Convention and a clamp-down on asylum seekers.

In summary, the policy of mandatory detention and the implementation of immigration detention more generally, breaches two key principles of international law; the principle of non-discrimination against asylum seekers, and the principle against arbitrary detention. As well as the personal cost to the detainees and the high financial costs of the policy outlined above, the cost of the breaches to international human rights law has been Australia's international reputation as a supporter of human rights.

Conclusion

This chapter has outlined four key problems with the policy of immigration detention: the policy objectives of immigration detention are not met by its outcomes; the policy has been shown to be damaging to the mental and physical health of detainees; the financial costs of the policy are disproportionate to what is achieved; and finally, the policy breaches international human rights laws to which Australia is a signatory. Yet immigration detention remains a key aspect of Australia's immigration policy, and despite some minor changes to the policy since 2005, the fundamental policy remains unaltered. Why, despite these problems, does the policy persist with bipartisan support? If the policy of immigration detention does not meet its stated objectives, then it must fulfil other social and political functions. This thesis, then, seeks to investigate and explain the social and political functions of immigration detention in Australia. To do so,

another mode of examination of the policy is required, one which draws on social theory.

Chapter 2

Social Histories and Theories of Immigration Detention: A Literature Review

Immigration detention in Australia has been the focus of much scholarly investigation, particularly since the high media coverage of the *Tampa* crisis in 2001. This chapter examines the literature that has been written about immigration detention centres in Australia. It investigates how immigration detention centres are represented and explained, what methods are employed, and with what conclusions. It argues that much of this scholarly literature has focused on asylum seekers, with little to no attention paid to the other categories of immigration detainees, for whom detention serves a different function and has a different meaning. It finds therefore that explanations of immigration detention that focus only on the detention of asylum seekers are insufficient, and that further investigation is required.

This chapter surveys two broad categories of the literature. First, it examines social histories of detention and asylum seekers. This category aims to describe the experiences of asylum seekers in immigration detention centres, and to add the voices of asylum seekers to the wider debate on border protection. On the whole, these social histories are critical of the policy of detention, in nature and intent. The second category of literature is that in which authors have sought to explain the social and political function of immigration detention centres in Australia. These explanations attempt to uncover the underlying reasons for the problem of why asylum seekers are incarcerated, how and why they are ill-treated in detention, and why their detention receives popular support.

This chapter identifies six types of explanations about immigration detention. The first explanation is that the detention and ill-treatment of asylum seekers is evidence of a continuing racism in Australian society. The second explanation argues that immigration detention centres are a response to a latent fear of invasion in the Australian psyche, which has roots in the nature of white colonialism of the continent and its geographical position. The third explanation holds that immigration detention is a response by the national 'will' to the

competing migrant individual 'will', a theory developed by Ghassan Hage (1998). The fourth explanation, derived from the work of Giorgio Agamben (1998), argues that detention centres are a modern response to the position of the refugee in contemporary world, and that they are becoming both a ubiquitous and permanent part of the modern nation state. The fifth explanation offers an alternative to the racist explanation for immigration detention, arguing instead that feelings of economic insecurity within the Australian community contribute to mainstream support for the detention of asylum seekers. Finally, the sixth explanation, developed by Bashford and Strange (2002), argues that Australia has a long history of using types of administrative detention for purposes of nation-building, and that immigration detention is a contemporary form.

Immigration Detention Centres: An Anomaly in Australian Society?

In writing about immigration detention centres, many authors describe their initial emotive, almost automatic response to the policy and practices of immigration detention centres. The reaction is one of surprise, and the response was to distance immigration detention centres from the Australia that they know. Perera (2002), for instance, refers to detention centres as 'not-Australia'. She makes a cultural and geographical distinction between the current culture and values of Australia, and the seeming anomaly of detention centres. For Perera (2002: 2) 'the inmates of not-Australia are, in official phraseology, unlawful non-citizens. They are Not-Australian and unAustralian; the stuff of contraband: traffic, illegals, human cargo. Non-people.'

Hage (1998) also observes an initial response to detention centres as 'shockingly "other"' to most Australians' experience of everyday life, and to their understanding of Australian history. He explains that immigration detention centres seem to be a 'historico-ethical reversal' (1998: 106), a 'negation of the historical direction Australia is pictured to have taken within multicultural discourse' (1998: 105). Brennan (2003) expresses confusion at the seeming incongruity between Australia's humanitarian intervention in East Timor in the late 1990s and its response to asylum seekers. He states (2003: viii):

Australia had such a fine reputation for its humanitarian intervention in East Timor, driving the pace for UN peacekeeping and making up the shortfall in the interim with the leadership of INTERFET. Here now was the same government, the same nation, refusing humanitarian aid to a boatload of asylum seekers.

While many of the authors examined in this chapter identify with this initial response, the intention of these authors, nevertheless, is to demonstrate that detention centres are not contradictory with Australian society. Instead, immigration detention centres are consistent with aspects of Australia's history, its values, and the way it responds to outsiders. As Perera argues (2002: 8), 'Not-Australia's isolated detention camps cannot be disowned as anomalies in an otherwise healthy, democratic society'. They are, instead, part of this society. More than this, however, the examination of detention centres raises questions about the very nature of Australia's liberal democracy, about its values, aspects of its history, and strategies for dealing with outsiders.

Social Histories of Immigration Detention

A large proportion of writings about immigration detention centres are in the form of social histories. This body of work sits within a tradition of writing about the lives of oppressed, exploited and marginal peoples whose stories would not otherwise be told. In this case, the social histories focus on the experiences of asylum seekers in immigration detention. There are two key aims of these social histories. First, the social histories aim to record experiences of asylum seekers in Australia to counteract the silencing of their voices by the Australian government. Second, they are politically inspired, and the aim is to make the readers aware of the situation of asylum seekers, with the hope that this awareness will lead to public pressure on the government to change its policies. The social histories of detention examined in this section also form the basis for further investigation of immigration detention using social theory.

Social history, or 'history from below', brings categories of people previously ignored by scholars to the fore of historical inquiry. Originally concerned with class, social history encompasses research into gender, ethnic groups, subcultures, and any other social category, who are in some way dominated by economic, political or social systems. As E.P. Thompson said in his preface to *The Making of*

the Working Class (1963: 13), 'I am seeking to rescue the poor stockinger, the Luddite cropper, the "obsolete" hand-loom weaver, the "Utopian" artisan, and even the deluded follower of Joanna Southcott, from the enormous condescension of posterity'. Thompson and other early British social historians were inspired by Marxist political theory, and as such, their social histories were essentially political in intent. To give voice to those at the bottom of the social hierarchy is necessarily disruptive to the status quo. The social histories of asylum seekers in immigration detention share a sense of moral outrage. What is produced, as a result, is a rich descriptive account of the experiences of asylum seekers in detention. These experiences form the basis of a moral, legal and political critique of immigration detention.

One aim of the social histories examined here is to counteract the effective silencing of the voices of asylum seekers. The politicisation of detention and other border protection policies has been achieved while making those subject to these policies both invisible and silent. Leach (2003) and Marr and Wilkinson (2003) describe the techniques used by the government to ensure that the stories, voices and even faces of asylum seekers do not enter the public debate on onshore asylum policies. During the *Tampa* affair (outlined in Chapter 1), Marr and Wilkinson describe the 'intense censorship surrounding the operation' (2003: 215), and that 'there was nothing journalists could use to tell the human story of the operation, not from the sailors' nor the asylum seekers' points of view' (2003: 214). Defence officials were directed not to take any photographs of asylum seekers, and the Navy was instructed not to publish any personalising images. The chief political correspondent for the *Daily Telegraph*, Malcom Farr, described the secrecy around the *Tampa* as 'a deliberate program of censorship on a scale which would not be out of place in a war' (cited in O'Neill 2008: 79).

Once in detention centres, journalists have to be accompanied by an immigration official, and any photographs must be viewed first by the department before publication (Leach 2003). Limited and inconsistent access to telephones in detention means detainees have difficulties in contacting family, lawyers, and journalists, and this problem is compounded by the distances from detention centres to the metropolitan centres (Crock et al. 2006, Mares 2002). The former Chair of the Human Rights and Equal Opportunities Commission Chris Sidoti

(HREOC 1998: 224) observed ‘no other Western country keeps asylum seekers in detention incommunicado’. This policy has led to the absence of asylum seeker’s stories in the debate about border protection. Instead, debate has been shaped by the discourse of ‘illegals’, ‘queue jumpers’, and ‘economic migrants’ seeking ‘migration outcomes’. Leach (2003) argues that this silencing of asylum seekers’ voices is a strategy to ensure the government’s ‘propaganda’ on asylum seekers is not contradicted (also Pickering 2004).

One way in which the silencing has been overcome is through the publication of collections of detainees’ experiences and stories in their own words. *From Nothing to Zero* (2003), *Another Country* (Keneally and Scott 2004), *Asylum* (Tyler 2003) and *Dark Dreams* (Dechian et al. 2004) are collections of asylum seekers’ letters, poems and other creative writing about their experience in detention. Human rights lawyer Julian Burnside writes in the preface to *From Nothing to Zero* (2003: v) that the aim of the collection is to ‘give a face to the faceless; a voice to the voiceless’, and to ‘show that the people we hold in indefinite detention are human beings like the rest of us’. Other publications, for example *Lives in Limbo* (Leach and Mansouri 2004) and *Human Rights Overboard* (Briskman, Goddard and Latham 2008) use the words of detainees to illustrate the effects of specific border protection policies. Leach and Mansouri (2004: 10) explain that a key motivation for writing their book was because ‘much of the frustration experienced by refugees and asylum seekers is the feeling that their stories and experiences are misrepresented, distorted, or, perhaps most distressingly, completely ignored’.

The most comprehensive publication about immigration detention is *Human Rights Overboard* (Briskman et al. 2008). This book is a result of the *People’s Inquiry into Immigration Detention*, a citizen-led inquiry, chaired by former Federal Court judge Marcus Einfeld. The inquiry heard testimony from anyone who experiences of detention, including former detainees, their supporters, doctors, nurses, educators, former Department of Immigration officials, detention centre employees, migration agents and lawyers. The inquiry heard approximately 200 verbal accounts and 200 written submissions. The resulting book is significant not only because of its vast scope, but also because it includes the experiences of all categories of detainees, including Indonesian fishermen, and people who have had their residency visas cancelled and were detained awaiting deportation.

A number of books follow the journeys of individual asylum seekers, from the persecution they experienced in their homeland, through the journey to Australia, to the experience of Australia's immigration detention centres. A common theme is to outline the hardships that these asylum seekers experienced, and then show the inhumanity of the detention regime once the asylum seekers thought that they had arrived safely. The *Rugmaker of Mazar-e-Sharif* (Mazari 2008) and *The Bitter Shore* (Everitt 2008) are two such accounts. A number of novels pursue the same aim with fictionalised stories of the journey to Australia, including Thomas Keneally's *The Tyrant's Novel* (2003), Maurice Whelan's *Boat People* (2008), Sandy McHutcheon's *The Ha Ha Man*, Eva Sallis' *The Marsh Birds* (2005), and Morris Gleitzman's *Boy Overboard* (2002) and *Girl Underground* (2004). Linda Jaivan's *The Infernal Optimist* (2006) is the only fictional account of detention whose main character is not an asylum seeker, in this case, a young Turkish-Australian man whose permanent residency visa is revoked on character grounds. Other texts attempt to describe the impact of immigration detention on people other than the detainees. *Blind Conscience* (O'Neill 2008) tells of the struggles of 'ordinary Australians' who become activists against the detention regime. From a different point of view, in *Beyond the Razor Wire* (2003), Sandy Thorne writes about her time as a detention officer at Curtin Detention Centre.

The second aim of these social histories is to raise public awareness of the effects of government policies, in order to pressure the government to change them. The voices of asylum seekers are not always necessary to achieve this. Mares (2002) combines his own impressions of Woomera detention centre with interviews with people who have worked inside, explanations of the policy, and political discourse, to demonstrate the often devastating reality of the government's 'tough on asylum seekers' approach. MacCallum (2002) employs a combination of discourse analysis with an intimate descriptive account of domestic politics to argue for what he sees as the political opportunism of mandatory detention and border protection more generally. McMaster (2001) argues that the changes to refugee policy over the last half of the 20th century demonstrate a 'culture of control' in various Australian governments, at great expense to individuals needing assistance. Brennan (2003) examines the detention and ill-treatment of asylum seekers in Australia within the context of global refugee flows, international treaties and the policies of other nations (see also Sparrow 2005).

Michael Gordon's *Freeing Ali* (2005) tells of the conditions of detention on Nauru as part of the Pacific Solution, and in particular the story of one detainee, Ali. *Troubled Waters* by Ruth Balint (2005) discusses the plight of Indonesian fishermen in Australia's detention centres. David Corlett's *Following Them Home* (2005) reveals the fate of a group of asylum seekers, who spent months in detention, before being found not to be refugees and deported. These writings develop a social, moral, political and legal critique of what the authors see as the inhumanity and the irrationality of the government's policies.

This chapter is not intended to provide a comprehensive list of the social histories of detention centres. Instead, it demonstrates the intentions and methods of this literature. Social histories of asylum seekers and immigration detention are important in their own right, and their political and moral intentions are clear. Yet, however critical they may be, they are not necessarily analytical in their approach. Instead, these social histories play an important role as a foundation, a starting point, for more theoretical analysis and explanation of immigration detention centres. The negative experiences of the asylum seekers, the conditions of the centres, the often fraught interactions between the detainees and guards, immigration officers and other professionals within the centres point to a problem that requires explanation. How did this situation come about? Why do governments adopt such strategies in order to protect national borders? The social histories of asylum seekers provide not only the subject but also the moral foundation of more 'explanatory' literature.

One of the problems with social history is the issue of which groups and sub-groups are included in the investigation and which groups are left out. As Fairburn (1999) explains, as much as it attempts to be comprehensive, social history can never be completely inclusive. Simply for reasons of practicality there are groups of people that must be omitted. He explains (1999: 18-19):

No matter how hard we try, our accounts of the social past are doomed to exclude many categories of person who lived there. Despite our best efforts to be inclusive, the very nature of social categories guarantees that our accounts will contain multitudes of absences.

It is these absences that make social histories of immigration detention somewhat limited. Social histories of immigration detention focus on asylum seekers, and the

social, moral, political and legal critique relates to this category of detainee. Yet asylum seekers are one of many categories of people detained in immigration detention. While the proportions of different categories have fluctuated over the history of detention in Australia, asylum seekers share detention with Indonesian fishermen, visa overstayers, and people who have breached their residency visa and are awaiting deportation. Balint's (2005) account of Indonesian fishermen in Australian detention centres, and Jaivan's (2006) novel about a permanent resident awaiting deportation, are important exceptions.

Where the work of these social histories have sought to make asylum seekers visible, they have overshadowed the experiences of other categories of detainee. Moreover, as the social histories have served as a starting point for other analyses of immigration detention, the omission of these other categories means that, on the whole, immigration detention has only been examined in relation to asylum seekers. Yet detention centres serve a different function, and have a different meaning, for each group of detainees. So long as the analysis of detention remains on asylum seekers, only part of the picture of immigration detention can emerge.

Nevertheless, investigating the experiences of asylum seekers and their attempts to gain protection from the Australian government has produced a rich body of literature. The situation of asylum seekers in Australia has led to investigations of Australian politics, government and bureaucracy; domestic and international law and the power of the courts; history of asylum seekers and refugees in Australia; public and media discourse; incarceration; refugee and community resistance; and moral and political philosophy about our responsibility to refugees, to name just a few. This body of work, inspired by the moral outrage of the social histories of asylum seekers, has contributed enormously to our knowledge about contemporary and historical Australian society.

Theories of Immigration Detention

The social theories explored in this next section extend the work of the social histories above. They seek to explain how and why detention practice and policy has evolved, and what function it has in contemporary Australian society. These theories have been divided into six separate categories according to their explanation for immigration detention: racialism; fear of invasion; ethnic caging

and the national will; refugee rights and Australian sovereignty; globalisation and economic insecurity; and a genealogy of detention.

Racialism

The first category of social theory explored here argues that immigration detention centres are evidence of the continuing influence of racism in Australian society. This perspective identifies a racial bias throughout Australia's history, and views immigration detention, and border protection strategies generally, as a continuation of past values. Two events in particular are central to this racist perspective. The first is the White Australia policy, and the second is the rise of the politician Pauline Hanson and her One Nation movement. This section explores how various authors regard immigration detention as an extension of these two events.

The White Australia policy is the term commonly used to refer to the *Immigration Restriction Act 1901*, although more precisely it was the umbrella term for a number of laws, including the *Pacific Islander Labourers Act 1901* and the *Pearlshelling Act 1912*, policies that restricted entry to Australia, and denied many Chinese, Japanese and Melanesians the means by which to earn a livelihood. Policies of control of Aboriginal people included the removal of children. White Australia had an enormous role in shaping the character of Australian society in the first half of the century. It shaped immigration policy, the movement of non-white people within Australia, and also Australian institutions, domestic labour policy, and trade and international relationships (Jupp 2002, McMaster 2002, Markus 2003, Jayasuria et al. 2003, Tavan 2005).

Although it does not mention race, the *Immigration Restriction Act 1901* restricted immigration to Australia to white British subjects. The *Act* aimed to make (rather than keep) Australia white by immigration restriction, and by the perceived inevitability of the extinction of Aboriginal people. This attempt to control immigration was, according to Jupp (2002: 5), different from the approach of other settler societies including the United States and Canada, and was evidence of a project of 'conscious social engineering to create a particular kind of society'. Kane (1997) and Curthoys (2003) argue that to those involved in federation, this

policy of exclusion was not inconsistent but integral to the formation of Australia as a liberal democratic society.

The White Australia policy was officially dismantled as one of the first acts of the Whitlam government in 1972, but it had been steadily eroded since the 1930s. In the 1930s it became increasingly clear that the premises on which the policy was founded - that Aboriginal people would die out, and that it was possible to bar entry for non-Europeans to Australia - were 'illusory' (Markus 2003: 179). After the atrocities committed in the name of blood and race in World War Two, the original racist language of the White Australia policy was toned down (Jayasuriya et al. 2003). Stronger trade and diplomatic relations with Asia, and also with Europe, were becoming increasingly important in the post-war years and it was perceived that the White Australia policy could jeopardise this (Markus 2003). During the 1950s students, non-white spouses, non-white refugees, and eventually non-European migrants were allowed entry.

To what extent can we argue that there is a continuity between the restriction and racism of the White Australia policy and the policy of immigration detention? Surely such an exclusionist approach was put to rest with the introduction of the policy of multiculturalism in the 1970s? McMaster (2002) argues that the history of exclusion in Australia, particularly that which was biased against Asians, still informs and shapes the current border protection policies, in particular the policy of mandatory detention. He argues that this restriction on entry to Australia is implicitly racially selective, and that this racial bias can be found in the policy itself. The policy of mandatory detention is aimed at non-citizens without a valid entry visa, or unlawful entrants, who arrive in Australia by boat. This accounts for only a small proportion of unlawful entrants who arrive in Australia, as most unlawful entrants arrive by airplane. By far the largest numbers of non-citizens living in Australia are those who have overstayed their visa. According to Crock, Saul and Dastyari (2006), this amounts to 50,000 to 60,000 in Australia at any one time. A large proportion of these people are from Britain, Canada, New Zealand or Western Europe. The lack of policy to deal with these people, and specifically the lack of panic around this problem, indicates to McMaster (2002) that there is a racial bias against asylum seekers.

Similarly, Burke (2001) finds historical continuities between the two policies, in particular, the 'repressive' values behind the policies. These values have been 'present in almost every act of foundation, conflict and identity-formation in Australian history' (2001: 327). The current border protection policy is, in Burke's words, a 'resurgence of an historic image of White Australia' (2001:327). He suggests that the 'complete lack of concern' of contemporary Australian governments and the broader community about the thousands of Europeans living without visas in the community means that 'the perceived threat of the boat people really lies in their *difference*' (2001: 327).

Another way to assess the racial bias in asylum seeker policy is to turn the question on its head. Rather than asking whether asylum seekers are treated badly because of their racial and ethnic backgrounds, Pederson and others (2005: 174) ask 'would asylum seekers have been treated so appallingly if they had been white?' (See also Keneally 2003). Similarly, Manne (2001: 178) finds this an illuminating thought experiment:

Imagine that in the next few months political conditions in Zimbabwe forced hundreds of white farmers and their families to flee their country without papers or passports. Imagine that the farmers left their wives and children in camps in a contiguous African country and flew to Australia unlawfully. Imagine that on arrival they were detained, despatched at once to the detention centres at Port Hedland and Woomera, kept ignorant of their legal rights and not granted access to a lawyer, and were required to remain in the centres for very many months, uncertain of their fate. Imagine, finally, that they were eventually released, granted a temporary protection visa, refused access to services available to first-class refugees, informed that they had stolen places from people more genuinely in need and forbidden to apply for reunion with the wives and children they had left behind in the squalid setting of an African refugee camp ... [an Australian government] would face overwhelming national outrage.

The Australian government has not faced overwhelming national outrage over the policy and practice of immigration detention. In fact, when the government prevented the *HMV Tampa* and its cargo of 433 asylum seekers from landing in Australian territorial waters, many Australians supported this strong stance,

reflected in letters to the editor, speakers on talkback radio, and ultimately votes in the federal election.

Then Prime Minister John Howard's stance against the *Tampa* is best understood as an action in an election year when race had once again become one of the top issues of the political agenda, thanks in part to the rise of Pauline Hanson and her One Nation movement (Markus 2001). The election of Pauline Hanson to the Parliament in 1996 put the issue of race back in the public debate. Hanson's (1996) maiden speech to Parliament in 1996 articulated, on behalf of 'ordinary Australians', an anger at government policy perceived to favour Indigenous Australians and migrants, in particular 'Asians'. Immigration detention was first practiced in 1989, and then introduced as policy in 1992, years before Pauline Hanson arrived on the political stage. Yet, as Perera and Pugliese (1997) argue, the public and political response to Hanson enabled the government to tighten immigration restrictions.

As Prime Minister, John Howard's response to Pauline Hanson was critical in shaping the public debate, and determining what was allowed to be said and what was not. Crucially, Howard did not respond to Hanson's views immediately, and when he did, he did not condemn her position as racist. Rather, he said that he thought that Hanson was expressing the views of many Australians, and that this was an issue, not of racism, but of freedom of speech (Markus 2001). This allowed a public debate to take place that allowed people to voice racist opinions. A major effect of this was that prejudice and panic about asylum seekers was allowed to be expressed in public without moderation, resulting in a justification of anti-asylum seeker policies.

In the 1998 federal election, Hanson's One Nation Party won 1 million votes across Australia. The majority of these came from voters who would have usually supported the Liberal-National Party coalition. Early in the 2001 election campaign it looked as though the coalition would lose the election. To have a chance of winning, part of the coalition strategy was to win these Hanson voters back. Howard (cited in Boucher and Sharpe 2008: 64) made a direct plea to One Nation voters on a Sydney talkback radio station during the campaign:

What I'm going to do is to ask potential One Nation voters not to waste their vote, but to vote for us. And to point out that the legitimate concerns they have, and most of the concerns of One Nation voters are the concerns of Australians – they're not bigoted concerns ... What I'll be saying to them in order to get their first preference votes is that our policies are better able to address their concerns than the policies of One Nation.

His firm stance on *Tampa* succeeded in securing these votes. Jupp (2002: 199) argues:

How did Australia get into a situation where its international reputation and credibility have been thrown away for the sake of stemming such a small flow? How did a minister [Minister for Immigration Philip Ruddock] once viewed as a benign and humane liberal end up operating a system as rigid as anything attempted since the end of White Australia? The answer is relatively simple but not reassuring. It lies in the need to regain the 1 million votes which went to One Nation in 1998. It was the natural outcome of a process begun by John Howard in 1988 of playing on popular fears of immigration and multiculturalism. It marked the revival of racist and xenophobic popular attitudes.

The former Minister for Immigration Philip Ruddock (cited in O'Neill 2008: 226) confirmed this approach years later, stating:

I think the Pacific Solution and all of the measures that we put in place to restore public confidence in the immigration program was dealing with the Pauline Hanson phenomenon ... I'm saying 'One of the factors that we had to deal with was ... Pauline Hanson.' And do you reckon it wasn't an issue that needed to be dealt with? It was an issue that needed to be dealt with and it needed to be dealt with by ensuring that the factors that she would identify which reflected badly on all of us were in fact dealt with.

This short history of racially exclusionist policies demonstrates a continuity in Australia's response to the 'other' over the first century of federation. As Devetak (2004) suggests, there is a clear continuity between the *1901 Immigration Restriction Act* and the *2001 Border Protection Act*. This continuity, at its base, has a racist element. Yet, by itself, is this explanation complete? Some authors argue that asylum seekers arriving to Australia by boat create such a (disproportionate)

response to their arrival because this taps not into a simple racist response, but to a more complex, deep-seated fear of invasion into the Australian psyche.

Fear of Invasion

The idea of a fear of invasion is a way many authors have explained Australia's response to asylum seekers. Often described in psychoanalytical terms as an 'invasion anxiety' or an 'invasion complex', this fear is suggested to be deeply embedded in the national psyche. Like racialism, the fear of invasion is deep, yet irrational, and is strongly connected with Australia's colonial history and its geographical positioning. Yet unlike racialism, which is concerned primarily with human difference, the fear of invasion is connected to the need to protect territory, national borders, and maintain national sovereignty.

The notion that Australian society, throughout recent history and in spite of its great diversity, subscribes to collective thoughts and fears is the taken-for-granted foundation of this literature. It is a powerful concept, because despite common sense claims to the diversity of experience and background, it is hard to dispute the idea that Australia, like all societies, responds collectively to certain stimuli, whether subtle or explicit. The fears of invasion, explored here, are taken as evidence of this collective psyche. Papastergiadis (2004: 8) explains that the invasion 'complex', the result of 'deeper unconscious processes that are historically embedded in the national imaginary. These unconscious processes are manifested in the invasion complex which lies just below the surface of Australia's political culture'.

The sense of insecurity in contemporary Australian society is attributed to two aspects of Australia's history. First, our colonial history, based on the legal fiction of *terra nullius*, means that territory in Australia has always been contested. Taking land under this pretence from Aboriginal people, argues Burke (2001), has created a latent fear that one day it will be taken back. Second, Australia's geographical location, as a white 'outpost' on the 'edge' of Asia, has resulted in a sense of vulnerability. Australia, with its vast areas of unsettled land, is vulnerable to invasion from Asia, sparked by overpopulation or the desire for economic improvement. Both of these factors, according to Papastergiadis (2004) result in a fear that our territory may be under threat. Reynolds (1989: 205) supports the

idea that the fear of invasion was one aspect of a broader threat of colour that characterised Australian society from the 1880s to the 1940s, when Australians were just as fearful of being 'swamped' by immigrants as they were concerned to halt the growth of the 'half-caste' indigenous population. Lawrence (2006: 43) argues that the invasion anxiety is a 'real and continuing part of our history'.

In *In Fear of Security*, Burke (2001) argues that this fear of invasion is both constructed and used strategically by politicians to gain support for their objectives. From a Foucaultian perspective, Burke deconstructs the idea of security, arguing that rather than being a 'thing', an objective to be sought after, it is more useful to understand security as a 'practice', or better, a 'political technology'. We should examine security, he argues, not for what it is, but for what it does. Burke argues (2001: xxxiv), 'to see security as a political technology is to see it as a network of practices and techniques which produce and manipulate bodies, identities, societies, spaces and flows.'

For Burke, the common connection between all the recent manifestations of the fear of invasion in Australia's history has been that none of them have been real. Burke demonstrates that the discourse surrounding Australia's relations with Indonesia over the question of East Timor and Bougainville were couched in terms of Australia's security. Yet he argues, what is the security risk to Australia of the situation in East Timor? (2001: xxxv). With this example, Burke illustrates how the discourse of security has been used to justify government decisions on issues that are quite separate from a security threat, and that the notion of security is distinct from the notion of justice or responsibility. What we see instead is the manipulation of the fear of invasion, always latent in the Australian subconscious, by politicians wanting to achieve policy objectives.

Lawrence agrees that this fear is manipulated by the government to achieve political objectives. She argues (2006: 40):

In deliberately portraying asylum seekers as a threat, the Howard government succeeded in gaining traction for the bizarre notion that desperate people in leaky boats were somehow a threat to our national security. It counted on being able to arouse our fear of being overwhelmed by strangers envious of our good fortune. Perhaps our own deep knowledge that we are alien invaders who have stolen the land we occupy allowed them to feed this anxiety.

Various discourse analyses have demonstrated how the Howard government manipulated the notion of the fear of invasion with regards to asylum seekers in Australia (Pickering 2001, 2004, 2005; Leach 2003). Analysing government discourse surrounding the arrival of asylum seekers in 2001-2002, Leach (2003) demonstrates how the government is able to tap into the fear of invasion to justify its harsh response to asylum seekers. During the peak of the 'refugee crisis', politicians built on both notions of cultural foreignness that threatened Australia's social integrity, and the direct threat to security.

Asylum seekers were presented as being culturally foreign to Australia, having different values. The 'children overboard' affair enabled politicians to raise questions about different parental values and standards, and to suggest that these values were different from Australian values, and that these were not the sort of people wanted in the country (Leach 2003). The sheer numbers of asylum seekers arriving in Australia were also presented as a threat to social cohesion. Burke (2001: xxii) cites then Minister for Immigration Philip Ruddock who in November 1999 argued:

... the information available to us suggests that whole villages [in the Middle East] are packing up and there is a pipeline. If it was a national emergency several weeks ago, it's gone up something like ten points on the Richter scale since then.

Finally, drawing on the atmosphere of insecurity caused by September 11, asylum seekers were described as a direct threat to Australian security. Already criminalized and definitely 'other', it was not too far-fetched draw a link between asylum seekers and terrorists (Pickering 2001, MacCullum 2002). Two days after the attacks on the World Trade Centre in New York, Defence Minister Peter Reith (2001) argued, 'look you've got to be able to manage people coming into your country, you've got to be able to control that otherwise it can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities'. Prime Minister John Howard (cited in Allard and Clennell 2001) warned 'there is a possibility some people having links with organisations that we don't want in this country might use the path of an asylum seeker in order to get here', and that while he could not say for certain that there were terrorists on board the boats turned away, he couldn't 'guarantee' otherwise.

This style of discourse used by politicians taps into the fear of invasion. It also justifies and enables a certain governmental policy. In response to the fear that Australia may be invaded by asylum seekers, border protection has become increasingly important in both domestic and international relations (Maley 2003). This has increasingly become a militarised response to a border security problem. Pickering (2004: 213) demonstrates how the metaphors used to describe asylum seekers are metaphors of the tactics of war:

Refugees plan to 'invade', are 'gathering' to Australia's north; they make 'incursions' and make 'sustained assaults' on Australia's shores to which the government must respond with 'defence plans' that include putting international treaties 'on hold', closing immigration routes and undertaking 'hunts; for 'boatpeople'.

Devetak (2004) describes how when the *Tampa* picked up the asylum seekers and requested permission from the Australian government to drop them at Christmas Island, the government responded as if to a very real threat. He describes the absurdity of the situation thus:

In 26 August 2001 Australia came under attack. To extinguish the threat to Australia's national security, three days later, Prime Minister Howard swiftly deployed crack SAS troops who successfully averted an invasion of the mainland by the enemy, thus preserving Australia's territorial integrity and national sovereignty (Devetak 2004: 101).

This popular discourse validates a militarised response to asylum seekers, and it 'demarcates the possibilities of how we can relate to refugees - a war is only ever won or lost and requires clear boundaries to be drawn' (Pickering 2004: 213).

Burke (2001) and Tazreiter (2004) explain that immigration detention centres are part of the response to asylum seekers motivated by the fear of invasion. They are intended to be an important element of deterrence, and, as such, are as much a tool of communication as a strategy for defence. Burke argues that, just as detention centres are part of the broader strategy of security, the treatment asylum seekers receive within the centres are an integral part of this strategy. He argues (2001: 327):

This is *security* at work ... The harshness of the detention regime is deliberate – it is designed as a form of *deterrence* that will hopefully dissuade others from beginning the long voyage to Australia ... The suffering and pain experienced by asylum seekers in detention is *necessary* (authors italics).

This section has shown how border protection and the treatment of asylum seekers is driven by powerful motivations that are not visible in the government's policy objectives. These motivations are alleged to be 'deeply embedded' in the Australian psyche, and to uncover these motivations requires an alternative history of Australian culture, one that takes into account its relationship with 'others' and its unique geographical positioning.

Globalisation and Economic Insecurity

This chapter has already outlined some explanations for why a large proportion of the Australian population supported the detention of asylum seekers during the end of the 1990s and early 2000s. The reasons proposed were based on racist and fear of invasion ideas that have their foundations in the national psyche and are the result of Australia's particular history and geography. These are not the only explanations for the mainstream support of detention policies. Anne McNevin (2007) and Ghassan Hage (2003), from different perspectives, offer an alternative way of understanding why the detention of asylum seekers was electorally popular in the late 1990s and early 2000s. For McNevin and Hage, widespread feelings of individual financial insecurity in the face of neo-liberal economic policies resulted in a reaction against open borders, in both financial and migration policy arenas.

In her analysis of the response to the detention of asylum seekers in Australia, McNevin (2007) applies to Australia the idea of the 'liberal paradox'. Coined by James Hollifield, the liberal paradox describes the trend in contemporary Western nations to a greater transnational openness in the economic arena, but a corresponding pressure for domestic political closure (McNevin 2007: 611). McNevin draws on surveys from the late 1990s and the early 2000s – the period when Australians generally supported the detention of asylum seekers, despite early reports of the harsh conditions of detention – to assess the feelings of financial wellbeing. She finds that during this period there were widespread feelings of economic insecurity and anxiety among working-class and middle-class

families. Economic reforms of the 1980s and 1990s resulted in one and a half decades of financial growth in Australia, yet rather than reporting feeling better off, respondents reported the sense of a broken contract, alienation from the workplace, stress, and higher demands from the workplace for lower rewards. Higher rates of under-employment, casualisation and contract work, and an increasing gap between high and low incomes, meant that the economic reforms had not resulted in a widespread sense of being 'relaxed and comfortable'. In addition, there was a sense that such economic reform was global and inevitable, and therefore, to a certain extent, out of the government's control.

Pauline Hanson's One Nation movement responded to these feelings with economic policies favouring national protection over globalisation, and voicing complaints that indigenous people and migrants were being unfairly advantaged by the economic conditions. While open economic borders may have been inevitable, closing borders against unwanted migration was within government control. Polls conducted around the time of the Tampa in mid 2001 indicate that the support for the government's approach to border protection was anywhere between 75% and 90% (McNevin 2003). The 'mainstream' of Australia responded to the insecurity caused by transnational and neo-liberal economic reforms by demanding government control over its borders in arenas where it was possible. In particular, closing the borders against unauthorised migration would ensure that only Australians (although not indigenous Australians) were to share in Australia's resources. McNevin (2007: 622) explains:

[The Coalition government's] defence of territorial integrity in this arena countered a more general anxiety about increasingly open borders. In contrast to the notion of a globalised market to which there was no alternative, the rhetoric of border protection reified a bounded national community that defended its sovereignty *despite* its integration with transnational legal regimes. Indeed, asylum policy practice resurrected the *possibility* of territorial closure that had been denied by justifications for economic policies. Precisely because of this contradiction, asylum policy assuaged some of the disaffection borne of economic reform and generated support for the government on the basis of a return to the territorial closure abandoned elsewhere (author's italics).

Pitty and Leach (2004) coined the term 'regressive nationalism' to explain the social mood described by McNevin. Regressive nationalism, 'a combination of

ethno-nationalist notions of cultural identity and a commitment to neo-liberal economics', also involves the rejection of international intervention in domestic affairs. Stokes (2000), for example, explains that One Nation supporters viewed international treaties as a global conspiracy to subjugate ordinary Australians. International groups and monitoring bodies such as Amnesty International, wanting to report on the state of immigration detention in Australia, were regarded, therefore, as an attack upon Australian sovereignty.

From a quite different perspective, Hage (2003) also describes a desire for defence of the Australian community caused by a sense of economic insecurity. Employing a psychoanalytic framework, Hage describes how the neo-liberal economic reforms of the 1980s and 1990s resulted in a sense of 'worry' about the nation within the Australian community. Hage uses the term 'worry' advisedly, intimating the sense of paranoia and defensiveness that the act of worrying implies. People on low to middle-class incomes often felt as if they were living in a permanent state of financial insecurity, and the effect of this was the desire to defend Australia from further insecurity. The opposite of this national sense of worry, for Hage, is a sense of hope. Hope comes from the feeling that one's own needs are going to be met by the nation, and safe in this feeling enables an expansive, sharing response to outsiders. Economic reforms, and the increasing sense of personal insecurity, resulted in what Hage (2003: 20) calls 'hope scarcity', that is, 'a sense of entrapment, of having nowhere to go, not a sense of poverty'. The result was the desire to close the national borders. Hage (2003: 20-21) explains:

Many people, even those with middle-class incomes – urban dwellers paradoxically stuck in insecure jobs, farmers working day and night without 'getting anywhere', small business people struggling to keep their businesses going, and many more, have begun suffering various forms of hope scarcity ... They become vindictive and bigoted, always ready to 'defend the nation', in the hope of re-accessing their lost hopes.

It is not important whether or not the sense financial insecurity was justified. As McNevin (2007: 616) argues, 'what is most important for this discussion is the *perception* of unfairness and *feelings* of anxiety about rapid economic and social change' (her italics). The government's response was equally about perception;

whether or not they actually achieved it, they had to give the *impression* that they had taken control of the national borders.

Like the other explanations explored in this chapter, McNevin and Hage argue that the widespread support of the Coalition's border control policies indicates that the response was not necessarily rational, but operated on the level of the national psyche. McNevin and Hage's explanation is valuable because it highlights the importance of a confluence in the late 1990s and early 2000s of a number of factors – the rise in boat arrivals, and increase in the sense of personal financial insecurity – which led to the reawakening of latent ideas of racialism and fears of invasion described above. Having examined these explanations of why detention was largely supported by Australians, the analysis now turns to how people have explained the nature and function of detention itself.

Ethnic Caging and the National Will

In *White Nation* (1998), Ghassan Hage provides a unique explanation of the function of detention centres that combines elements of racism and fear of invasion with the concept of 'national will'. He refers to detention centres as ethnic caging, and introduces the themes of exclusion and punishment.

As a starting point, Hage notes the seeming disparity between tolerant, multicultural Australian society, and the detention of asylum seekers, which seems, even to supporters of the policy, to be separate from contemporary Australia's treatment of the 'other'. He asks 'can "we" really be nice to ethnics in the internal organisation of the nation and cage them in its external organisation without there being any relation between the two?' (1998: 107). To answer this question, Hage argues that the treatment of asylum seekers in immigration detention is not separate from the treatment of ethnics in multicultural Australian society. Rather, both are integral to the same social and political process, one that is ultimately concerned with ensuring white supremacy in Australia.

The term Hage uses for detention centres – ethnic caging – immediately highlights the central racist concern of the policy. Yet Hage's understanding of racism in Australia is quite different from that of the authors in the previous sections. Hage does not recognise a divide in Australian history between the times

of White Australia and multiculturalism. Instead, he regards multiculturalism as an extension of White Australia.

To understand Hage's position, we must note his critique of multiculturalism and, in particular, the use of the word 'tolerance' in public discourse. For Hage, the word 'tolerance' reveals a power imbalance inherent in the multicultural project. White Australians, Hage argues, tolerate non-whites because they choose to. Implicit in this action of toleration is the power held by white Australians. It is their choice to decide who belongs and who does not. They also have the power to not tolerate, or to withhold tolerance. Therefore, multicultural Australia still has a 'fantasy of white supremacy', choosing when and when not to tolerate the other.

To understand the relationship between tolerance of the other and ethnic caging, one must understand the concept of the 'national body' and the 'national will'. In Hage's analysis, for a nation to exist, to function and to be recognised by the international community, enough of the national body has to come together to form a national will, in order to govern the rest of the nation. When the national will is not threatened, it is relatively 'easy-going', that is, it chooses to tolerate, or not to tolerate, the other within the nation, rather than marginalise it.

Yet there is always a threat of a different national will being formed in competition with the original. According to Hage (1998: 111), the national will is 'constantly aware of the danger of the otherness constituting itself into a national will and has to ensure that this otherness does not do so and so come to endanger the national will's existence as such'. A mass influx of migrants, for example, contains with it the possibility of a formation of an alternative national will. In this way, Hage links his theories with notions of a fear of invasion. He also explains why, in Australia's history, people who are inside the nation may be suddenly regarded as a threat (Hage 1998: 111):

Why were Italians and Germans who were 'tolerated' in the 1930s and early 1940s denied and caged during World War II? Because wars emphasise the problematic of the national will. Many things that are perceived as harmless in peacetime become perceived by the dominating national will as dangerous for national survival in wartime. This also explains anti-Arab violence during the Gulf War. The national will cannot cope with the idea of others who may potentially subvert it by acting in the name of another national will.

Similarly, ‘enclaves’ or ‘ghettoes’ of different ethnicities threaten the national will with the potential that they will form their own collective will. Thus, many western nations, including Australia, have a policy of dispersal of new migrants. An independent Member of Parliament, Pauline Hanson (1996) was famously concerned about Asians ‘who form ghettoes and do not assimilate’.

What has this to do with asylum seekers and detention centres? When asylum seekers are detained in detention centres, says Hage, it is because they have challenged the national will. By coming to Australia and not following the rules set out by Australia, asylum seekers display an alternative will, and thus pose a threat to the national will. The idea of the queue, for example, identified by many advocates to be a political construction that does not exist in reality, is a symbol nonetheless of the national will. Hage (1998: 113) explains:

This queue is nothing other than the manifestation of the national will ... This is why it is not a matter of numbers: whether two people or one hundred jump the queue, what they have done is engage the nation at the level of its national will. They have literally tried to subvert the national will. They have activated something no national will can perceive without turning nasty: they are ethnic others who have exhibited a will of their own. The national will does not care about the reason why the other hasn’t followed the proper channels set out by that will for entering the nation. What it cares about is that it is a national will and must be capable of enforcing its proper channels, its queues, its order ... Ethnic caging is not the caging of ethnic numbers, it is the caging of ethnic wills. It is, as the government itself argues, an example of others: don’t try to activate your own will. One will rules in Australia and this is how it is going to be.

With his theory of the national will, Hage has given the nation a life-force, if not a character, of its own. This anthropomorphising of the nation is similar to a technique used by Agamben (1998), explored in chapter 4. The idea of the national will offers an explanation for the disproportionate response to the small number of onshore asylum seekers, and the punitive treatment these asylum seekers experience in detention and in other policies. This theory also suggests an explanation for why asylum seekers who arrive by airplane with valid entry visas are spared incarceration and are allowed to live in the community while their applications are processed. Even if it is proved that their documentation is forged

or misleading, these asylum seekers have followed the rules outlined by the government, and so are not punished.

The theory of the national will also indicates a certain arbitrariness of the rules. Like Agamben's 'sovereign power', Hage's national will seems to be free from judicial restraint. So how does this fit with Australia's democratic political system and the rule of law? How could the national will 'behave' unchecked and unregulated by the Judiciary? These questions do not discount Hage's theory, but point to a tension between the national will and the Judiciary as another possible aspect of it. Importantly, Hage's theory of the national will and its rules also offers an explanation for the use of detention centres for people other than asylum seekers. Indonesian fishermen, visa overstayers, and those who have breached the conditions of their visa, are all examples of people who have broken the rules. Perhaps then we can see a connection between this practice of detention and the detention we know from the school classroom, confinement as punishment for breaking the rules.

Refugee Rights Versus Australian Sovereignty

There are many similarities between Hage's theory of the national will and Giorgio Agamben's (1998) theories of sovereign power. While Agamben's theories will be examined in depth in chapter 4, this section examines how these theories have informed explanations of immigration detention in Australia. Agamben's interest in how asylum seekers fit into the global system of nation states, and the consequences of this for the notion of universal human rights, leads to a more internationalist perspective than that which has so far been examined in this chapter. Holt (2003) draws heavily on Agamben's work of 'the camp' and 'sovereignty' to offer an explanation of detention centres and their place in Australia. Rajaram and Gundy-Warr (2004) use Agamben's notion of the 'system of nation states' (see also Malkki 1995a, 1995b) to explain how refugees hold a unique place both within and outside this system.

The focus of Holt's (2003) work is the denial of human rights to asylum seekers, which he observes in Australia in the treatment of asylum seekers in detention. His analysis of 'rights, life and sovereignty' examines the notion of human rights in the contemporary system of nation states. He observes that although the

modernist project of the 20th century was to make the notion of rights universal and available to all, the denial of human rights to asylum seekers belies the success of this modernist project. Drawing on the sentiment expressed by Arendt in *The Origins of Totalitarianism* (1973), Holt (2003: 90) asks:

at the point where rights should be extended – to the refugee, the stateless, the homeless – is the same point where they are most often denied. Why is this the case? How to account for the expedient denial of rights when the refugee comes into contact with the sovereignty of the nation?

Holt (2003) argues that despite attempts to universalise the notion of human rights, the power to bestow rights lies with the nation state. These rights, which are supposedly universal, are actually only effective if a community recognises and chooses to exercise them. These rights can be withdrawn at any time, particularly in a time of crisis. Thus, politics and human rights are intimately entwined. Yet despite this intimate relationship, politics – even liberal politics – does not guarantee rights. Those who can claim citizenship to a nation have, through this political relationship, their rights ‘protected’. But those who are not citizens of a nation have no political ‘being’. Hence, the asylum seeker who arrives in a country and uses the right to ask for protection, reveals a gap in the modernist notion of human rights. Far from subscribing to a universal notion of human rights, nation states are primarily concerned about sovereignty, and the threat that uninvited asylum seekers pose to that sovereignty. As Holt (2003: 91) explains:

Thus the refugee is a problem residing at the very centre of our democratic consciences and our democratic institutions. The refugee tells us, face to face, from a distance, at the edges of our shores and in our camps, that we are not democratic: that we are not who we think we are or who we pride ourselves to be.

For Holt (2003), detention centres are ‘zones of exclusion from law, or more profoundly, from justice’. Drawing on the work of Agamben (1998), he argues that detention centres are spaces void of judicial rule or regulation, where the power of the ‘sovereign’ acts unregulated. He compares detention centres to prisons, and argues that detention centres are worse places than prisons because of this lack of judicial regulation. In detention centres, there is little or no freedom of movement, no right of appeal, no differentiation between relative needs, claims

and personal situations, all of which are taken into account in prisons (Holt 2003: 98). Prisoners know the length of their sentence, and are saved from the 'sense of arbitrariness and instability' that not knowing the length of one's sentence may cause. In the judicial system, the reduction of rights only occurs after due process, whereas refugee rights are only granted after assessment. 'This' Holt argues (2003: 99), 'completely reverses the order upon which rights are meant to be founded'.

The denial of human rights of the asylum seeker is the result of the unique position of the asylum seeker in global geopolitics. Rajaram and Grundy-Warr (2004) also draw on Agamben's theory, this time to explain that the 'the refugee should be thought of, paradoxically, as part of the system of the nation-state' (2004: 35). Refugees are part of the system, as byproducts of the system of nation states. They are, in Rajaram's and Grundy-Warr's terms, 'the detritus left over from the interiorising process'. Yet, by this exclusion, the refugee plays an important role. Rajaram and Grundy-Warr demonstrate how, through their exclusion from the nation state, the refugee reinforces the position of those inside. In essence, their existence not only strengthens the identity and cohesion of the nation state, but also makes it possible.

Devetak (2004) also argues that asylum seekers, like communists in the cold war, represent an 'existential threat' to Australia's sovereignty. More than their race or their sheer numbers, asylum seekers are a threat because they disrupt the global system of nation states. As stateless people, they have rejected the protection of one country, and are seeking protection in another. In this way, they have rejected, or at least disrupted, the 'national order of things' (Malkki 1995b). In Devetak's words, they 'fall between the cracks of international relations' (2004: 103).

Rajaram and Grundy-Warr (2004) also examine the notion of the excised migration zone. As Agamben notes, the zones of exemption are simultaneously part of the nation state, and excluded from it. For Rajaram and Grundy-Warr, the Pacific Solution, more than the mainland detention centres, is the zone of exemption, due to the Pacific Solutions' unique place in migration law. Migration law has created the Pacific Solution, and at the same time excluded the Pacific Solution from the zone in which migration law is practiced.

The application of Agamben's theories to the Australian situation sheds some light on the contest between who is included in the Australian nation state, and who is excluded. Exclusion can involve exclusion from territory, from the law, and ultimately, from human rights. The notion that asylum seekers disrupt the system of nation states causes anxiety for legislators and bureaucrats. In the next section, we see how this anxiety has been met with a national security response.

A Genealogy of Detention

The explanations of immigration detention explored so far in this chapter have focused on the detention of asylum seekers in contemporary times. In their article 'National Histories of Detention' (2002), Alison Bashford and Carolyn Strange introduce an historical perspective to their analysis of immigration detention by drawing parallels between immigration detention and other forms of administrative detention in Australia's history. In doing so, they demonstrate a continuity in the practice of detaining unwanted 'others' in Australia. In addition, their analysis of two historical case studies – quarantine and enemy alien internment – sheds some new light on the practice of immigration detention in contemporary times.

Producing what they call a 'genealogy' of detention, Bashford and Strange (2002) link contemporary immigration detention with the quarantine stations and enemy alien internment camps in Australia's history. Such an exercise, they argue, reveals certain continuities in the practice of detention that are useful in our analysis of contemporary practice of detention. The first important lesson is that detention of outsiders or 'others' in Australia is not new, but in fact has a long history in Australia. In the three case studies they examine in their article, administrative detention is a tool of nation-building. Finally, there is also the connection between justifications for the practice: specifically, for purposes of national security.

Quarantine stations operated in most of Australia's key ports from the 1850s to 1930s. For Bashford and Strange (2002), emerging ideas about cleanliness, hygiene and disease in the colonies, and later the young nation of Australia, created the impression that this new, clean and pure nation was under threat from disease and subsequent disorder. Quarantine stations were a way the government could demonstrate that it was protecting the nation from disease. Implicitly, also, ideas

of race were tied with notions of disease, and in particular, the notion that Chinese proved a threat to Australia through both cultural and biological uncleanness. The Chinese experienced the brunt of quarantine regulations, which were administered arbitrarily by health and customs officials, and were broad enough to allow scope for discrimination under the banner of national security. Thus, according to Bashford and Strange (2002), quarantine became one of the mechanisms for implementing the White Australia policy. The authors explain (2002: 516):

Detention centres for asylum-seekers and old quarantine stations for the infected are substantively linked in that quarantine historically entailed detention at the border on the grounds of national security and defence. Compulsory quarantine detention in Australia is thus also part of the history of immigration restriction – one technology through which “white Australia” was implemented. In an under-recognised way, the *Immigration Restriction Act* (1901) and the *Quarantine Act* (1908) were twin legislative tools for the creation of an imagined white (read: clean, pure, immune, uncontaminated) Australia.

Unlike quarantine stations that protected Australia from threats from the outside, the enemy alien internment camps of WWI and WWII were, on the whole, designed to protect Australia from threats from the inside. While some enemy aliens were interned upon arrival in Australia, the large majority of interns were enemy aliens, or those with enemy alien parentage, who were already living within the community. The act of determining who was an enemy alien from within the community was an act of identifying and classifying outsiders, and rendered vulnerable the notion that ‘belonging’ comes from being a long-term member of one’s community. The act of identifying, extracting, and confining enemy alien internees from within the Australian community was, like quarantine, an act of nation-building, and had just as much to do with race. The wars gave Australian authorities the opportunity to implement their ideas about who really belonged in Australia, and the internment camps, and later deportations, provided the mechanism.

Bashford and Strange’s brief history reveals the continuities between past and contemporary policies of administrative detention. These ideas provide the springboard for the historical analysis in chapter 3 of this thesis. Their work also

offers a framework for understanding the incarceration of categories of people other than asylum seekers in immigration detention centres. While asylum seekers, like those subject to quarantine, are incarcerated on entry to Australia, many others, like those subject to enemy alien internment, have been removed from the community, and like many enemy aliens, are awaiting deportation. Thus, this historical exercise not only brings perspective to immigration detention, but it provides a starting point for examining the incarceration of other categories of detainees in contemporary detention centres.

Conclusion

This chapter has examined the ways in which the experience of detainees in immigration detention in Australia have been represented, and how the purpose of their detention has been understood and explained in the current literature. The literature argues that the contemporary practice of immigration detention indicates that there is persistent concern about the 'other' in Australian society. As Hage (1998) and others argue, this concern persists despite an official policy of multiculturalism in Australia. Immigration detention is also a response to contemporary anxieties about globalisation and individual economic insecurity. In short, immigration detention is not an anomaly in Australian society, but a political mechanism that sits within the context of contemporary social concerns.

A number of themes emerge from this comparison of the literature. The notion of the 'other' is a consistent part of all the analysis. This 'other' is predominantly based on racist ideas, though since the introduction of multiculturalism it has been more 'new racism' based on cultural and class differences than 'old racism' based on notions of racial hierarchies (Dunn et al. 2004). Nation-building is another theme, interconnected with methods of exclusion. Responding to racial difference is part of the project nation-building, constructing and maintaining national identity, and fundamental to nation-building is the exclusion of the other. For the authors examined in this chapter, immigration detention centres are a contemporary method of exclusion. As Bashford and Strange (2002) point out, this is merely the latest in a number of forms of administrative detention that are designed to exclude.

There are some aspects of immigration detention, however, that have not been explained in the literature. As already pointed out, explanations for immigration detention focus on the detention of asylum seekers. Yet asylum seekers are only one category of people who are detained. As outlined in chapter 1, others subject to immigration detention include Indonesian fisherman, visa overstayers awaiting deportation, and residents who have breached the conditions of their visa, and are awaiting deportation. The absence of discussion in the literature about these other categories of people in detention limits our understanding of the function of detention centres in Australia. For each category, detention serves a different purpose, is a different experience, and has a different meaning. Similarly, the detention of each category serves a different function to Australian society. Our understanding of the function of detention centres will be limited if we analyse these institutions only with regards to one category of detainees. An analysis that focuses on immigration detention centres as political and legal institutions, rather than simply on their function with regards to asylum seekers, will help to develop a more comprehensive explanation of this form of incarceration in Australia.

Another reason that much of the literature offers only a limited explanation about detention centres is the emphasis on the function of exclusion. Detention centres are a mechanism for exclusion, but this is not their sole function. It has certainly been the intention by governments that detention centres fulfil this function: the former government's Pacific Strategy did not guarantee refugees entry into Australia even if they were granted refugee status. Australia's international obligations, however, mean that asylum seekers, once found to be refugees, must be eventually released and resettled in a safe country. By far the largest majority of asylum seekers who spent time in Australia's onshore and offshore detention centres were found to be refugees and resettled in Australia. For these refugees, detention has not fulfilled the function of exclusion. So what different function, and with what different meaning, does detention have in this circumstance? Alternative explanations for the function of detention, such as Hage's (1998) emphasis on the role of detention to punish, rather than exclude, are worth pursuing.

Another limitation of the literature has been to view immigration detention as a contemporary issue, without recognising the other ways that similar forms of

administrative detention have been used to regulate Australia's internal and external borders in the past. Bashford and Strange's (2002) genealogy of detention is an important exception. Nevertheless, most explanations for immigration detention do not address its place in the long history of administrative detention in Australia.

A more comprehensive examination of immigration detention is required, one that draws on the history of immigration detention, recognises the different categories of detainee, and the different function and meaning that detention has for each. This analysis will enable a better explanation of the function of immigration detention in Australian society. The following chapter examines three institutional predecessors of immigration detention as a way of placing it within the history of administrative detention in Australia.

Chapter 3

Administrative Detention in Australia: Three Case Studies

Studies of the history of immigration detention usually mark its beginnings in 1989, when detention was first used for immigration purposes, or 1992, when the policy of mandatory detention for onshore arrivals was introduced. Klaus Neumann (2004: 11) notes that ‘almost all attempts to make sense of the historical origins of the current asylum seeker and refugee policies have focused on the 1990s’. Immigration detention is, however, a contemporary form of administrative detention, which has been implemented in different forms since white settlement in Australia. An examination of this broader category of incarceration provides an historical context of immigration detention and a genetic explanation of its origins. This exercise reveals a consistency in social and political concerns in Australia, and in the mechanisms deployed as solutions to these concerns.

This chapter demonstrates that administrative detention has been used in different forms since European settlement in Australia. Although, ostensibly, each form of incarceration is a response to a different social problem, and targets different categories of people, there are many striking consistencies in carceral policies and their implementation. Each specific example of administrative detention functions to regulate and control social and geographic boundaries in Australia. This function is performed in two ways, to control the entry of people into Australian territory, and to remove, either temporarily or permanently, people already residing in Australia. The people subject to administrative detention are in some way classified as ‘outsiders’ to Australian society. For the dominant Anglo-Australian population, outsiders were most often those who were racially different. Administrative detention, therefore, functions as a mechanism for regulating the racial and ethnic composition of the Australian population.

In this chapter, three ‘institutional predecessors’ (Bashford and Strange 2002) of immigration detention are examined. Aboriginal reserves, quarantine stations, and enemy alien internment camps are forms of administrative detention that together span over 150 years of Australia’s history. An examination of these three case

studies reveals continuity in governmental response to certain social and cultural concerns of the era, and how these concerns are linked with specific categories of people.

The aims of this chapter are twofold. First, it aims to develop a history of administrative detention that recognises the longevity and continuity of this form of incarceration in Australia's history. Second, it aims to show that the repeated implementation of administrative detention demonstrates that, as a solution to a social problem, it was not invented anew, but was reused and revised for each new problem. When the cause of these social problems was attributed to certain categories of people, incarceration has often been the governmental response.

This study is not intended to provide a comprehensive history of administrative detention in Australia. Aboriginal reserves, quarantine stations and enemy alien internment camps are just three of many forms of administrative detention in Australia's history. Other examples include reformatory schools, orphanages, homes for the disabled and blind, psychiatric institutions, and more recently, anti-terrorism control orders. A similar analysis could be undertaken with each of these examples. The three case studies explored here have been chosen because of their relationship to ideas of exclusion, boundaries, and race. These three case studies, therefore, are particularly pertinent to a study of immigration detention.

Aboriginal Reserves

From the last decades of the 19th century to the 1960s, a system of reserves, missions and other institutions isolated, confined and controlled Aboriginal people. These forms of administrative detention were a government solution to the social 'problem' of Aborigines. In each state or territory a number of such institutions separated Aborigines from white society. While the level of isolation and control over those confined differed between institutions and jurisdictions, there was enough similarity in policy and practice to enable broad discussion of Aboriginal reserves as one form of administrative detention. On the whole, Aboriginal reserves were sites of extreme restriction and regulation over every aspect of Aborigine's lives.

This section outlines the history and social context for reserves and missions in different colonies in Australia. It then describes the reserve system, and the use of

dormitories for the incarceration and training of children removed from their families. It also examines the rule of law in relation to reserves, and the limited ability for Aborigines to seek legal recourse regarding their incarceration. Although Aboriginal people were British subjects from 1788 (Chesterman and Galligan 1997), they had little power to challenge their administrative detention.

This section then draws on social theory to explore two main themes that arise from the case study. First, it examines the classifying of Aboriginal identities in terms of 'blood', and the implications for policy caused by a growing population of people of mixed descent. Second, it applies Goffman's (1961) theory of 'total institutions' to Aboriginal reserves. Goffman's theory about the social function of total institutions and the way they control and shape the lives of inmates is a useful tool for analysis in this particular case study.

To discuss this case study, I use the term 'reserves' to refer to a system of reserves, missions and other institutions that made up the network of carceral institutions for Aboriginal people (Sutton 2003). This is primarily for simplicity, but also because, as missions received funding from the government and operated within tight governmental restrictions, they were for all intents and purposes the same as reserves. I also use the term 'Aborigine' to refer to both peoples indigenous to Australia and Torres Strait Islanders. Again this is for simplicity of expression, and is not intended to discount the experiences of Torres Strait Islanders with regards to Australian policy.

The History and Social Context of the Reserves

In order to understand the function of Aboriginal reserves in Australian society, a study must take into account the broader historical context of Aboriginal-settler relations. This section provides a brief history of these relations and the corresponding government responses. This history demonstrates that the reserve system was adopted to perform a particular social function, and it evolved to meet the different challenges that emerged as the relations between Aborigines and settlers changed. A historical perspective also reveals the different approaches between colonies depending on the local concerns arising from geography, patterns of settlement, and governance.

In the first half of the 19th century, a large proportion of interactions between Aborigines and white settlers were characterised by violence. In Queensland, South Australia, and Western Australia, where colonial settlement involved the claiming of land for farming, the majority of Aboriginal-settler interaction took place on the frontiers. The policy of 'dispersal' involved groups of settlers, and later the Native Police Force, engaging in massacres of the Aboriginal population on these frontiers (Elder 2003). These massacres, motivated by the desire for land, were often reprisals for Aboriginal guerrilla-style attacks on white settlers.

By the late 19th century, disease and violence had devastated the Aboriginal population throughout Australia. Full accounts of the drop in population after 1788 are hard to determine as original population could only be estimated, and the numbers of deaths by disease and massacre were obscured, for obvious reasons. In Queensland, however, it is estimated that the population decreased from 100,000 in 1788 to 26,670 in 1901 (Chesterman and Galligan 1997: 31). The decline in Aboriginal population was accompanied by social Darwinist notions of racial hierarchy and the survival of the fittest. It was widely believed that Aboriginal peoples were a primitive race doomed to become extinct.

In response to this problem of the 'dying race', the colonial governments introduced systems of 'protective' legislation. The first was in 1860 in South Australia, where a Chief Protector was appointed to watch over the interests of Aboriginal people (Brock 1993) and to 'smooth the dying pillow' (Bolton 1982: 59). Similar legislation was implemented in Victoria (1869), and later, Queensland (1897), Western Australia (1905), New South Wales (1909), and again South Australia (1911). The protectorate laws were a way of 'protecting' Aborigines from violence on the frontier. By designating a piece of land for Aborigines, it was hoped that the conflict between settlers and Aborigines over land would stop. Also, it was hoped that Aborigines would use the settlement land to farm and become self-sufficient, thus improving their 'destitute' state and reducing their reliance on the government for rations.

Another aim of the reserves was to 'Christianise and civilise' the Aboriginal population (Attwood 1989). The missions in particular, but also the reserves, incorporated the teaching of Christianity, and the practice of traditional knowledge, rituals and songs was forbidden. Further 'civilising' strategies were the

incorporated in idea that Aborigines needed to be settled in one place, because it was believed that constant wanderings led to an undisciplined mind (Attwood 1989: 2); an emphasis on the nuclear family; and strict rules about cleanliness, grounded in the connections between Christianity, cleanliness, and moral righteousness (Attwood 1989: 21).

Between the colonies there were degrees of difference in the legislation. Of all the policies, those in Victoria and South Australia were most influenced by humanitarian and philanthropic concerns, and by contemporary anti-slavery movements in the United States (Reynolds 1989). The Queensland *Aboriginals Protection and the Restriction of the Sale of Opium Act 1897* was the most restrictive. The *Act* regulated Aborigines' lives in seventeen areas, including the power over the removal to reserves, education and care of children, the distribution of food and other resources, the conditions under which children should be placed into service, employment, the prohibition of Aboriginal rites and customs, and the control of marriage. Section 9 of the *Act* permitted the relevant Minister to remove any Aborigine to a reserve and ensure that he or she stays there, with a three-month prison sentence for breach of disciplinary regulations or escape, and to move Aborigines from one reserve to another (Chesterman and Galligan 1997). The Queensland legislation served as the blueprint for similar Acts in Northern Territory, Western Australia and South Australia.

These laws conferred on the governments a great degree of regulatory power over all aspects of Aborigines' lives. Under these acts Aborigines lost basic human rights such as freedom of movement and labour, custody of children, control over personal property (Attwood and Markus 1999). In some states and the Northern Territory, the Chief Protector had legal guardianship over all Aboriginal children, usurping the power of the parents (HREOC 1997). These restrictive policies reached their peak in the 1930s (Attwood and Markus 1999). 'In the name of protection', suggest the authors of *Bringing Them Home* (HREOC 1997: 22), 'Indigenous people were subject to near-total control'.

By the 1920s it became clear to the various governments that, whilst the full-blood Aboriginal population was still declining, the population of people of mixed descent was increasing. This realisation caused a shift in the function of reserves. Now, they were not to 'smooth the dying pillow', so much as sites for training

Aborigines, particularly of mixed descent, in the ways of white society. Children were removed from their parents and taught the values and behaviours that would make them acceptable in white society. After World War II, policies of assimilation gradually took over the policies of protection, and in 1951 the protectionist legislation was finally repealed. The 1967 referendum gave the Commonwealth the powers to legislate on all Aboriginal matters in all states and territories, although these powers were not used until the Whitlam government in 1972 (Brock 1993).

Over the history of the reserve system, funding remained minimal, which meant a lack of adequate food, medical supplies, clothing, and other resources. Many Aborigines on reserves suffered from malnutrition and disease, and in some cases life expectancy was dramatically shortened (HREOC 1997, Kidd 1997). Ryan (1996: 176) notes that disease was not a problem among Tasmanian Aborigines until they were in 'captivity', and then the effect of disease was devastating to the population. The idea that Aboriginal people were destined to die out, therefore, was reinforced, rather than assuaged, by the reserves.

One argument for the reserve is that it offered security for Aborigines from the violence of the settlers. To a certain extent this was true, and the reserve system largely stopped the massacres. In fact, the Native Police Force in Queensland was disbanded the same year that the reserve legislation was introduced. Yet, as Rowley (1970: 250) and Chesterman and Galligan (1997) argue, the boundaries were more to keep the Aborigine in than the white person out. Miners and hunters were allowed to access reserve land, and the strict rules of entry applied only to the settlement townships themselves.

The reserves were also meant to improve the economic situation of the Aborigines. In the early days it was expected that they would use the land to produce food to supplement the government rations. It was also a place where they could be taught employable skills. Yet Rowley (1971a: 69) argues that the separation of the reserve from the economic opportunities of the towns meant that this was impossible.

There were some benefits from being on the reserves. The primary benefit was that it did offer protection from settler violence. In most occasions, there was a

regular source of food and medical care. The reserve also served as a mediator between Aboriginal and white society. Finally, as Sutton (2003) and Hammill (1999) note, reserves became part of the fabric of Aboriginal society, often becoming the source of new kinship networks.

At the same time, reserves were the integral part of a broad system of regulation and control over Aborigine's lives. Nowhere were the resources allocated to the reserves sufficient to provide a decent standard of living, health care, and real opportunities for improving the lives of residents (HREOC 1997). Kidd (2001) documents the scarcity of both, resulting in malnutrition, starvation, and death from preventable illness during the depression years in Queensland. Moreover, they were sites of systemic neglect, abuse, violence, rape and death (HREOC 1997, Kidd 2001).

Rowley (1981: 138) describes the reserve system as a 'gulag archipelago', a network of carceral institutions that operate separately to the rest of society, and were ignored or unknown to the wider community. He argues 'Any difference from a prison farm was not marked' (Rowley 1970: 248). Similarly, Attwood (1989: 8) suggests that the reserves were designed as islands – symbolically, if not in actuality – from the white Australian community.

Generations of Aboriginal families were subject to the reserve system. Attwood (1989: 119) explains that by the 1880s in Victoria, most Aborigines on the missions had grown up there, and so they had no knowledge about other ways of living. Similarly, Brock (1993: 157) notes that once the second generation of Aboriginal people were born on the missions, 'staff were no longer idealistically converting the "heathens", but baptising and confirming children and controlling "inmates"'. The HREOC (1997) report describes the process whereby girls and women would be sent from dormitories into domestic service, and upon falling pregnant, they would be returned to the reserve to have the child, who was then raised within the institution. Thus, the reserve system disrupted Aboriginal families and communities, and the transfer of traditional knowledge, skills, and beliefs, with lasting effects on Aboriginal communities.

This section has demonstrated how Aboriginal reserves, as a form of administrative detention, were used as the 'solution' to the 'problems' created in

Australian society by a particular social group. As the problems evolved, the thinking behind the reserves shifted, but the reserves remained the solution. At first, Aboriginal reserves were intended to provide a place of protection from the violence, an opportunity for Aborigines to develop skills for self-sufficiency. Later, reserves were a site of palliative care for a dying race. Later still, reserves became institutions for training Aborigines in ways in which they could integrate with white society. In each case, Aborigines were separated, surveilled and controlled.

The Reserves: Examples from Queensland

Reserves were created for Aborigines in all parts of Australia during the second half of the 19th and first part of the 20th (Reynolds 1989: 83). Each colony had a system of reserves for a proportion of its Aboriginal population. During the 1930s, when regulation of Aborigines was at its peak, approximately half of the Aboriginal population was incarcerated in reserves. This section describes three different reserves in Queensland: Cherbourg, Palm Island and Fantome Island. In Queensland the legislation was the most restrictive, and these three reserves are evidence of a large-scale interlocking system of control. According to Rowley, (1981: 133), in 1965 reserves in Queensland held 8,500 people, that is, about forty percent of estimated Aboriginal population. The Chief Protector had control over nearly every aspect of Aborigine's lives, including where they lived, marriage, employment, schooling, their ability to travel, their access to rations and resources (Kidd 1997).

Cherbourg, like other reserves and missions, was a total community. As well as houses for nuclear families, and larger 'decent homes' for the white families, it had men's and women's jails, separate girls, boys and babies dormitories, single men's quarters, a ration store, a main store, an office, a school, and a sawmill (Holt 2001, Kidd 1997). It was also notorious for the level of control superintendents held over the residents. Holt describes the use of punishment for minor infringements of the mission rules, including being 'cheeky', could result in corporal punishment or time in solitary confinement in the jail. This threat of further punishment left residents in a state of fear. Holt (2001: 15) explains:

The conditions enforced on our people were so unjust that we all lived in fear that, at any time, any one of us could be taken off to jail. It was very scary. People could be jailed just on allegations. There was no escaping this.

Kidd (1997) notes how Cherbourg in particular was conducive to sickness and disease, with poor hygiene, lack of food, blankets, and medical treatment.

Within the Queensland reserve system, Palm and Fantome Islands were the most extreme examples of incarceration. In both cases, their distance from the mainland meant that both were effectively prisons for those who were sent there. Palm Island was designed as a place where delinquent or rebellious residents of other reserves could be sent as punishment, or as a way of pre-empting any attempts of unified resistance. Aborigines could be removed to Palm Island if they were considered troublesome or 'cheeky' (Hammill 1999: 38). The level of control on Palm Island, explains Rowley (1971b: 97), was augmented by its geography: 'the surrounding ocean gave real meaning to the predicament of being "under the *Act*". This institution was equipped with its own criminal justice system including Aboriginal policemen with a white superintendent, who was also the police chief, judge and jury, and a gaol for residents convicted of 'offences'. Particularly troublesome offenders could be further removed to nearby Curacao or Eclipse Islands for extended periods (Finnane and McGuire 2001). Finnane and McGuire (2001: 293) describe life on the island:

Until the 1960s, for example, indigenous residents were forced to salute non-indigenous residents as they passed in the street; permits were required for fishing or hunting; residents were subjected to unannounced inspections of their homes; women were required to sweep the streets and work in the homes of white staff; certain areas, including the cinema and school, were racially segregated; people continued to queue for rations; and the network of indigenous police, armed with batons, patrolled the community observing the activities of residents.

Aborigines were sent to Fantome Island when they suffered from infectious diseases, including leprosy and venereal disease. These transfers were undertaken without prior consultation with the individual or their family, with no regard to family reunion or kinship networks, and with no avenue of resistance (Hammill

1999). On both these islands, correspondence was censored, so for the inmates, their time there was one of extreme isolation (Rowley 1971b: 90).

The interconnection between these three Queensland reserves demonstrates how the reserve system was indeed a system or a network of regulation and control. Finnane and McGuire (2001) suggest that this system of control also included Aborigines in general prisons, who were subject to different regimes of punishment and isolation than the white population. This form of administrative detention, then, was large in scale, complex, and designed to achieve the greatest regulation and control over Aborigines' lives.

Dormitories and the Incarceration of Children

The tightest restrictions within the reserves were imposed upon children in dormitories. In all colonies, children classified as 'neglected' or 'delinquent' could be removed from their parents to single-sex dormitories under the oversight of the Chief Protector, or the Board or Department responsible for Aboriginal affairs. In some cases the children were as young as four or five when they were removed from their parents, and kept there until the age when they could be sent to work, usually between twelve and fifteen. The dormitory system, even more than the general reserve system of which they were a part, involved complete control over every aspect of children's lives. With its close resemblance to the reformatory institutions for troublesome white children in the first decades of the 19th century, the dormitory system most clearly demonstrates how administrative detention was a model that was re-used and reformed to meet the requirements of different circumstances.

Bringing Them Home (1997), the Human Rights and Equal Opportunities Commission's (HREOC) report into the removal of children, suggests that between one in three and one in ten children were removed from their families to live in dormitories, foster homes or put into private service. Read (2003) argues that the difficulty in getting a correct figure is due to the lack of correct population statistics, that in some cases were deliberately under-estimated. In addition, Read (2003: 161) notes cases where a child had been removed from their family, but no official record was kept for that child, so that to authorities, and later historians, it was as though the child had never existed. Many generations of

Aboriginal families spent their childhood in the dormitory system (HREOC 1997, Kidd 1997).

In his memoir of childhood spent at Cherbourg mission in Queensland, Holt (2001) describes how his sisters were separated from the family and kept in dormitories within the settlement. These dormitories were separated from the rest of the settlement by two metre high fences topped with barbed wire. Even though his family lived within the settlement in close proximity to the dormitories, they rarely saw the girls. To visit their families, the girls had to apply for a ten-minute permit. An officer would escort them to their family, be present for the duration of the visit, and then escort them back to the dormitory.

The education Aboriginal children received in the dormitories aimed to create acceptable staff or workers, rather than giving children the tools for social advancement (Rowley 1971b, Kidd 1997). Nevertheless, rules were strictly enforced, with punishments including forfeiture of rewards, isolated detention, corporal punishment, and fatigue duties (HREOC 1997: 38). The training regimes associated with dormitories were part of the overall strategy for improving the lot of Aborigines by separating the children, removing traditional influences and knowledge, and training them in the way of white society. In the late nineteenth century, missionaries and other philanthropists believed that Aboriginal children were the key to success in 'civilising the natives'. The aim was to remove children from 'tribal influences' at a young age (Attwood 1989: 18), and that 'extremely rigid training' was the only way to overcome the 'wildness' in the children (Reynolds 1989: 170), and to, eventually, facilitate assimilation.

It is important to note that the model of separate schools and institutions for problem children was not created for Aboriginal children. Instead, the incarceration of Aboriginal children in dormitories and reformatory schools was, according to Kidd (1997), an extension of a broader government strategy to remove 'problem' children in the white community. Reformatory institutions for white children were already a part of white settler society in a number of colonies by the middle of the 19th century. Government-backed reform schools removed delinquent children or children from degenerate circumstances for retraining. The Queensland *Industrial and Reformatory Schools Act 1886* authorised the removal to a school of any destitute child under the age of seventeen, any child found

wandering or begging in the streets, any child dwelling with a thief, prostitute and drunkard, or any child born of an Aboriginal or half-caste mother. Kidd (1997: 19) describes the function of the schools as follows:

Set up by philanthropic bodies in the slum areas, ragged schools fostered order and obedience and ‘the awakening of moral and religious principle’. This latter was not so much a matter of spirituality but of indoctrination in behavioural norms of punctuality, diligence, cleanliness and submissiveness *through* religious practices of self-criticism and prayerful obedience (author’s italics).

The use of institutions to confine and reform Aboriginal children, then, was not a system ‘invented’ for them. Instead, it was a system already in place in the broader white community. It tapped into preconceived notions of what was problematic or undesirable in the population, an increasing governmental ‘gaze’ on the problem, and the role of missions and other reformatory bodies to reform the characters of the most vulnerable members of the community (Kidd 1997).

Once under the ‘protection’ of the *Act*, however, Aboriginal children were managed under different administrative bodies than white children. As explained in the HREOC (1997: 38) report, ‘two systems of regulation and administration thus operated side by side: one for non-Indigenous wards under the control of the Child Welfare Department and one for Aboriginal wards under the control of the Board’. Aboriginal children were regarded as a separate problem, to be dealt with different strategies, from disadvantaged white children. Ultimately, policies for Aboriginal children did not progress at the same rate as policies for white children. When it was recognised in the 1890s that it was best for children’s growth and development to stay with their families, the removal of white children ceased. Aboriginal children continued to be removed from their families for a further seventy years, indeed, the policies were pursued with most vigour from the 1920s (HREOC 1997).

Reserves and the Rule of Law

Aboriginal people became British subjects in 1788, by virtue of their birth on British soil. Social, economic, and legal obstacles, however, made it impossible for Aborigines to use the legal system to challenge their treatment and status.

Chesterman and Galligan (1997) observe that the status of the Aborigine is best understood as ‘citizens without rights’.

This secondary citizenship status even reduced access to legal justice for murder. In 1799, five settlers were brought to trial over the murder of two Aboriginal boys. They were found guilty, and yet were set free, and eventually pardoned (Elder 2003: 10-11). Only in 1836, a landmark case in the NSW Supreme Court recognised that an act of violence against an Aboriginal person was the same as an act of violence against a white person. This ruling officially marked the end of legal pluralism in Australia, but in practice it was rarely enforced (Peterson and Sanders 1998: 5). The conviction and hanging of seven white men for the Myall Creek massacre in 1838 was an exception to usual proceedings (Elder 2003: 288). Peterson and Sanders (1998) describe the double standards that applied to Aboriginal and settler violence. As victims of crime, Aborigines were treated the same as other subjects, but as perpetrators they were dealt with more harshly, in order to prevent future attacks. Largely, however, settler violence was external to the rule of law. Kidd (1997: 2) suggests that the ‘frequent procedural exclusion’ of Aborigines from courts of law was indicative of the white hierarchy to flout British law when it came to race relations. Instead, white settlers pursued their own private dispensation of ‘justice’. As Attwood and Markus (1999: 8) explain:

In remote Australia, the fate of Aborigines was shaped by demand for their land or labour, and so frontiersmen – rather than the government or the rule of law – determined race relations.

The lack of protection from the law contributed to the need for protection by other means, and, as we have seen, the reserve system was set up largely to ‘protect’ Aborigines from the frontier violence. But the reserve system itself was external to the rule of law. The decision to incarcerate Aborigines in reserves was not made by courts but by the Minister, the Chief Protector, or Board with responsibility for Aboriginal affairs. Once within the reserves, the overseer decided each daily activity, including the doling out of punishment. Aborigines could have rations restricted, be flogged, be kept within the reserve jail, or moved to a different reserve, all by decision of the overseer. Attempt to escape the reserve, for example, was punishable with up to six weeks in solitary confinement, by order of the Protector.

In most jurisdictions, the Chief Protector or the Board responsible for Aborigines was the legal guardian of Aboriginal children, and was able to make the decision to remove the child from their families without a court order. In the 1920s and 1930s some jurisdictions introduced the ability for Aboriginal families to challenge the removal of their children in the courts (HREOC 1997). Aboriginal families could challenge the grounds on which their children were deemed 'neglected' or 'destitute'. This was one attempt to bring the policies for removal of Aboriginal children in line with policies for the removal of white children. In practice, however, social and cultural factors meant that the courts remained inaccessible to Aboriginal families. Describing such difficulties in Tasmania, the observations in the HREOC (1997: 82) report could apply to other jurisdictions where physical access to courts and assistance to understand the procedures were very real limitations.

Although a parent was entitled to appear at court to argue that the child was not neglected, this theoretical possibility took no account of the remoteness of mainland and non-indigenous legal processes from the island communities, the speed with which removals occurred, the parents' lack of knowledge of their rights under the law, their financial inability to get to the court in Launceston in time and the fact that no legal assistance was available to them. It was not until the early 1970s that solicitors began to appear on behalf of indigenous children and parents.

In many ways, then, the reserve system in Australia was largely unregulated by the Judiciary. Aboriginal people could not challenge their incarceration, nor could they seek justice for ill-treatment on the reserves. It is doubtful whether such judicial oversight would have made much difference to the daily lives of Aborigines within the reserves. Nevertheless, it demonstrates that the incarceration of thousands of Aboriginal people was administrative detention, quite separate from the rule of law.

The Reserve System: Separation, Classification, Socialisation

So far, this section has outlined the policies, justifications, and the implementation of the reserve system. How can we understand the social and political function of Aboriginal reserves in Australia? This section examines two themes from this case

study that increase our understanding of the issues that were pertinent in Australian society at the time. The first theme is the classification of Aborigines according to 'blood'. This preoccupation with the sub-classification of Aboriginal people had very real policy implications. More importantly, it reveals a concern about the increasingly evasive boundary between white and Aboriginal society. The second theme is the notion that reserves are, in Goffman's (1961) terms, 'total institutions', performing the social function of changing people into good members of society. These themes demonstrate that one function of Aboriginal reserves was the creation and maintenance of the social and physical boundaries between Aboriginal and Anglo-Australian society.

Categorisation by Blood

Until the 1960s, laws relating to Aborigines classified them into sub-groupings according to 'blood', or more precisely, according to one's relationship to a 'full-blooded' Aborigine. People whose parents were both 'full-blood' were themselves 'full-blood', those with one white and one 'full-blood' parent were 'half-castes', those with one 'full-blood' grandparent were 'quadroons', and so on. This system of classification had very real consequences for the individuals, as different policies applied to the different sub-categories of Aborigine. The resulting complication from this process of classification demonstrated the difficulties for colonial governments in drawing racial boundaries between white and Aboriginal people, and therefore in justifying the exclusion of the latter.

The distinction between people of mixed descent and 'full-blood' Aborigines had become increasingly relevant by the late 1800s, when colonial governments realised the population of people of mixed descent was increasing. It caused problems with policies. Should people containing some 'European blood' be allowed to continue to live with Aborigines, or should they be integrated into white society? Should they marry whites, further 'diluting' the degree of Aboriginal blood, or should their choices be restricted to Aborigines or others of mixed descent? Where is the boundary between white and Aboriginal society?

Victorian policy made the clearest distinction between different categories of Aborigines. The 1869 *Act to Provide for the Protection and Management of Aboriginal Natives of Victoria* gave the Board for the Protection of Aborigines the power to

determine where Aborigines should live. By 1874 most 'Aboriginal Natives' lived in six reserves newly established in Victoria. As the population of people of mixed descent grew, it became clear that a growing number of people with some European heritage were benefiting from government support. In 1886 government policy was altered to 'prevent a "race" of nearly white people living like Aborigines' (Brock 1993: 16). Those of mixed descent were removed from the reserves and forced to 'merge' in white communities, and earn a living despite limited experience and entrenched racism within the white community. As Chesterman and Galligan (1997) explain:

Regardless of the life opportunities that had been denied them, and regardless of the inherent difficulties they faced in obtaining employment, housing and education in white society, these people would now be treated by the State as though they were not Aborigines. In pursuing this policy, the State effectively denied that it owed them any special responsibility.

These removals from the reserves was implemented without respect for kinship and family ties, or the hardships Aborigines of mixed descent would encounter in the wider community, with no eligibility for welfare assistance. There was also some resistance from the Aborigines within the reserves as they were all moved to the single operating reserve at Lake Tyers.

Other states dealt with the issue of blood differently. In Western Australia, 'half-castes' living with Aborigines were considered Aborigines in terms of the *Protection Act*, but not for the *Liquor Act* (Rowley 1971a: 5). In Queensland, the 1897 *Aboriginals Protection and Restriction of the Sale of Opium Act* considered 'half-castes' to be Aborigines if they associated with Aborigines, but if they lived in the white community they were exempt from the policy and living on the reserves. In 1901 the Act was changed so that any 'half-caste' under the age of sixteen was brought under the Act, no matter where they lived (Chesterman and Galligan 1997: 40). In New South Wales, Northern Territory and Western Australia, many children of mixed descent were separated from their families and sent to training institutions, foster care, and into service (HREOC 1997: 24).

How was one's percentage of Aboriginal blood, and thus identity in terms of the law, determined? Gardiner-Garden (2000) has identified 67 different definitions

of 'Aborigine' in 700 different pieces of legislation. Rowley (1971a) explains that the decision was made by government administrators based only on an observation of skin colour. When in doubt, however, section 8 of the Queensland *Act* provided that a judge could make a decision by sighting the individual, and make the decision 'in his own view and judgement' (Rowley 1971a: 5).

The proportion of European 'blood' in a growing number of people complicated policy objectives in each jurisdiction. A further complication was that, overwhelmingly, these children were not the result of mixed-race marriages, although there were a small number of exceptions. To the contrary, children of mixed descent were often the result of the frequent and systemic sexual abuse and rape of Aboriginal women by white men (Chesterman and Galligan 1997: 35, HREOC 1997). The HREOC (1997) report notes that children of mixed descent were most likely to live within their Aboriginal mother and kinship group and grow up learning Aboriginal customs and traditions. This issue of parentage no doubt added further to governmental confusion about the extent of inclusion or exclusion should be afforded people of mixed descent.

The reserve system was primarily a system of separation of Aborigines from white society. The issue of a growing population of people of mixed descent made the justification for exclusion more difficult. Where was the boundary between whites and Aborigines? Were 'half-castes', 'quadroons' and 'octoroons' white, or Aboriginal? The gradual shift towards policies of assimilation was one solution to this problem. Assimilation required the continued incarceration of Aborigines – of all degrees of descent – on the reserves, so that they may be taught how to integrate with white society. The following discussion explores reserves as sites for creating good citizens.

Total Institutions and the Production of Citizens

Erving Goffman's (1961) theory of total institutions is useful for analysing Aboriginal reserves (Rowley 1981, Sutton 2003). Goffman's theory not only identifies a total institution by its daily practices and its physical characteristics, it also demonstrates how these characteristics contribute to the production of good citizens. Here, Goffman's criteria for the characteristics of total institutions, and

their social function, are compared with the descriptions and analyses of Aboriginal reserves.

Goffman's (1961) theory of total institutions are examined in depth in chapter 4, but it is worth briefly outlining the main points within this context. In describing total institutions, Goffman identifies six key characteristics. First, total institutions are places where people are treated as a group or category. Second, all aspects of their lives – learning, working, eating, sleeping – are performed as a group in the same place under the same authority. Third, the physical geography and architecture of the institution separates the total institution from the outside society. Fourth, there is a distinct hierarchy and separation between staff and inmates. Fifth, the daily lives of inmates are tightly surveilled and controlled, with an emphasis on routine and discipline. Finally, 'the various enforced activities are brought together into a single rational plan purportedly designed to fulfil the official aims of the institution' (Goffman 1961: 6). Each of these characteristics is evident in the descriptions and analyses of Aboriginal reserves explored in this chapter.

Physical and bureaucratic boundaries separated reserves from the outside community (Holt 2001, Sutton 2003, Hammill 1999). Reserves were often geographically separate, with a distance of eight to ten miles to the town. Rowley (1981) argues that this distance from town was important, in that they must be close enough so that Aboriginal men could provide labour in the town when it was needed, but far enough away to discourage real interaction (in particular, sexual interaction) between townsfolk and Aborigines. The permit system was a bureaucratic method of restricting the ability of Aborigines to leave the reserves (Holt 2001). Also, Holt (2001) and Attwood (1989) describe the separation between the white people's houses and Aboriginal houses on the reserve, in keeping with Goffman's (1961) observations about the separation of staff and inmates. While the managers of the reserve were able to enter Aboriginal houses at will, which were also subject to inspection three times a week, Aboriginal people were not allowed to enter the white's houses except to work. Similarly, Trigger (1992) describes the white overseer's house up the hill from the Aboriginal settlement, and emphasises the symbolism of this positioning. The surveillance and enforcement of routine has been discussed already, as has the

‘single rational plan’, whether to provide protection, palliative care, or train for assimilation.

Reserves, then, fit all the characteristics of total institutions. What of their social function? Goffman (1961: 22) identifies three social functions of total institutions: confinement and separation from the broader community; for labour; and as ‘forcing houses for changing persons’. For Goffman, different examples of total institutions may incorporate one function or the other. Aboriginal reserves incorporate all three. The latter function is particularly relevant to the place of reserves in 20th century ideas of assimilation. Aboriginal reserves were ‘forcing houses for changing persons’, and they did this in four ways, by introducing Christianity, through enforcement of routine, through education and training, and by punishment. Rowley (1981) argues that the reserves aimed to create ‘effective citizens’, and that every part of the daily routine was part of this plan. The reserve system, he argues (1981: 147-8):

was a practical and heavily-funded experiment in changing, by tuition, Aboriginal people into effective citizens of white Australia ... the settlements were supposed to become towns where Aborigines would be prepared for assimilation ... Concentration on changing individuals led to bureaucratic fantasies about ‘indices of assimilation’ with the managers thinking of themselves, in a kind of parody of colonial administration, as ‘social engineers’.

Thus every maintenance job, like hosing the grass, became ‘training’ (Rowley 1981: 148), and resistance to such training was ‘attributed to inferior mental processes, misunderstandings, and lack of sophistication’ (Rowley 1971b: 98). A tidy environment, it was believed, would lead to a tidy mind (Attwood 1989: 2). The social experiment increased depending on the level of control that could be achieved. Palm Island was, according to Rowley (1971b: 97) ‘the most complete expression of the philosophy of the ‘imposed program’ for producing social change. Even the house in which one lives with one’s family is officially regarded as an instrument of policy, a means of learning to be like the whites’.

Ironically, this training for life in the wider community was taking place in an environment of such strict oversight and control that any attempt to develop self-sufficiency among the inmates was ultimately futile. Rowley (1971b: 122) points out

Women who do nothing to feed their families may at the same time be learning, in special classes, how to manage cuisine and the other domestic arrangements in the house, in anticipation of getting a real house.

Hence, the reserves produced people who were deeply institutionalised, achieving the opposite of the desired result (Rowley 1971b: 111). This institutionalisation meant that, rather than 'integrating' with white society, the dismantling of the reserve system corresponded with a dramatic increase in Aboriginal incarceration in the prison system (Rowley 1981, Finnane and McGuire 2001).

There is no doubt that Aboriginal reserves had all the characteristics of 'forcing houses for training persons' (Goffman 1961: 22). This policy, however, infers the idea that one day Aborigines will be able to put their new skills to use by living in the community. Kidd (1997) and Rowley (1971b) hint that these skills, while fitting with a certain ideology, were just as important for the running of the reserves, and ensuring their continuity. Getting inmates to perform all the chores kept the reserves cost-effective (Kidd 1997: 23), and was necessary in order to 'maintain institutional services' (Rowley 1971b: 98). This no doubt reflected a tension in the public thinking about the reserves, that on one hand continued to endorse separation between races, and on the other hand supported the training of Aborigines into good citizens.

Summary

The reserve system in Australia performed a number of social and political functions. It separated and isolated a particular social group that was problematic to the white settlers. Aborigines threatened white society because of the violence between the groups, and the threat of disease and miscegenation. They also upset white sensibilities because of their lack of religion, culture, and desire for economic improvement, and because they seemed to be dying out in destitute conditions. The reserve system provided the solution to all these problems. Later, when the issue of people with mixed descent accelerated the notion of assimilation, the reserve system again provided the solution for how to facilitate the shift of Aborigines into white society. As Rowley (1981: 127) suggests, 'British colonial rule in Australia largely avoided the usual colonial problems by rounding up the colonised and restricting them to certain locations'.

Within the reserve system, the government was able to instigate near absolute control over the lives of Aboriginal people. It was a system that was bureaucratically isolated from departments and policies that governed whites. The near complete lack of judicial regulation or intervention meant that policies could be implemented with disregard to the rights afforded to other Australians. The lives – and deaths – of Aborigines within the reserve system was completely under administrative control. This chapter now turns to an examination of quarantine stations, which, like Aboriginal reserves, provided a governmental solution to concerns about boundaries and race.

Quarantine

Between the 1830s and 1950s, all vessels, cargo, crew and passengers entering Australia were subject to quarantine. Like other forms of administrative detention, quarantine involved the spatial segregation and confinement of groups of people from the rest of Australian community. Originally a policy determined by each colony, quarantine was brought under federal jurisdiction in 1908. There are two important elements of the quarantine program. The first is the role that quarantine played in the process of federalising Australia. The consolidation of different quarantine programs into one centrally managed program at the time of federation was symbolic of the potential of the new nation. Related to this, the second element of quarantine is the role of notions of hygiene and public health played in excluding certain groups of people from the Australian community. Ideas of cleanliness corresponded with ideas of whiteness, and contributed to public sentiment about White Australia.

Like Aboriginal reserves, quarantine stations are a long-standing example of administrative detention, used throughout Australia. While Aboriginal reserves were a method of maintaining boundaries between groups already living in Australia, quarantine was primarily about controlling and regulating the entry into Australia of people from the outside. As such, quarantine stations functioned as the threshold to the colonies, and later, to the federated nation. By far the majority of people in quarantine were eventually allowed to enter Australia, but only after they had proved that they met the requirements for entry. Thus, quarantine was one way by which the government could regulate entry into the country, and ensure exclusion when deemed necessary.

This section has three parts. The first examines the policy of quarantine, how it changed over time, and how it was managed. The second investigates how quarantine categorised people according to their class and race, and how the management of race in particular was an important aspect of the policy. The third part explores the place of the policy in the project of nation-building in Australia in the first half of the 20th century. This includes the notion that quarantine was needed to respond to a certain threat to Australia's population, that came from both from inside and outside the national boundaries. This threat was in part real, and in part imagined, but had a great amount of influence on the policy and its implementation.

The Policy

Until 1908, each colony in Australia maintained their own quarantine programs, with separate policies on inspection, confinement, and length of isolation. North Head quarantine station at the head of Port Jackson, Sydney, was the first quarantine station. It was opened on a temporary basis in 1828, and became a permanent station in 1837 (Foley 1995). Quarantine stations were opened in the other colonies throughout the century. There was no regulation or streamlining of quarantine policy and practice between the colonies. The success of the quarantine in keeping out infectious disease, and the experiences of those detained, was largely variable between stations.

Quarantine was a policy of temporary incarceration, confinement and isolation of people, plants, animals, cargo and vessels, on entry to Australia, to control the spread of disease in Australia. Of human quarantine, the policy stipulated that all passengers and crew must be isolated, whether displaying symptoms of disease or not, until they had passed an 'incubation period'. By far the largest number of people held in quarantine were healthy people. They were not a threat to the community, yet were incarcerated nevertheless, and with no legal recourse to appeal their confinement. In a reversal of liberal democratic notions of the right to liberty, the onus was on those in quarantine to 'prove' that they were healthy, and should be released.

Quarantine has traditionally been a measure of time – forty days – but more recently it is understood to be a spatial measure as well (Bashford 2004: 130).

Stations were located on islands at the mouths of ports where the water was deep enough for vessels to dock, or on peninsulas that could be isolated from the rest of the mainland. Each colony had a number of sites that could be isolated, either temporarily at short notice, or more permanently as stations. Many stations were purpose-built. Histories of the quarantine stations at North Head in New South Wales (Foley 1995), and Bruny Island in Tasmania (Duncombe 2004), show that these stations were renovated with additions made at different times according to requirement and funding.

The length of time people spent within detention depended on where they had travelled from, and the disease they were suspected of harbouring. Confinement could range from one day to several weeks, according to an 'incubation period'. This measure of time, usually fourteen days, was the length of time during which the symptoms of disease was supposed to manifest. The incubation period needed to be regularly adjusted, however, as travel times were shortened with the introduction of steam ships, and as new strains of disease developed. Nevertheless, the length of quarantine was often disproportionately longer than the accepted incubation period for infectious disease. It was not uncommon for people to be kept in the stations for months before they were allowed entry (Maglen 2005: 200).

The issues that arose from having different quarantine policies for an island continent were discussed at length at the various federation conferences in the last decades of the 19th century. At these conferences it was decided that a federated Australia should have a federal quarantine policy. Delegates agreed that a federal system of quarantine was needed both for reasons of commerce – so a ship did not have to go through the same procedure at every Australian port – and to provide as much protection as possible to ensure against an outbreak of infection.

The *Quarantine Act* was enacted on 30 March 1908, after extended Parliamentary debate. Significantly, quarantine was and remains the only area of health that comes directly under Commonwealth jurisdiction. Management of quarantine is complicated, however, as it overlaps three main areas of governmental responsibility: health, customs and trade, and immigration. The Commonwealth Minister for Trade and Customs had overall responsibility for the system, but the day-to-day administration of the policy was the responsibility of the

Commonwealth Director of Health. J.H.L. Cumpston was Director of Quarantine from 1913 to 1945, and some historians have attributed the success and the longevity of the quarantine program to his personal dedication to the practice (Hyslop 1997).

The quarantine system also sits uncomfortably between federal and state responsibility. Parliamentary debate about the legislation in 1907 (see *Debates* 1907a, 1907b) was clearly concerned more with controlling the entry of disease from outside Australia, rather than on controlling its spread once here. If an outbreak of disease occurred in Victoria, for example, would the Commonwealth manage movement between Victoria and New South Wales? In the end, it was determined that quarantine between states was a matter for the states, and federal quarantine legislation was concerned with the entry of vessels from overseas. It could be argued, then, that quarantine was essentially a policy about controlling the national boundaries, rather than on reducing the overall impact of disease.

Furthermore, the Parliamentary debates (1907a, 1907b) also suggest quarantine policy targeted humans more than plants, animals and other cargo. One Member of Parliament pointed out that quarantine stations have facilities for the accommodation of large groups of people, but no facilities for confining large herds of livestock. Animal and plant diseases, despite their potential to devastate the new Australian economy, were of secondary concern to the politicians who drafted the legislation. The *Quarantine Act* therefore was more concerned about the management of human movement and human diseases than on regulating disease in general.

Australia's maritime quarantine program continued into the mid 20th century, more than fifty years after quarantine had ceased to be used in Britain, Western Europe and North America. Already in 1847, Britain was moving away from the use of quarantine because it slowed immigration and trade, and did not guarantee security from infectious disease (Foley 1995: 59). The lack of success in controlling disease may be partly because of the prevalence of infectious disease in Britain in this time, that quarantine was incapable of alleviating. Britain officially stopped using quarantine in 1896, at the very same time that Australia was debating how its policy could be strengthened.

Maglen (2005) attributes the continuation and longevity of the Australian policy to two main factors. First, as an island nation with a small population, the Australian community was remarkably free from infectious disease. Any outbreak would cause disproportionate panic in the community, and as a result, extreme precautions were taken against any spread of new diseases (Maglen 2005). Second, the geographical position of Australia meant that it was far from so-called 'disease founts' of Britain, Western Europe and Asia. This distance meant that disease was easy to detect, because the symptoms of those infected were often apparent before the vessel made it to Australian shores. This distance meant that, unlike in Britain, the maintenance of Australia as relatively disease-free was actually possible. Bashford (2004) suggests that a third reason for the continuation of Australia's quarantine policy lay with its use for the management of entry of people of different race in Australia. The next section discusses this latter idea further, and explores how issues of race and class were integral to the implementation of quarantine.

Race and Class in Quarantine

The groups of people confined for quarantine were grouped according to social category. These subcategories often determined one's experience of quarantine, determining different levels of medical treatment, access to facilities, and ultimately, the possibility of entering Australia. Just as the healthy and sick received different treatment, so too were people treated differently because of their race or class.

Foley's (1995) history of the station at North Head, New South Wales, and Duncombe's (2004) study of the station on Bruny Island, Tasmania, describe how the stations grew according to need, funding, and pressure to create and maintain a division between social categories. At North Head, accommodation was improved in the 1870s to include separate quarters 'for the proper classification of passengers' (Foley 1995: 65). First, second and third-class passengers were accommodated in separate lodgings from each other, and from the crew. The first, second and third class accommodation was labelled 'Accommodation for White Passengers' (1995: 122).

The treatment of passengers, including inspections for disease, was highly dependent on the class of the passenger. Mr Liddell (1907: 539), Member of Parliament for Perth, described his own experiences of quarantine travelling from his Perth constituency to Melbourne Parliament.

I am sure that there are many honourable members who agree with me that the examination [for disease] is made in a very perfunctory and unsatisfactory manner. Not only are the ships delayed until the arrival of the health officer, whose time appears to be of greater value to himself than to anybody else, but when he comes on board he makes an examination of the passengers, which is one of the loosest kind. How a passenger is treated depends a good deal upon the way in which he is dressed. If he appears to be a man with money in his pocket, he is told to walk from one door to another without undergoing any inspection. If he happens to be travelling in the second class he is probably told to put out his tongue. But if he is travelling in the steerage he is set aside and examined more thoroughly.

People of different races were also considered more likely to carry contagious diseases, and were subsequently treated differently in quarantine. Maglen (2005) argues that before the smallpox epidemic of 1881, Asian ports were not regarded as a potentially dangerous source of disease. In contrast, vessels from Europe and England were checked thoroughly, especially those from England, where smallpox was always present. This changed in 1881, when health officials determined that the smallpox pandemic, that had a large impact on Sydney, came from China. From this time, the focus of quarantine became ships, cargo, and people of Asian origin, and ideas of race and of Asia as a source of disease began to inform both medical theory and policy (Maglen 2005: 210).

The treatment of the Chinese during the 1881 smallpox pandemic was particularly harsh. Community resentment towards the Chinese that had 'simmered' since the events of the gold rush years were reignited by the belief that Chinese were infecting the community with disease, in particular smallpox and leprosy. During the smallpox pandemic, Foley (1995) describes the punitive treatment of Chinese people to 'encourage' them to reveal the location of their sick relatives. On the hospital ship Chinese people were not separated from their sick contacts, they were given no medical treatment, rations, and had to sleep on the floor. In the quarantine station at North Head the conditions were better, but they were

segregated in tents under police supervision (Foley 1995: 75). 'Asiatic' dormitories were built in 1903 (Foley 1995: 121).

That people of different classes and races were treated differently by quarantine authorities was not that unusual, given that the same social stratification could be found in nearly every social and political institution of the time. What was important with these social categories in the case of quarantine, was the role quarantine played in the 'imagining' of Australia as a new nation. The next section describes the function, both actual and symbolic, of quarantine, in the context of the new Australian nation. The identification, separation and exclusion of people according to class and race in quarantine procedures communicated a message about who was welcome into the Australian nation, and who was not.

Quarantine and the New Australian Nation

Quarantine was an important part of the new, federated Australian nation. On one level, the consolidation of different colonial quarantine programs into the one system was a successful exercise in federal cooperation and administration. On another level, quarantine was part of a symbolic 'imagining' of the new nation (Bashford 2004). Geographically, the quarantine boundaries outlined the boundaries of the nation. Socially, quarantine identified races as a threat to the nation, and provided one strategy for their exclusion.

Marking the quarantine boundaries of the nation contributed, according to Bashford (2004: 116), to the formation of a 'particular geographic imagining of Australia'. 'Quarantine boundaries *are* national boundaries' (Bashford 2004: 116, my emphasis), they are the nation's outer boundary, the place where it is determined who may enter the nation, and who may not. Quarantine stations, therefore, were the threshold of the nation, through which every newcomer passed, and health checks were one criteria which would determine one's entry or exclusion from the nation. As Bashford (2004: 124) explains, 'the idea of quarantine was one of the means by which nations imagined their integrity: quarantine lines made otherwise often abstract national or colonial boundaries very real'.

If quarantine helped shape a particular geographic imagining of the new nation, it also helped shape a particular racial imagining of Australia. Australia was regarded

as new, fresh, clean and pure (Bashford 2004). Importantly, keeping Australia 'clean' and 'pure', was, for health administrators, synonymous with keeping Australia 'white'. Australians saw themselves as fit and healthy, free of disease and capable of physical exertion and endurance. For example, Director General for Health, J.H.L. Cumpston (1989: 100) noted, 'the more Australian the child is, the better the specimen'. The threat to Australia's health, therefore, was to come from outside. As demonstrated above, ideas that particular races were susceptible to certain contagious diseases, such as the Chinese with smallpox and leprosy, perpetuated the idea that Australia should as much as possible avoid potentially dangerous migration. At this time, this meant the exclusion of Chinese.

Irving (1999) notes that immigration restrictions based on race was not favoured by the British, who were at the time enjoying good trade relations with Japan and China (see also Jupp 2002). Public sentiment was so strong against Chinese immigration, however, that 'Australians were prepared to depart from British traditions in their hostility to the Chinese' (Irving 1999). Quarantine restrictions were one way of excluding Chinese people without explicit immigration restrictions. Irving (1999: 109) explains:

Earlier stereotypes of the Chinese as thieves – of gold and possessions and jobs – were by the end of the century overshadowed by fears of pollution. Chinese immigration represented, it was believed, a contagion. The Chinese themselves were seen as 'impure', and the spectacle (both imaginary and real) of opium dens and squalid living quarters reinforced this view. One strategy employed to restrict Chinese immigration without running the risk of British opposition to restrictive Immigration Acts was the imposition of quarantine controls against entry from China. When Chinese cases of leprosy were reported in Australia, the fear of contagion seemed confirmed.

As Director General of Health, Cumpston (1989: 96) promoted the idea that extreme caution against disease was required, and that while the threat of disease was associated with race, the races in question were not necessary from overseas.

Another difficulty has arisen from customary national neglect of sanitation in such places as China and India. The immigrants from these countries have had to be educated in sanitary practices from the most elementary stages. This

difficulty has been greater in the past than it is now, as mass immigration from these countries has not been permitted since 1901. The Aborigines have also presented public health difficulties ... These Aborigines have yielded very little to the influence of civilisation in respect of hygiene.

The controlling of the threat of disease from Aborigines to the white population resulted in their spatial segregation and confinement. As discussed earlier in the chapter, islands such as Fantome Island in Queensland were specifically for quarantining sick Aborigines from the rest of the population. Another administrative method of controlling the movement of Aborigines, ostensibly for controlling the spread of leprosy, was the 'leper line' (Bashford and Nugent 2003): from 1941 to 1963 Aborigines in Western Australia were forbidden to travel further south than the 20th parallel. These 'public health measures', argue Bashford and Nugent (2003) were more about controlling the interaction between Aborigines and white Australia than containing the spread of the disease, as medical research on leprosy had long demonstrated its very low rates of contagion. Quarantine, then, was about regulating the entry of certain categories of people into Australia, and about controlling certain groups of people already residing here.

Quarantine played an important function in the development of Australia as a new, federalised nation, and its importance lay in the symbolism of the legislation and its implementation as much as the words of the *Act* itself. Just as the *Immigration Restriction Act* did not once mention race or ethnicity (Jupp 2002: 8), neither did the *Quarantine Act* mention race. Yet the implementation of the Act, and the discourse surrounding it, was steeped in the social context that categorised people by their class and race. The *Quarantine Act 1908* may be placed alongside the *Immigration Restriction Act 1901*, the *Pacific Islanders Labourers Act 1901*, the *Pearlshelling Act 1912*, and the other laws that together made up the White Australia policy (Bashford and Strange 2002).

Summary

As a form of administrative detention, quarantine performs a number of functions in addition to controlling the introduction of disease to Australia. Being more concerned with human diseases than diseases of plants or animals, quarantine was a way of regulating the entry of people into Australia. In a few

cases, quarantine policies were also used to remove infected people from the community. In both cases, those subject to the most restrictive implementation of the policy were non-white. Quarantine's function of restricting the movement of non-white people into, and within, Australia, reassured Anglo-Australian concerns about race and disease. Quarantine was one further barrier to the nation, through which new entrants were required to pass. This aspect of the function of quarantine, more than the prevention of disease, meant that the policy continued in Australia for nearly half a century longer than similar policies in other Western nations.

Enemy Alien Internment

The third form of administrative detention examined in this chapter is enemy alien internment. Used in both World War I and World War II, internment was ostensibly used to incarcerate anyone who may be a threat to Australia's war effort, either through their connections with enemy nations, or through political alliances. In practice, however, internment was used much more broadly. Many people were interned with very little evidence of their threat to either the war effort or Australian society. Some ethnic groups, such as the Japanese in WWII, were interned *en masse*. Internment, then, became a tool for the social control (Evans 2000) over certain categories of people in Australian society.

During both WWI and WWII, three categories of people were interned for purposes of national security. The first category is defined by ethnicity. This group included 'enemy aliens', that is, people who had been born in a country with which Australia was at war, and had not become naturalised Australians. Later, the definition was extended to include people whose father or grandfather had been an enemy alien. The second category of people were Australian nationals of anti-war or anti-nationalist political persuasion, or trade union activists. The third category was prisoners of war (POWs), and civilian internees sent to Australia for internment from Britain, the United States, Free France in the Pacific, and the Dutch East Indies.

Internment had a number of characteristics. The most apparent is the arbitrary nature of the internment policy and its implementation. Drawing on the state of national emergency invoked by war, both the Hughes and Menzies governments

interned thousands of people without trial, on the basis that they were ‘reasonably suspected’ of being a threat to society. Internment was for an indefinite period of time, and while a small number of internees were released before the end of the wars, most were interned for the duration. Some were removed from Australia at the end of the wars. Finally, internment was encouraged by a general public anxiety and ‘moral panic’ towards people who were perceived as ‘outsiders’ to the Anglo-Australian community.

This examination of enemy alien internment has five parts. First, it examines the policy of enemy alien internment in each of the wars. It traces the development of the policy in relation to the progress of the war, and to corresponding public pressure on the government to intern people of non-Anglo origin. Second, it examines the arbitrary implementation of these laws, both in the sense of lack of judicial oversight over internment, and in the sense that people were interned on very little evidence of being a threat. Third, it introduces Cohen’s (1972) theory of ‘moral panics’ as a way to understand the success of public pressure on the government to intern the ethnic ‘other’ in Australian society. Fourth, it investigates the idea of internment as exclusion, in particular the use of deportation of internees after each war to remove certain groups of people from Australian society altogether. This section closes with a discussion about what the policy and practice of internment revealed about membership into the Australian community.

Internment in World War I

In WWI, the internment policy was one aspect of the *War Precautions Act 1914* (the *Act*). The *Act* gave the Labor government under Prime Ministers Andrew Fischer (until 1915) and William Morris Hughes broad powers for the duration of the war. Under the *Act*, the government had complete control over the press and the economy, and established a centralised and militarised administration (Fischer 1989). Originally a small document, the legislation was amended multiple times throughout the war, so that by 1918 it was a ‘weighty document ... [with] a bewildering collection of rules, orders and prohibitions which affected civilian life in many instances’ (Fischer 1989: 65). The *Act* outlined two categories of people that could be subject to internment, enemy aliens, and anti-war or unpatriotic Australians. A third category, largely prisoners of war and civilian internees, sent

to Australia from Britain and other allies were also interned. This final group is examined separately below. Here, the first two categories of internees are discussed.

When war was declared, all German and Austrian nationals had to register in the Aliens Register at their local police station. The policy stipulated that local authorities could intern 'enemy subjects with whose conduct they were not satisfied' (Fischer 1989: 65). Originally the *Act* was concerned with people who had only recently migrated to Australia. In 1915, the categories of people who could be interned under the *Act* were broadened. People born in Germany or Austria but who were naturalised British subjects, yet deemed 'of hostile origin or association', could be interned, as were people of 'enemy descent', that is, people who were born in Australia but whose father or grandfather were a subject of an enemy nation.

Many German or Austrian residents, both naturalised and not, handed themselves to authorities for voluntary internment. These were people who had lost their jobs or could not find employment because of their enemy background, which was becoming increasingly common. A subsistence allowance was paid to the families of voluntary interns. At the start of the war these men were permitted to leave the camp if they found work, but in November 1915 this policy was changed (often without informing those it affected) to keep them interned for the duration of the war. The government regarded voluntary interns as 'unsuccessful migrants', and, as is discussed below, these were among the many people who were deported at the end of the war (Evans 2000).

Also subject to internment were Anglo-Australians who were thought to be 'disaffected and disloyal' (Fischer 1989: 65). These were Anglo-Australians with anti-war and anti-patriotic political persuasions, and included radical pacifists, socialists, unionists, and political and church leaders who campaigned against conscription. Anyone who actively campaigned against the war could, under the *Act*, be subject to internment (Fischer 1989). A total of 6,890 people were interned in WWI (Fischer 1989, Scott 1941). Of these, only about 4,500 were residents of Australia prior to August 1914. The rest were sailors and passengers on ships that arrived in Australian ports after war was declared, or residents of other British colonies, transferred to Australia for internment. At the start of the

war, only German reservists were interned, but by 1915 most of the internees were civilians. About 700 of the internees had been naturalised, and about 70 were 'Native Born British Subjects', that is, they had been born in Australia of German or Austrian parentage (Fischer 1989: 77).

Internment in WWII

The large numbers of people detained during WWI, and the cost of supporting their families, meant that internment was a highly expensive exercise. For this reason, the government of Prime Minister Robert Menzies in WWII wanted to avoid a repeat of such large-scale internment. The *War Book*, the Defence Department document outlining internment policy in WWII, stipulated that people would be interned to prevent an individual 'acting in a manner prejudicial to the public safety, or the defence of the Commonwealth'. This time, however, the number of people interned should be kept to the 'narrowest limits consistent with public safety and public sentiment'. This qualification that internment should be consistent with 'public sentiment', however, meant that the WWII program was just as large as in WWI.

The *War Book* gave the government more far-reaching powers than the *War Precautions Act* in WWI. As well as internment, it placed many restrictions on the lives of aliens and naturalised Australians. Both these categories of people had to obtain a special licence to work on ships and wharves, and in the packing and conveying of goods for export, and aliens were prohibited from possessing or using firearms, weapons, ammunition, explosives, petrol, signalling apparatus, carrier pigeons, motor vehicles, motor boats, yachts, aircraft, telephones, wireless apparatus, cameras, naval, military or air force maps, ciphers or codes, and could not buy or lease land (Hasluck 1965).

The desire to keep costs to a minimum kept the number of internments low until May 1940. By November 1939, less than 300 people had been interned, and most were released by the beginning of 1940. In May and June 1940, however, when France was invaded, Italy joined the war, and as public panic started to rise, the number of internments increased (Neumann 2006: 10). Most of the Germans who had been released were re-interned. In 1940, all Japanese were interned, including women and children, and large numbers of Italians, especially in

Queensland, were interned. In mid 1942, the numbers of people in internment peaked at about 12,000 (Neumann 2006: 7), although many were released after this date. By the end of WWII, 6,739 residents were still interned, of which more than 1,500 people were British nationals detained on political grounds.

While internment was relatively selective for other ethnic groups, Japanese people were interned *en masse*, regardless of how long they had spent in Australia, or their political persuasion. As immigration to Australia for Japanese, as for all ethnic groups other than British, was severely limited after the *Immigration Restriction Act 1901*, many Japanese interned had migrated before 1901 and were quite old by WWII. The Japanese were the only ethnic group to have their women and children interned, although the Anglo-Australian or Aboriginal wives of Japanese men were allowed to remain outside (Nagata 1996). In November 1945, there were 3,268 Japanese civilian internees in the camps, 958 of whom were Australian residents, the rest were held on behalf of other allied nations (Nagata 1996: 193).

Internment for Australia's Allies

One aspect of Australia's internment policies of both WWI and WWII that has caused consternation among historians is the fact that Australia accepted and interned thousands of prisoners of war and civilian internees from other allied nations. These POWs and civilian internees came from Britain and all British colonies, the United States, free France in the Pacific and the Dutch East Indies. The majority of enemy aliens in the British colonies in particular were rounded up and sent to Australia (Fischer 1989). No other nation accepted and interned prisoners for another nation.

From correspondence between Australia and its allies in both wars, it is unclear why Australia agreed to incarcerate prisoners of war on behalf of other nations. Correspondence reveals no debate between the nations, nor was there any disagreement on the matter recorded in interdepartmental correspondence. It seems the request by various nations were made, and Australia assented, with the only concern to ensure payment for the cost of internment was forthcoming (Fischer 1989). In WWI, a total of 1,300 people were sent to Australia to be interned. The only women and children interned in Australia, with the exception of the Japanese, were from these transported groups.

The ‘*Dunera* Boys’ were one such group of men, mostly Jewish-Germans resident in Britain sent to Australia on the *HMS Dunera*. The ship carried a total of 2,732 internees to Australia, where the men were interned in Tatura and Hay. On the *Dunera*, the men were subject to appalling mistreatment from the guards and officers, including being robbed, beaten and starved (Bartrop and Eisen 1990: 21). In internment, they were instrumental in creating the social infrastructure in these particular camps, described below. The *Dunera* boys were also well known for the significant contribution many of the men – future musicians, theatre directors, architects, mathematicians, and academics, for example – in Australian society in later years.

So why were POWs and civilian internees sent to Australia for safekeeping? Fischer (1989: 151) argues that perhaps the most influential factor in sending POWs to Australia was the historical precedent of transportation and imprisonment:

Prisoners of war were sent to the fifth continent simply because other governments in the British Empire found it convenient to do so, because there was a tradition of sending prisoners there, and because the Commonwealth government agreed that this was the normal thing to do, and that Australia was the place, within the Empire, where prisoners were to be sent ... The policy was adopted and implemented without consideration being given to questions of sovereignty and jurisdiction; it was executed in spite of the possibility of reprisals and regardless of the considerable efforts involved in organising and co-ordinating the program.

Fischer places emphasis on subservience and an ‘eagerness to prove themselves loyal and worthy sons of the Empire’, at the expense of the role of independent but collaborative ally. Saunders (2000a) agrees that, far from acting as a sovereign nation, Australia reverted during the wars to acting as a colonial outpost. This meant, Saunders argues, that Australia’s maturity as a new nation continued to remain elusive.

The Camps

Every state in Australia, except Tasmania and Northern Territory, had internment camps. The below table lists the location of the camp, and the number and type of internees.

Camp	Years	No. Interns (approx)	Categories of Interns
New South Wales			
Berrima	1914-19	400	Germans, POWs
Bourke	1915-18		Germans deported from Singapore, Malaysia, Ceylon, Fiji, Hong Kong. Some local internees
Holsworthy	1914-20 1939-46	WWI: 6000 WWII: 124	WWI: Internees and POWs: Japanese, Italians, Slavs, Germans, naturalised British of German descent. WWII: Various nationalities
Trial Bay	1914-18	580	German and Austrian internees and POWs of wealth and social standing
Cowra	1941-47	500 +	Italian POWs, and local Italians, Javanese and Indonesians
Hay	1940-46	1000	Italian POWs, and local Germans, Italians and Japanese.
Queensland			
Enoggera (Gaythorne)	1914-15 1940-46	WWI:140 WWII: 1800	WWI: Locals and crew of German ships, WWII: German, Austrian, Italian, Japanese.
Victoria			
Langwarrin	1914-15	500	Moved to Holsworthy after closure
Tatura-Rushworth	1940-47		Local Germans, Italians, German-Jews, and Italian and German POWs, Italian and German families and single women from Iran, Australia, Palestine, Singapore and Malaysia. 4: Germans, Italians, Hungarians, Finns, Romanians, Japanese, Javanese, and New Caledonians.
ACT			
Molonglo	1918-19	Built for 5000, housed far fewer	German families
Western Australia			
Rottneest Island	1914-15 1940	WWI: 1000	WWI: Slavs, Germans, Austrians and Italian internees and POWs. WWII: Italian internees
Harvey	1940-42	1000	Local Italians and crew of German and Italian ships
South Australia			
Torrens Island	1914-15	400	Germans
Loveday	1941-46	5000	Local Italians, and German, Italian, Japanese and Taiwanese POWs

Conditions of the camps were variable. Molonglo in the ACT, for example, was constructed to house 5,000 POWs, who never arrived in Australia. Instead, it housed local German families. At Torrens Island in South Australia, inmates were accommodated in tents and were often short of food and clothing. The camp commander, Captain G.E. Hawkes, was responsible for the ill-treatment and

physical abuse of the inmates, and was subject to two court investigations after the closure of the camp. In some camps, interns set up a whole system of social activities. Hay in New South Wales, for example, had educational facilities, sports, a daily newsheet, legal assistance, handicrafts, a musical union, literary evenings, theatre groups, vegetable-producing gardens, pottery, painting, dentists and denture-making clinics. Interns even printed their own banknotes, and organised a 'canteen' funded by those with money to provide basic luxuries such as writing paper, cigarettes and toothbrushes, to the penniless (Merrylees 2006).

The Arbitrariness of Internment

In both of the wars, internment as it was used in Australia was arbitrary in both the common usage and the legal definition of the word. In the common usage, people were interned with very little evidence against them, often on grounds that amounted to gossip, submitted anonymously to local authorities. Factors that led to internment changed between states and regions, and depended largely on the success of the allies in the war. In the legal sense of the term, internment was implemented with no regulation from the Judiciary, or respect for legal principles such as assuming innocence before guilt. Those confined were not able to hear the evidence against them, or to appeal against their internment. The extra-judicial nature of internment demonstrates the power of the government in times of war or emergency, and during these times national security takes precedence over civil liberties.

The primary way that enemy aliens were interned was from the disclosure of information to the local authorities from neighbours and colleagues. The use of anonymous 'evidence', comprised mostly of gossip with an element of 'patriotic hysteria' (Saunders 2000b), led to the internment of many hundreds, if not thousands, of people. Historians of internment in both wars provide multiple examples of people being interned on such unsubstantiated 'evidence' (Bevege 1993; Fischer 1989, 1993; Hasluck 1965; Nagata 1996; Saunders 2000a, 2000b; Scott 1941). Fischer (1989: 86) explains:

Frequently, it was nothing but gossip, rumour, hearsay or plain speculation that was at the beginning of an enquiry into a person's alleged disaffection or disloyalty, both rather vague terms which were constantly employed but never conceptually defined.

National security in Australia involved an enormous exercise in surveillance. Military intelligence managed the administration of internment, and a large surveillance system had compiled an enormous amount of internal security data between 1934-39. Former WWI officers, for example, had the task of keeping watch on their rural and regional communities. This information too contributed to decisions to intern. Drawing on anti-German sentiment in the broader Australian community, the government encouraged individuals to carefully watch their neighbours, and to report anything suspicious. Fischer (1993: 270) argues that it was:

an extraordinary, blatant invitation to denounce, to 'dob in', and the very vague nature of the reasons suggested for possible incrimination made it all but inevitable that abuses were to follow and that innocent people were going to be harassed, intimidated and frequently interned and deported on the flimsiest of evidence.

In the official war history of WWI, Scott argues that 'the cool, good sense of an experienced police sergeant with a knowledge of the people living in his district, saved many a person of German origin from interference' (Scott 1941). Saunders (2000b) presents a different picture of WWII. She argues that 'political ignorance' of the local police authorities, with whom the decision to intern rested, further contributed to the arbitrariness of internment. Saunders points out that many rural police were ill-educated, had not finished primary school education, and could not discern between political ideologies to realise that many of the migrants were in Australia because they were trying to escape Fascism or Nazism. Yet, these policemen had discretionary powers to intern. The police records of one internee, for example, stated that he was a 'strong communist with fascist sympathies' (Saunders 2000b: 155). In 12% of all cases the military authorities did not record the reasons for internment, which was contrary to the trend within the military of collecting masses of data (Fischer 1989).

Three other factors were influential in deciding which aliens were interned and who was not. The first factor was the position of the alien in their community. In WWI, the less successful German and Austrian migrants were interned, including those who gave themselves in for voluntary internment. These were the 'weakest and most vulnerable' (Fischer 1989: 85) of the German-Austrian community. At

the same time, leaders of the communities were also targeted for internment. This included businessmen, priests, academics, doctors and other professionals, who were seen to be making money while Anglo-Australians were fighting at war. Fischer (1989) argues that this internment of the leaders of the German community was a specific strategy by the government to undermine the community.

The second factor was the alien's place of residence. Aliens in Sydney were treated differently to aliens in Adelaide or Perth or Brisbane (Saunders 2000b). In WWII, by far the most interns came from Queensland, where the smallest number of enemy aliens lived, while the smallest number of detainees came from Victoria, where the largest population of enemy aliens lived. Internment was influenced by the concentration of ethnic communities, and the economic impact of aliens on the local community. If there was no work, the chances of internment were greater. Saunders (2000b: 137) notes that in WWII, internment in Western Australia was used to settle old industrial disputes from the 1920s, and Italian miners, woodcutters and farmers were indiscriminately taken into custody.

The third factor that influenced alien internment was the events of the war. In May and June 1940 when the war escalated, the number of internments also increased (Bevege 1993: 94). In 1942, after the fall of Singapore when invasion seemed imminent, a mass internment program was carried out, resulting in internment of aliens from 27 countries, with no distinction between enemy countries, allies, or those remaining neutral. That Greece was an ally and Spain was neutral did not stop their nationals from being interned. The largest individual round up was of Japanese and Italians in Queensland on 13-14 February 1942, days before the fall of Singapore (Saunders 2000b: 154).

The arbitrary internment of thousands of people concerned many Anglo-Australians. Campaigns and protests against internment in both wars led to the setting up of an appeals process in each case (Bevege 1993; Neumann 2006; Hasluck 1965; Scott 1941). In WWII, Advisory Committees, chaired by a judge or a retired judge and independent of the military, were set up to hear objections to the internment of British subjects. In 1941 an Aliens Tribunal was set up to hear appeals to internment of enemy aliens. Still, the grounds on which an alien would be released from internment were not decided on the legal grounds for

confinement, but on more vague criteria. The members of the Aliens Tribunal (cited in Neumann 2006: 17) had to be:

satisfied that it is neither necessary nor advisable for public safety, the defence of the Commonwealth or the efficient prosecution of the war that an individual should continue to be detained ... [and that] release would both be likely to occasion serious unrest in any Australian community.

Furthermore, the appeals process was limited in its investigation to examine only the 'evidence' against the interned. Justice E.E. Cleland was one chair of the Aliens Tribunal who had concerns about the tribunal process. He wrote to the Minister for the Army in December 1940 (cited in Saunders 2000a: 115):

I find my duties are particularly distasteful because there is nothing 'judicial' about them. First of all, I understand that the onus of satisfying the Committee that any person detained is loyal lied upon...[him] and the more general and indefinite the charge against him, the more difficult it is for him to satisfy the Committee. Again ... the Committee has before it, the oath of the person detained subject to cross-examination and, on the other, the unsworn efforts of more or less anonymous individuals (always described as being 'a particularly reliable agent') and some of these reports maybe personally malicious, probably honest, and sometimes, no doubt, inspired by patriotic hysteria.

Despite these avenues for appeal, the system remained fundamentally unfair. The onus was on the internee to prove his or her innocence. Internees were not given access to their case, and so had no knowledge how best to defend themselves against the reasons why they were interned. Finally, internment was indefinite, and depended on the decision of the appeals tribunal, the Attorney-General (who had discretionary power to release) and the length of the war.

The arbitrary nature of internment was enabled by public sentiment and an atmosphere of suspicion of the ethnic other. The emergency powers given to the government in the *War Precautions Act 1914* and the *War Book* of 1939 allowed for decisions to be made with respect to this public sentiment. Yet how much of the suspicion of enemy aliens justified, and how much was a symptom of a moral panic?

Moral Panic about Enemy Aliens

Interconnected with the arbitrariness of internment is the notion of moral panics. Cohen's (1972) theory of moral panics, described in depth in chapter 4, is useful here in helping explain the enthusiasm with which some members of the Australian community encouraged internment. Some aspects of Cohen's theory of moral panics, such as the disproportionate response to a threat, and the conservative political response, are visible in the histories of internment in both the wars.

Foremost, internment was a disproportionate response to a slight threat to public security. At the close of WWI, there was no evidence that any German or Austrian national had been engaged in espionage or sabotage of Australia's war effort (Scott 1941). Similarly, during WWII, no one was convicted of treason, sabotage, or sedition, despite the fact that 7,780 residents were detained because their 'loyalty' was wanting (Saunders 2000a: 118, Neumann 2006). Nevertheless, the policies of internment encouraged an atmosphere of suspicion, where all non-Anglo Australians were watched by their neighbours for any potentially dangerous activities. At the same time, the public concerns forced action from the government, and in so doing influenced government policy. Neumann (2006: 12) argues:

Anticipation of the impact of the 'disturbed state of public mind' significantly influenced the government's internment policy. While no plots 'to neutralise the war effort' were ever discovered, and while many aliens were anxious to assure the government of their loyalty, many Australians remained resentful of the fact that their German and Italian (and later Japanese) neighbours had not been locked up.

Another characteristic of moral panics, according to Cohen (1972), was that public concern demanded, and often achieved, lasting changes to law to restrict civil liberties. Certainly in both the wars, civil liberties and the rule of law were temporarily suspended. Evans (2000) cites Prime Minister Hughes, who boasted that during WWI that Australia was ruled by a triumvirate: himself, Solicitor-General Sir Robert Garran, and 'Garran's fountain pen, and the multitude of regulations under the *War Precautions Act* flowing from that pen' (Evans 2000: 30). To this Garran concurred, stating that 'John Citizen was hardly able to lift a finger

without coming under some technical offence against the War Precautions regulations' (Evans 2000: 30)

Fischer (1989) notes, also, that the system of political surveillance that grew out of the registration procedures in WWI remained in place after the war, and was incorporated into the 'machinery of civilian government' (1989: 75-6). This absorption of war-time investigative procedures into peace-time governance, according to Fischer (1989: 76), raises 'very basic questions about the nature of Australian democracy, about civil rights and liberties'. Thus, the moral panic in WWI and WWII influenced governance for a long time after the war ended.

Deportation

At the close of both wars, internment provided the opportunity for the government to deport people from Australia. Government records in both wars suggest that the policy of deportation was not pre-determined, instead, the decision to deport certain individuals and groups of people was a hurried response to the need to release interns at the end of the wars (Fischer 1989). At the close of WWI, the Minister for Defence was granted power to decide on the fate of naturalised Australians after the war, having the power to cancel naturalisation certificates and deport people of enemy origin who had been guilty of disloyal acts. There was no judicial appeal for this process, and the only stated reason for this policy was that 'public feeling' demanded action be taken (Fischer 1989). Deportations after WWII followed on the precedent set for WWI (Evans 2000).

The *War Precautions Act 1914* allowed for the deportation of any unnaturalised aliens without a hearing. In December 1916 and July 1917, two *Unlawful Associations Acts* were passed to expand the powers of deportation to enable the removal of British subjects who were not Australian born. The second of these placed the onus of proof of Australian birth on the potential deportee themselves (Evans 2000).

At the close of WWI, a total of 6,150 Germans, Austro-Hungarians, Slavs, Bulgarians and Turks were deported from Australia. The majority of these people had been interned during the war, and the remaining were dependent family members. Three main reasons led to the deportation of certain groups and

individuals from Australia. First, at the end of the war, the government was reluctant to release certain people back into the community. In WWI, approximately 50 British subjects who were not born in Australia, but who were interned for political reasons, were deported (Evans 2000). In WWII, trade union activists, including members of Industrial Workers of the World (IWW) union were deported in two ships, before the appeals tribunal for deportations was set up. The second reason was that the government was concerned, with perhaps some justification, that enemy aliens would receive harsh treatment from the community on their release. Third, many enemy aliens volunteered to leave. Fischer (1989) notes that many Germans felt that their treatment by the community, and in the camps during the war, was such that they no longer wished to remain in Australia. The exact numbers of deportations are unclear, as deportations occurred with 'intense secretiveness', and that 'individuals unceremoniously seemed simply to disappear' (Evans 2000: 32), with very few records kept. After WWII, nearly all Japanese were deported, with very few exceptions.

The deportation of people after they had been interned meant that their deportation was based on the same arbitrary evidence that had warranted their internment. There was no further investigation process of someone's threat to the Australian community. Thus people were deported 'without the need to provide charges, issue arrest warrants, supply counsel or any of the appurtenances of a civil trial – let alone establish a condition of guilt' (Evans 2000: 28).

In this way, the government was able to remove people or groups of people from the Australian community whom it considered unwanted or undesirable. This included leaders of ethnic communities, businessmen, consuls, 'unsuccessful migrants' (voluntary internees, of whom nearly all were deported), people with criminal convictions, patients of psychiatric hospitals, Industrial Workers of the World (IWW) union members, and Australians with radical or socialist political beliefs (Fischer 1989: 298-9). Through deportation, Fischer (1989: 85) argues, 'the internment system thus developed into a tool of social control ... to exclude undesirable residents'.

Evans (2000) further suggests that the deportations in WWI ignored two taken for granted procedures for deportation. The first of these is that deportation must

occur within two years after the arrival in the country by the alien, because, as section 5(2) of the *Immigration Restriction Act 1901* states, 'there must come some time or other when an entrant to the Commonwealth ceases to be an immigrant' (Evans 2000: 32). The second is that deportees must be directed to their country of origin. In the case of the deportations in WWI, the concept of convenient disposal took precedence (Evans 2000: 32). Many members of the IWW were deported to Chile, to the indignation of both the Chilean and British governments, the latter concerned that its subjects were being treated with contempt by Australia.

Many interns, however, were given the opportunity to stay in Australia. Among them were the POWs from other allied countries, who, given the White Australia policy, would not have been allowed into Australia otherwise. For some, therefore, internment was the first step in permanent exclusion from Australia. Permanent exclusion was selective, and to a certain extent, for the government, opportunistic.

Belonging in Australian Society

The internment experience in Australia demonstrates the tenuous position of the ethnic 'other' in the Australian community in the first half of the twentieth century. In a time of war, when national security took priority over civil liberties, the people in the community who were not of British heritage became the objects of suspicion, surveillance, internment, and in some cases, more permanent exclusion. The suspension of the rule of law in a national emergency revealed a fundamental hierarchy between Anglo-Australians and the ethnic other in the Australian community, a hierarchy that was not immediately obvious in peacetime. The internment experience, therefore, raises the question of whether people of non-British heritage can ever become Australians, and at what point do they belong to the Australian community.

Saunders (1993: 291) describes the reaction of Minister for External Affairs Evatt, who travelled to the United States in 1942. Evatt was shocked to learn that the United States did not intern all the enemy aliens *en masse*, and that Italians were even allowed to join the army. So, where does the difference in Australia's

treatment of outsiders in wartime come from, and at what point does an outsider become an insider?

Alistair Davidson (1997) argues that the rules of membership to Australian society are somewhat different to other Western liberal democracies, and that the treatment of enemy aliens is a good example of this difference. Davidson argues that, for most Western liberal democracies, there are two ways of becoming a citizen. The first is the rule of *jus soli*, that is, one is granted citizenship by virtue of being born on national soil. The second is by naturalisation. In Australia in the first half of the twentieth century, however, membership in Australia was not so straightforward. Both the *jus soli* and the naturalisation rules were compromised at certain times for certain groups of people. Aboriginal people were born on Australian soil, yet they were not granted the rights and privileges that membership to the Australian community ensured. Similarly, people born overseas who became naturalised Australians enjoyed full rights in peacetime, but in times of war the right to privacy, to work, of freedom of association, and of liberty, were taken away. In both WWI and WWII in Australia, this applied also to people whose parents, or even grandparents, had been naturalised, and they themselves were born in Australia.

In some cases, naturalisation was viewed with suspicion. Prime Minister Hughes, and other politicians in WWI, argued that naturalisation by the Germans was only a ruse, ‘a cunningly and ruthlessly exploited cover’ which allowed the Germans to continue their quest to undermine Australian society (Fischer 1989: 101). Similarly, when the issue of interning naturalised Germans was discussed in Parliament in 1914, the prevailing view was that naturalisation to Australia might not be respected by the country of origin. Senator Pearce (1914: 346), the Minister for Defence, explained:

We ought to assume that persons who have become British subjects are not going to do anything which will injure the Commonwealth ... [but] the country to which that alien belongs does not necessarily recognise our right to denationalise its subjects ... Whilst up to the outbreak of war we conferred upon Austrian and German subjects the privilege of naturalisation, in the eyes of the Austrian and German law those people are still Austrian and German subjects.

The suspicion of foreigners and their loyalty remained, therefore, even after naturalisation, and the wars brought this suspicion to the fore. Fischer (1989) notes, somewhat laconically, that mateship and working class loyalty was the first 'casualty' of war on home soil. Anglo-Australian men who had worked for years alongside naturalised Europeans went on strike until the latter were sacked, and people reported on their neighbours. Despite good relations in times of peace, the ethnic other remained an outsider in Australian community.

Summary

The internment of enemy aliens, political activists and prisoners of war during WWI and WWII was managed, controlled and implemented by the government. As administrative detention in a time of war, the government was able to dismiss the rights of certain groups of people who would otherwise have been entitled to them. The people that were granted only tenuous, second-class rights and status in Australia were ultimately those who did not fit in with Australia's notion of itself as a white, British nation.

Enemy alien internment controlled both social and geographic boundaries. For the prisoners-of-war and civilian internees sent to Australia from its allies, the internment camps were a way of keeping them from entering Australian society. For the enemy aliens and dissidents already living in the community, however, removal to internment camps was a communication of their inherent difference. These people were different from the ideal Australian community no matter how long they had lived in Australia, their naturalisation status, familial ties, or contribution to society. With deportation powers, internment was the first stage for many of a more permanent exclusion from Australia.

Conclusion

The study of administrative detention in Australia is ultimately the study of the classification of people into social groups, the identification of some of these groups as outsiders to Australian society, and the attempt by governments to control and regulate these groups. Implicit in this process is the notion that there is an ideal Australian identity, and the categories of people subject to administrative detention diverge from this identity in some way. As British

heritage and 'whiteness' have been large preoccupation in Australian society, the social categories targeted for incarceration have often been non-white.

The three case studies of administrative detention explored in this chapter were responses to different social problems, targeting different categories of people. Yet there are some striking similarities and continuities in the practice that span all three. The first is the discourse surrounding, and justifying, the incarceration. In each case, the administrative detention was implemented in an atmosphere of moral panic. In the case of Aboriginal reserves there was concern about settler-Aboriginal violence and the dying race, miscegenation, lack of religion, and uncivilised behaviours. In the case of quarantine there was a concern about the spread of infectious disease, particularly from Asia. In the case of enemy alien internment, public concern was about national security. In each situation, the actual risk or harm to society was variable. In each situation, however, the government's response was to incarcerate.

Each form of administrative detention, also, was very much an act of Executive power. The courts played no function in determining who was to be incarcerated, and had only partial or belated regulation of the implementation of the policy. In the cases when social pressure demanded the implementation of judicial review mechanisms, as occurred in the case of removal of Aboriginal children in some jurisdictions, and with enemy alien internment, these mechanism were difficult to access, making their impact negligible. The result is that, throughout Australian history, governmental control and regulation over certain categories of people has been largely unmitigated.

Finally, the case studies demonstrate the complex and qualified nature of belonging in Australian society. Aboriginal people were British subjects, and later Australian citizens, by birth, yet were not accorded the same rights as white Australians. Many people who were classified as 'enemy aliens' had already become naturalised Australians, or had been born in Australia to parents or even grandparents with 'enemy' heritage. The classification of these people as 'other' to Australian society, and subsequently incarcerating them, is evidence of concerns about race. At this point, incarceration becomes a form of communication to these categories of people to the effect that no matter what they do to

demonstrate commitment to Australian society, by virtue of their race, they will never fully belong.

Two other issues are worth drawing out from this study of administrative detention. The first issue is that of boundaries, and the function of administrative detention in maintaining boundaries. On the one hand, administrative detention controlled people who were already on Australian territory by removing them from society. This was the case with enemy aliens and political dissidents sent to enemy alien internment camps. In the case of the 1881 smallpox epidemic in Sydney when infected people were removed from their homes, quarantine performed the same function. In these cases, administrative detention functioned to maintain the social boundaries between different categories of people living in the Australian community. On the other hand, people quarantined on arrival in Australia, and prisoners of war and civilian internees who were sent to Australian for internment, are people who are incarcerated at the external border of Australia. In these cases, administrative detention restricted entry to Australian territory. Aborigines overlapped both the social and geographic boundaries. Some Aboriginal people were members of a social category classified as 'other' residing in the white Australian community. Other Aboriginal people were lived on the other side of the internal geographical boundary of the frontier. Administrative detention, then, maintained these social and geographic boundaries. By removing certain categories of people already living in the community, and by controlling and regulating those who wished to enter, administrative detention functioned to regulate who was permitted to be part of Australian community.

The second issue worth exploring is that of exclusion. Administrative detention was a form of exclusion from society, but this exclusion is not necessarily permanent. For some Aborigines, people in quarantine, and enemy aliens (both those from Australia and sent from allied nations), administrative detention facilitated permanent exclusion from Australian society, by enabling deportation or entry into the judicial prison system. As discussed above, the dismantling of the Aboriginal reserve system corresponded with a sharp increase in Aboriginal imprisonment rates. Similarly, breaching the rules of internment or quarantine could equally result in imprisonment.

In other cases, however, some Aborigines, people in quarantine, and enemy aliens (both those from Australia and sent from allied nations) were released from incarceration to reside in Australian society. These cases of release occurred alongside cases where people were permanently excluded. There did not seem to be any rules consistent about who was excluded and who was released, instead, the decision-making appears arbitrary. Factors influencing the decision to permanently exclude people included the degree of moral panic or other (including more humanitarian) domestic social pressures, concerns about race, national security, demand for labour, risk of infection, and international pressure. For those who were eventually released from incarceration to live in the wider community, however, one's experience in administrative detention would leave the individual with no doubt about their conditional status of belonging in Australian society.

This chapter offers a genetic explanation for the social and political function of immigration detention in Australia. This chapter has demonstrated that there are strong continuities between the historical practices and contemporary immigration detention. This continuity comes from a repetition of social and political concerns in Australia regarding certain categories of people, and the political solutions to these concerns. Just as other forms of administrative detention were reused and revised for new problems, so too is immigration detention a revised version of the same solution. The next chapter examines theories of incarceration to further develop an explanation for the social and political immigration detention in Australia.

Chapter 4

Incarceration, Classification and Control:

Theories of Administrative Detention

Chapter 1 of this thesis demonstrated that conventional methods of policy analysis do not provide a sufficient explanation of Australia's immigration detention regime. Moreover, the exercise raised further questions about immigration detention. Specifically, why, despite not meeting its policy objectives, and incurring additional financial and social costs, has mandatory detention remained part of Australia's border control strategy with bipartisan support? Chapter 1 concluded by arguing that a theoretical analysis was required to explain the social and political function of immigration detention in Australia. Chapter 2 of this thesis examined how other thinkers have explained immigration detention in Australia. It concluded that the focus on asylum seekers, and the absence of analysis of other categories of people subject to immigration detention, ultimately leads to a somewhat narrow explanation of social and political function of immigration detention in Australia. What is needed is a theoretical explanation with a broader perspective, one that recognises that immigration detention is part of a larger conceptual category of administrative detention.

In order to explain immigration detention using theories about administrative detention, however, these theories must first be identified. To date, administrative detention has been the focus of few theoretical analyses. This chapter, therefore, sets out a theoretical framework for examining and explaining administrative detention. There are three key reasons for this approach. First, as explained above, there needs to be a way of explaining immigration detention that takes into account the function of immigration detention for all the categories of people subject to it. Second, it allows us to observe patterns and regularities between many different forms of administrative detention. While chapter 3 positioned immigration detention within a history of administrative detention in Australia, a theoretical framework can assess the consistencies between the different forms, and thus draw conclusions about the function of administrative detention in Australia.

The third reason for this approach is a broader contribution to our understanding of administrative detention more generally. While theories of judicial incarceration form an enormous body of scholarship, administrative detention has received little attention. Giorgio Agamben (1998) and Erving Goffman (1961), despite differences in their approach, are important exceptions. In addition, other key theorists best known for their study of judicial incarceration, including David Rothman (1971), and Michel Foucault (1967, 1977, 1978), also contribute to our understanding of administrative detention. The latter two extend the study of incarceration outside the traditional criminological issues regarding punishment, and explore the social and political function of incarceration. In so doing, they reveal areas of similarity between administrative and judicial incarceration. Taking this lead, and in an attempt to overcome the lack of theoretical analysis specific to administrative detention, this chapter draws on theories of both administrative and judicial incarceration.

Three key theoretical themes stand out as being essential to explaining administrative detention, and each is explored in turn. The first theme is that of incarceration itself, and its 'enduring' nature (Rothman 1971) in Western societies. This section explores the different explanations for the beginnings and development of incarceration in the West, elucidates the purposes of incarceration, and examines reasons why incarceration endures in our society, despite not always fulfilling its objectives. The second theme explores processes of classification of people, and the creation of categories of social insiders and outsiders. In Australia, only certain groups of people are subject to immigration detention, while other groups, who arguably equally warrant confinement, are not. Durkheim (1938) and Douglas's (1966) theories about social outsiders and classification are useful for explaining the processes for determining who is subject to incarceration. The third theme is that of control. The study of administrative detention is, by its very nature, a study of governmental control. With immigration detention in Australia control by the government is the key characteristic of the policy and its implementation. This section explores what it means for the government to seek and achieve such a level of control over the decisions about who to incarcerate, the lives of those confined, and the rejection of regulation of the practice.

Incarceration

This section develops a general theoretical explanation of some of the functions and mechanisms of incarceration. Drawing on theories of both administrative and judicial incarceration, it asks, why incarceration? What does it achieve? It examines the ‘discovery’ (Rothman 1971) or ‘birth’ (Foucault 1977) of incarceration as a method for solving social problems. It then examines various theories about the purpose of incarceration, drawing on Rothman (1971), Foucault (1967, 1977, 1978), Goffman (1961), and Agamben (1998). Finally, it explores the reasons proffered by these theorists as to why incarceration persists as a part of our social and political landscape, despite its failings.

History of Incarceration

Examining the beginnings of the practice of incarceration has been useful for social theorists. This question leads to others that illuminate certain issues about incarceration regarding its purpose, methods, and its social and political functions. Rothman (1971), Foucault (1977), and Ignatieff (1978) explore the development of the prison in the United States, Europe and the United Kingdom respectively. Their studies mark the mid 18th to early 19th centuries as a time that society gradually, albeit inconsistently, moved away from violent and public punishments of criminals towards imprisonment. This shift was a result of a number of social changes, including growing public revulsion towards what Spierenburg (2004) calls the ‘spectacle of the scaffold’ (also Foucault 1977), and a belief that prisons could be a place not only of punishment but also of reform (Rothman 1971). Ignatieff (1978) proposed the idea that prisons were a way of managing overpopulated cities, while ‘storing’ populations of workers for times when labour was needed. Foucault (1977) explains the shift to a change not only in social sensibilities, but also as an emerging concern of the state towards the governance of individuals.

In his social history *The Discovery of the Asylum* (1971), David J. Rothman explains the sudden rise of incarceration in late eighteenth and early nineteenth century America. The asylum, the prison and the almshouse were new institutions in republican America. Each were introduced as a way to overcome social problems symptomatic of a perceived ‘unravelling’ of American society undergoing rapid

social change. Rothman describes the period from 1780 to 1830 as a time of major demographic and economic upheaval in American society. The population grew enormously during this period, and with the manufacturing boom, people started to move from smaller communities to the major cities. This led to physical and social mobility, and caused a move away from the traditional family, church and community structures that had previously provided support networks and defined one's place in the world. At the same time, notions of deviancy and dependency were changing. Before the 1800s, according to Rothman (1971), crime was understood as a sin in religious terms, but nevertheless a natural and inevitable part of society. From the 1780s, new social mobility meant that the towns and communities could no longer control and punish their deviants, nor sustain their dependents.

With the changing economic and social environment came increases in the rates of crime, mental illness and poverty. These deviant and dependent people now became the focus of social planners and medical practitioners, who understood the cause of their social dysfunction as being within society itself. The great fear was that society – the church, the community, the family – was ‘unravelling’ (Rothman 1971, xxxiv) and that social deviance and dependence were a symptom of this new society. Deviancy and dependency were regarded not as a flaw in the individual, but as part of the ‘course of civilisation’. In response, the asylum, the penitentiary and the almshouse were ‘discovered’. In the first part of the 19th century, asylums, penitentiaries, and other forms of incarceration were built in every state across the country.

The three institutions were modelled on the perceived causes of society's ills. Implicit in the building of a calm, steady and hierarchical environment was a ‘utopian’ vision that demonstrated at once the symptoms of and the cure for the ills of contemporary society. As a contained, structured society, the penitentiary, the asylum, and the almshouse, became a symbol for reformers on how a community could operate (Rothman 1971:107):

The functioning of the penitentiary – convicts passing their sentences in physically imposing and highly regimented settings, moving in lockstep from bare and solitary cells to workshops, clothed in common dress, and forced into standard routines – was designed to carry a message to the community ... By

demonstrating how regularity and discipline transformed the most corrupt persons, it would reawaken the public to these virtues. The penitentiary would promote a new respect for order and authority.

Like Rothman, Foucault's (1967:41) analysis of incarceration notes that from the end of the 1600s to the beginning of the 1700s, an entire network of centres of confinement – jails, hospitals, workhouses, asylums – had spread throughout Europe. For Foucault, the shift from ritualised, frenzied public executions to a disciplined, routinised prison system marked a shift in social sensibilities and political preoccupations. The 'birth of the prison', for Foucault, was evidence of a movement away from the punishment of the prisoner's body, to installing order over the prisoner's mind.

The Purpose of Incarceration

A number of writers offer theories about the purpose of incarceration. Many of these ideas are concerned with the removal of the citizen from the community. Goffman (1961), for example, argues that 'total institutions' are sites for re-socialisation of the inmate. Similarly, Foucault (1977) explains that prisons and asylums deploy surveillance mechanisms to shape the behaviour of inmates. Both these ideas are premised on the notion that the inmate will return to society after a period of incarceration. For Agamben (1998), however, 'the camp' is a site of permanent exclusion from the nation state.

Total Institutions and Socialisation

Erving Goffman's *Asylums* (1961) aims to demonstrate the impact of the institution on the character of the inmate. The resulting work, in which he coined the term 'total institutions', sheds light on the relationship between the inmate, the institution, and society. For Goffman, total institutions function to 're-socialise' people through processes of exclusion, isolation and discipline. Goffman maps the general characteristics of total institutions and the 'moral career' of the inmate to ascertain how these institutions go about producing good members of society.

Goffman (1961: xiii) defines a total institution as 'a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally

administered round of life'. Total institutions are both isolated from, and an integral part of, modern societies. They are defined by their physical isolation including barriers such as 'locked doors, high walls, barbed wires, cliffs, water, forests, or moors' (Goffman 1961: 4).

For Goffman, total institutions are places of re-socialisation. By this, he means that total institutions are places where the inmates go through a process of 'un-learning' anti-social behaviours, learning instead how to behave as good members of society. In describing the general characteristics of the total institution, Goffman explains how they try to transform the characters of their inmates. In general, this is achieved through the reshaping of the daily lives of the inmates with discipline and routine. He explains (1961: 5-6):

A basic social arrangement in modern society is that the individual tends to sleep, play and work in different places, with different co-participants, under different authorities, and without an over-all rational plan. The central feature of total institutions can be described as a breakdown of the barriers ordinarily separating these three spheres of life. First, all aspects of life are conducted in the same place and under the same single authority. Second, each phase of the member's daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases of the day's activities are tightly scheduled, with one activity leading at a prearranged time into the next, the whole sequence of activities being imposed from above by a system of explicit formal rulings and a body of officials. Finally, the various enforced activities are brought together into a single rational plan purportedly designed to fulfil the official aims of the institution.

So what are these 'official aims of the institution'? Why is the 'single rational plan' only 'purportedly' designed to fulfil them? Is Goffman here suggesting that the 'official' aims are different from the actual aims? According to Goffman, total institutions can be classified according to three, often overlapping, objectives. Some total institutions, such as workhouses and factories, facilitate production. Some, like prisons, achieve their aim simply through exclusion and confinement. And some are for purposes of re-socialisation. Yet when Goffman talks of the 'single rational plan', he is talking of the re-socialising function, that of turning social outsiders into good members of society. For Goffman (1961: 12), total

institutions are 'forcing houses for changing persons; each is a natural experiment on what can be done to the self'.

Governance and Biopolitics

Michel Foucault (1967, 1977) is credited with arguably the most important contribution to our understanding of the genealogy of the prison and its function in contemporary society. Like Rothman, Foucault maps the history of incarceration in the West, and draws theoretical parallels between judicial incarceration in his book *Discipline and Punish* (1977) and administrative detention in *Madness and Civilisation* (1967). For Foucault, the shift towards incarceration in the West marked more than the transition from the violence of public executions and torture to a more 'civilised' public sensibility, as argued by Spierenburg (1996), although this was certainly one factor in this cultural shift. For Foucault, the transition from the 'spectacle of the scaffold' (Spierenburg 1996) to incarceration marked a change in the aims of governance and sovereign power.

Like Goffman, Foucault (1977) emphasises the role of routine and surveillance in the function of carceral institutions. Prisons, in particular, exert power over the minds of prisoners with two methods: a strict daily routine for work and other domestic duties; and constant surveillance. With a strict daily routine, prisons control the bodies of the inmates. Unlike the public executions and torture of the previous era, however, in prison, control of the inmate's body is not an end in itself. Rather, the purpose of routine is to create 'docile bodies' (Foucault 1977), from which are created minds subjugated to the state. For Foucault, the control over the mind, or indeed 'soul', of the inmate, is the real function of prisons and other forms of incarceration.

With a similar logic, constant surveillance of inmates is also designed to achieve control over the mind. Foucault (1977) illustrates the power of surveillance most clearly with his discussion of Jeremy Bentham's architectural designs for the panopticon. The panopticon is an architectural design for a prison, in which individual cells are arranged in a circle around a central observation room or platform. The inmates of the cells are not visible to each other, but all can be constantly observed from the centre. Through the particular placement of windows, the effect of the light is such that the inmates are always visible to the

guards, while the guard remains invisible to the inmates. Enabled by this architecture, the guard is able to control the prison population through surveillance with little effort and interaction.

Yet the power of the panopticon, according to Foucault (1977), is not that the prisoners *are* constantly observed; instead, it is the possibility that they *may* be constantly observed. In Foucault's words, 'the inmate must never know whether he is being looked at at any one moment; but he must be sure that he may always be so (1977: 201). The result of this possibility of observation is that inmates modify and self-censure their behaviour. The inmates absorb or 'embody' the power of the institution, and thus they exert the control upon themselves. The inmates train themselves to behave according to the rules of the institution, and in this way, too, become 'docile'.

The two outcomes are the same: for Foucault, incarceration is a technology through which people are excluded from society, and where the state can impose control over their very minds. In an article entitled 'Right of Death and Power over Life' (1978), Foucault illustrates the significance of this process that occurs on a small scale in prisons, and applies these ideas to the broader scale of society itself. The 'birth' of the prison, according to Foucault, coincided with a shift in the function of the state towards 'governance' over its citizens. By governance, Foucault means the power over life. Where previously the state had power only to '*take* life or *let* live' (1978: 136, author's italics), in contemporary times the modern state has power over the most intimate, phenomenological details of the lives of its citizens. Governance comes in two forms: the 'disciplines: an anatomo-politics of the human body'; and 'regulatory controls: a biopolitics of the population' (1978: 139). The disciplines aspect of governance sees the body as a machine, and thus the state is concerned with controlling the body, optimising its capabilities, simultaneously increasing in its usefulness and docility, and integrating it into systems of efficient and economic controls. The regulatory aspect of governance regards the body as a producer of future citizens, and is concerned with propagation, births and mortality, the level of health, life expectancy and longevity, and all the conditions that can cause these to vary (1978: 139). Thus, Foucault observes that the state is concerned with power over our very bodies in both our capacities as workers and as producers of future generations.

In short, the era of the birth of the prison marks the shift in the responsibilities assumed by the state to include every aspect of the life of its citizens. ‘The old power over death that symbolized sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life’ (1978: 136). Prisons and other carceral institutions were small-scale sites where what happened on a wider scale could be observed.

Thus, for Foucault, the purpose of incarceration is to achieve control over the lives of inmates in much the same way that the state achieves control over the population more generally. But for Foucault, like Rothman (1971) and Agamben (1998), the emphasis on control and reform of the inmate indicates that the purpose of incarceration is temporary exile from the community, to which it is intended that they will return. But what if the purpose of incarceration is more permanent exclusion? Agamben’s theory of ‘the camp’ describes a more permanent exclusion from the modern nation-state.

Zones of Exemption

Agamben (1998) aims to explain the function of administrative detention within the modern nation state. Agamben (1998: 9) regards ‘the camp’ as being central to the modern nation state: ‘the hidden foundation on which the entire political system rest[s]’. In *Homo Sacer* (1998) he explains how the camp holds such a critical position in our political and legal systems. For Agamben, the camp is a geographical space in modern nation states where the sovereign power of the state is unmitigated by the judicial power of the courts.

The camp, in Agamben’s words, is a ‘zone of exclusion’, a holding place for those who have been removed from the modern nation state. Agamben emphasises the nature of the camp as being both an essential part of the nation state, and geographically and legally separate from it. The camp is essential to the nation state, according to Agamben, because of its function of exclusion of non-citizens and other outsiders. Exclusion of outsiders is an expression of sovereign power, in that it is about controlling who belongs within the nation state, and who does not. By performing this function, the camp is an integral part of the political system.

The camp, also, is geographically and legally separate from the nation state. It is a space, temporary or permanent, created in response to a 'state of exception' or a national emergency. By declaring a national emergency, the nation state is able to suspend access to civil liberties that would normally be protected. In so doing, the nation state creates a sort of legal vacuum, where those confined do not have access to legal protection. Agamben (1998:174) explains that the camp is:

... a space in which the normal order is de facto suspended and in which whether or not atrocities are committed depends not on law but on the civility and ethical sense of the police who temporarily act as sovereign.

In the absence of juridical protection for those confined inside, the camp is a site of 'bare' sovereign power. In his theory, Agamben sees sovereign and juridical power as quite separate from each other. In *Homo Sacer*, sovereign power is described in anthropomorphic terms, in constant struggle to overcome the constraints that judicial power places upon it. The camp is the site of the successful struggle of sovereign power over judicial power.

Agamben's (1998: 166) examples of the camp include both temporary and more permanent sites of exclusion. He includes the concentration camps created by the Spanish in Cuba in 1896, by the English in the Boer war, and by the Nazis in 1930s Germany. Agamben also includes more temporary 'camps', such as 'the stadium in Bari' into which police herded Albanian immigrants before deportation, the Vichy winter racing track in which Jews were gathered before being handed over to the Germans, or the '*zones d'attentes*' in international airports where asylum seekers are detained (1998: 174). What makes these events and places 'camps' is the absence of law to protect the individual. They are made possible – or justified to the citizenry – through a 'state of emergency', 'extended to an entire civil population' (1998: 166). While similar extra-legal zones have always existed throughout history, in recent times the camp has become an increasingly familiar part of our political landscape. Indeed, Agamben argues that the camp has become a permanent aspect of contemporary politics (1998: 169):

In the camp, the state of exception, which was essentially a temporary suspension of the rule of law on the basis of a factual state of danger, is now given a permanent spatial arrangement, which as such nevertheless remains outside the normal order.

Agamben's theory of exclusion and the global system of states lends itself quite directly to theoretical discussions about immigration detention centres and the legal status of refugees. The notion of exclusion is at the heart of Agamben's theory, and he promotes the process of exclusion as if it was a natural characteristic of sovereign power. He makes connections between the state of emergency, exclusion within a global system of nation states, and a space in which individuals are without legal protection. Importantly, also, he describes the camp as a site of contestation between sovereign and judicial power. Some explanations of immigration detention centres in Australia have drawn heavily on Agamben's theory (see, for example, Diken 2004, Holt 2003, Perera 2002, Rajaram and Grundy-Warr 2004).

The 'Enduring' Nature of Incarceration

By the 1870s, Rothman notes, incarceration was not fulfilling its promise to rid society of its ills. No matter how well-intentioned the original ideal of incarceration was, penitentiaries were not ridding society of crime, asylums were not curing insanity, and almshouses were not solving the problem of the poor. So why, Rothman asks, is incarceration an 'enduring' institution? He suggests that 'the likely answer is that it was fulfilling the needs of those outside, if not inside, its walls' (1971: xlvi). But what are those needs? Rothman suggests that by the end of the century the aims of carceral institutions shifted in keeping with social fears and preoccupations. These institutions were now concerned with managing the perceived threat that the incarcerated posed to those outside.

Americans after 1850 were, therefore, free to follow what they considered an opportune and practical course. Convinced that the insane (especially the manic, but almost any among them) might at a moment commit some atrocious act or, less dramatically but no less seriously, spread their madness like a contagious disease, they found institutionalisation a useful method for nullifying a fundamental threat. At the least, the asylum would shield society from disorder and contamination (Rothman 1971: 286).

Incarceration, for Rothman, 'endures' despite failing to live up to its promises of deterrence and reform, because it 'shields society from disorder and contamination'.

Faced with the issue of the enduring nature of incarceration, despite the 'failings' of the prison, Foucault observes that the role of incarceration confining deviants and outsiders is 'deeply rooted' in our society. More than this, however, Foucault (1977: 271) argues that incarceration carries out 'certain very precise functions'. He explains that in a number of ways prisons produce delinquency, and that rather than contradicting its purpose, this actually satisfies certain requirements of society. Delinquency poses no great threat to society, as it is petty criminal activity, undertaken by the lower classes. Delinquency maintains an element of fear in the general population without general unrest. Delinquency is apolitical. Moreover, the victims of delinquency are more often the lower classes, and the subsequent division of the lower classes between petty criminals and victims, insures against political revolt (1977: 277). Finally, the delinquent milieu is easily supervised and malleable (1977: 278). Therefore, Foucault argues, when at first glance prisons seem to be a failure, they are in fact serving an important social, political and economic function.

David Garland (2001b) similarly argues that incarceration fulfils an indispensable social function, but for him it is less about creating delinquent populations, than about managing them. Following Rothman, Garland regards the late 19th century as a potential turning point in the history of incarceration, when the limitations of the practice were recognised, and when the practice could have been abandoned, but was not. He explains (2001b: 199):

Why has the prison moved from being a discredited institution destined for abolition, to become an expanded and seemingly indispensable pillar of late modern social life? Not because it was the centrepiece of any penal program that argued for the need for mass imprisonment. There was no such program. Imprisonment has emerged in its revived, reinvented form because it is able to serve a newly necessary function in the workings of later modern, neo-liberal societies: the need for a 'civilised' and 'constitutional' means of segregating the problem populations created by today's economic and social arrangements ... Imprisonment simultaneously serves as an expressive satisfaction of retributive sentiments and an instrumental mechanism for the management of risk and the confinement of danger ... Today's reinvented prison is a ready-made penal solution to a new problem of social and economic exclusion.

Ultimately, Garland explains, the modern nation state is unable to provide security for its citizens in any real sense. What it can provide, in lieu of security, is punishment. The closest thing to providing security – the incarceration of groups of people likely to threaten security – is, conveniently, achieved with the same process as punishment. Moreover, in the modern neo-liberal nation state, imprisonment is easier than solving the problem of marginalised sections of the population at their source. Why is this so, Garland (2001b: 200) asks?

Because penal solutions are immediate, easy to implement, and can claim to ‘work’ as a punitive end in themselves even when they fail in all other respects. Because they have few political opponents, comparatively low costs, and they accord with common sense ideas about the sources of social disorder and the proper allocation of blame. Because they can rely upon existing systems of regulation, and leave the fundamental social and economic arrangements untouched. Above all, because they allow controls and condemnation to be focused on low-status outcast groups, leaving the behaviour of markets, corporations and the more affluent social classes relatively free of regulation and censure.

Thus Garland offers a theory not only for the enduring nature of incarceration, but also for its increasing prominence in our social and political landscape. Although his observations are based on a study of judicial incarceration, every element of his argument can be equally applied to administrative detention.

Classification

To what extent can we generalise about the individuals or groups of people who are subject to incarceration? This section examines theories that explain the production of social ‘outsiders’ (Durkheim 1938), and the perceived danger posed to society from these outsiders (Douglas 1966). These theories explain how outsiders are perceived to pose a threat to social stability and cohesion, and how incarceration may be understood as a social response to these outsiders.

Social ‘Outsiders’

In *The Rules of the Sociological Method*, Emile Durkheim (1938) examines the role of the ‘other’ in society. He argues that the ‘other’ is both ubiquitous and essential to

every society. To articulate his theory, Durkheim uses the biological metaphor of society as a living organism, with both 'normal' and 'pathological' characteristics. The normal characteristics represent the majority of the population, while a minority of the population exhibit pathological characteristics in some circumstances in finite periods of time. For Durkheim, both the normal and the pathological characteristics are essential to the health of the organism. The clearest example of a pathological social characteristic is crime. Yet, while the relationship between the normal and the pathological, between order and crime, is universal, the manifestation of this relationship is contextual. What is considered crime in one society is not necessarily regarded as such in the next. Thus, crime is relative, it is determined by the collective consciousnesses of the society. For example, Durkheim (1938: 68) explains:

Imagine a society of saints, a perfect cloister of exemplary individuals. Crimes, properly so called, will there be unknown; but faults which appear venial to the layman will create there the same scandal that the ordinary offence does in ordinary consciousnesses. If, then, this society has the power to judge and punish, it will define these acts as criminal and will treat them as such. For the same reason, the perfect and upright man judges his smallest failings with a severity that the majority reserves for acts more truly in the nature of an offence.

Each society creates the conditions for the crime, and in so doing determines the nature of the crimes. What is certain, according to Durkheim, is that crime will always be present. Yet, rather than see crime as an anomaly, he argues, we need to learn to regard it, or other acts of deviance, as a part of the health of the social organism. Crime serves as an important mechanism for social order and cohesion. By labelling and punishing crime, society can define itself as crime's opposite, its negative image. Therefore, all societies have (indeed, create) their other, and this is a necessary function of human community.

Purity, Ambiguity and Boundaries

In her seminal work *Purity and Danger* (1966), Mary Douglas develops a theory about human practice and social relations based on classification according to notions of cleanliness and purity. For Douglas, identifying the clean and unclean, and maintaining the distinction between these classifications, constitutes the

foundation of both human bodily and social practice. Like Durkheim, Douglas explains her theory using biological metaphors. In her case, she employs the metaphor of society as a human body.

The starting point for Douglas' theory is the observation that all human societies have, at their very foundations, practices concerned with classifying, and then expelling, dirt. She observes that different cultures regard different things as clean and unclean, but, ultimately, each society has a system of taboos that regulate how to maintain cleanliness and hygiene. The complication to these hygiene rules is that dirt is not unclean or impure in essence, because in its designated place, such as the garden, dirt is acceptable. Instead, Douglas argues, what is unclean is 'matter out of place' (Douglas 1966: 44). This understanding of dirt implies two conditions; that there is a set of ordered relations, and a contravention of that order. She explains (1996: 2-3):

As we know it, dirt is essentially disorder. There is no such thing as absolute dirt: it exists in the eye of the beholder ... Dirt offends against order. Eliminating it is not a negative movement, but a positive effort to organise the environment ... In chasing dirt, in papering, decorating, tidying, we are not governed by anxiety to escape disease but are positively re-ordering our environment, making it conform to an idea ... In short, our pollution behaviour is the reaction which condemns any object or idea likely to confuse or contradict cherished classifications.

Human practice is always vigilant in maintaining the health and well-being of the body, and to creating order within the environment through classifications based on notions of cleanliness and purity. For Douglas, however, practices similar to 'pollution rituals' on a human scale are equally fundamental to the practices of societies and nation-states. The link between the body and society is more than a metaphor for Douglas. We can observe in our everyday bodily practices and rituals the same processes by which we maintain and protect our society. Douglas argues that societies develop classifications based on notions of cleanliness and purity, and that hygiene practices on a social level – that is, maintaining the boundaries between things neatly classified and 'matter out of place' – are part of the fundamental processes of human society.

For Douglas, social order is achieved through classification. She recognises, however, that the greatest threat is not contained in those things which we know and which we can easily classify as polluting. We have clear systems and processes to deal with things that fall into this category, and so they are managed and maintained as necessary. Rather, what is most threatening to our bodies and to society are those things that avoid classification. It is ambiguity, the evasion of classification, and the transgression of categories that most threaten us. Where something cannot be classified, where it is deemed ambiguous, it is excluded and expelled. Douglas argues (1966: 5):

Ideas about separating, purifying, demarcating and punishing transgressions have as their main function to impose a system on an inherently untidy experience. It is only by exaggerating the difference between within and without, about and below, male and female, with and against, that a semblance of order is created.

In a similar way, Douglas talks about ‘social pollution’, and develops a schema through which we can understand threats from ‘social pollution’ in our society. Again, however, the greatest threat comes not from the unclean, but from the ambiguous. She explains (1966: 151-2):

Four kinds of social pollution seem worth distinguishing. The first is danger pressing on external boundaries; the second, danger from transgressing the internal lines of the system; the third, danger in the margins of the lines. The fourth is danger from internal contradiction, when some of the basic postulates are denied by other basic postulates, so that at certain points the system seems to be at war with itself.

Each of these categories is recognisable in modern societies when we consider governments’ responses to asylum seekers, and issues of race in general.’

Control

The issue of control relates to administrative detention in two ways. Certain categories of people are, by their incarceration, controlled, and in so doing, society is shaped by this incarceration. The issue of control also relates to the way that the Executive seeks to gain power over the policy and practice of administrative detention, at the expense of the rule of law.

Moral Panics

Stanley Cohen's (1972) theory of 'moral panics' is a useful way of explaining social response to deviants and outsiders, and how this response may lead to incarceration of the outsider. It offers an explanation for the function of incarceration in a broader social context. Implicit in the theory of moral panics is the notion that some groups and individuals pose a perceived threat to social stability and cohesion. This idea of a threat, and the correct policy response to this threat, is an important aspect of both juridical and administrative detention.

Cohen developed his theory of moral panics to account for what he saw as the disproportionate response to the 'threat' to society posed by the mods and rockers in 1960s England. His aim is to show how the public response to certain events or behaviours can be manipulated by politicians and the media to create a sense of crisis. This sense of crisis is what he terms a 'moral panic'. It is often a disproportionate, short-lived, and emotionally charged response to the event or behaviour. Importantly, it may have lasting effects with the toughening of policy responses to the event or behaviour. Cohen (1972: 1) describes the trajectory of a moral panic as when:

... a condition, episode, person or group of persons emerges to be defined as a threat to societal values and interests; its nature is presented in a stylised and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.

The idea of the moral panic was developed to explain the social response to the mods and rockers riots in England, but it has a much broader application. In his introduction to the 1990 edition of his book, Cohen (1972: viii-xxi) identifies recent moral panics in the response to various social events and groups of people, including young, working class males, school violence, drugs, child abuse and paedophilia, satanic rituals, sex, welfare cheats, single mothers, and refugees and asylum seekers. To each of these events or groups of people, the response has been a new and tightened legislative policy and policing strategy. Legislators respond to the 'perceived' rather than the actual, often much smaller risk, a

process which Cohen calls 'escalation'. Societies are said to be faced with a 'clear and present danger' (Cohen 1972: 26), to which immediate responses are required. Often, new methods of control are introduced in response to the threat.

In his theory of the camp, Agamben (1998) uses similar ideas about the function of national emergencies to justify the exclusion of individuals or groups from society. Agamben traces the history of the camp from times of war, when there was a national emergency, to more modern times when the sense of national emergency is constructed. This construction of the national emergency is, according to Agamben, a strategy of the sovereign state to gain temporary extralegal power. By constructing a national emergency, the sovereign has the power to exclude those who it wishes to exclude from the nation state, without being held to account by the Judiciary.

Central to Cohen's idea of moral panics and Agamben's notion of a national emergency is the use of the media to communicate particular political rhetoric and discourse. The use of language such as the 'war on drugs' demands an emergency-like response. Similarly, the idea of a national emergency is invoked when boats of asylum seekers are referred to in terms of a national disaster: a flood, an avalanche, an invasion. Such language creates a social mood that justifies a national response using police and the military (Pickering 2005).

The theory of moral panics, then, is a useful one, not least to explain how seemingly minor events can provoke large-scale responses. This theory shows that the response may not be organic, but constructed to serve some political interests. Moreover, the political opportunity caused by the moral panic can have lasting effects on policy and legislation.

Incarceration of Groups

The treatment of people as groups or categories, rather than as individuals, is one of the main points of distinction between administrative and judicial incarceration. Judicial incarceration is a system that (theoretically, at least) treats people as individuals, and each are assessed for their crimes and imprisoned accordingly. The administrative detention system is similarly concerned with public safety and security, yet has no accompanying mechanism to assess people individually. As a

result, whole groups of people may be incarcerated at once. There are exceptions to this, psychiatric institutions being the most obvious.

Malcolm M. Feeley and Jonathan Simon (1992) observe the trend in judicial incarceration as a movement towards the targeting of groups of people, and their comments about this trend are worth discussing here. They note that increasingly, groups of people, rather than individuals, are targeted by the judicial system. They call this phenomenon ‘the new penology’. Judicial incarceration, argue Feeley and Simon, is moving away from being about punishment of crime, and instead is about assessing, controlling and managing risk to society. The massive rise in prison numbers in recent years, they argue, is not because of a massive rise in crime rates. Neither is it a coincidence that the overwhelming majority of US prison populations are blacks and Latinos. Instead, the effect of making minor crimes punishable by imprisonment means that whole categories of people are removed from society.

This marks a shift in the role of the judicial system, the authors argue, from a reactive to a managerial role: where once the judicial system was a response to individual acts of crime, now the judicial system is involved in managing risk. Feeley and Simon explain (1992: 452):

... the new penology is markedly less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather, it is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness. The task is managerial, not transformative ... It seeks to *regulate* levels of deviance, not intervene or respond to individual deviants or social malformations (author’s italics).

Feeley and Simon make their arguments based on judicial incarceration, yet the notion that groups of people are assessed according to their risk to society and incarcerated according to this risk is even more obvious in administrative detention. When ‘outsiders’ are targeted, administrative detention is about assessing risk and identifying, classifying and managing groups of people.

Managing Marginal Populations

While Feeley and Simon point to the contemporary trend towards incarceration of groups or sections of the population, Loic Wacquant (1999, 2001) demonstrates

that the targeted sections of the population are those who are socially and economically marginal. For Wacquant (2001: 95), these groups are often racially different from the mainstream population, but to understand the disproportionately high rates of incarceration, one must 'break out of the "crime-and-punishment" paradigm to reckon the extra-penological function of the criminal justice system as an instrument for the management of dispossessed and dishonoured groups'.

In the United States, Wacquant points out the massive increase in the incarceration of blacks and Hispanics, an increase which is largely fuelling the shift towards the United States becoming a country of 'mass incarceration' (Garland 2001a, Wacquant 2001). For Wacquant, the high incarceration of blacks in particular has a historical trajectory. Historical precedents for the massive black incarcerated population include three other 'peculiar institutions' of control: slavery from 1619-1865; the Jim Crow laws in the South, 1865-1965; and the urban Ghetto in the north, 1915-1968. From the late 1960s, when the Jim Crow and the Ghetto systems were dismantled, black incarceration rates rose dramatically. This was accelerated by policies such as the 'war on drugs' under the regimes of Ronald Reagan, George Bush snr and Bill Clinton. Research in 1996 found that, on any given day, one third of the black male population between twenty and thirty years of age was either behind bars, on probation, or on parole (Wacquant 2001).

Wacquant argues that the incarceration of blacks is the symptom of an economic and social system that is racist at its core. He argues (2001: 118):

... the conflation of blackness and crime in collective representation and government policy ... thus reactivates 'race' by giving a legitimate outlet to the expression of anti-black animus in the form of the public vituperation of criminals and prisoners.

Another effect of the conflation of blackness and crime is to depoliticise incarceration; no sympathy can be offered to individuals, nor arguments be made against the system of mass incarceration, if a black person is imprisoned legitimately for a crime.

In Europe, it is immigrants and 'second-generation' immigrants who are incarcerated in disproportionately high numbers (Wacquant 1999). In Germany, Belgium, the Netherlands and Greece, foreign prisoners rank approximately one third of the overall prison population, and in Spain, Italy, France, Austria and Sweden, the rate is one-fifth to one-quarter (Wacquant 1999: 217). These rates are due to high rates in joblessness, a subsequent parallel economy that draws attention from the police, the high visibility of the offender, and policies that facilitate the criminalisation of the immigration, thus beginning a self-fulfilling cycle. In addition, the EU Schengen and Maastricht treaties make unauthorised immigration a matter of security.

These populations are not simply marginal because of their race, but because of a conflation of factors that ultimately excludes them from the formal economy. These conclusions could also be applied to the high rates of incarceration of Indigenous people in Australia. Ultimately, however, the mass incarceration of lower class ethnic 'others' in the US, Europe, and Australia, indicates that these modern societies are evolving to the exclusion of specific populations.

Conclusion

This chapter has developed a theoretical framework for explaining the social and political function of administrative detention. This framework has been structured by three themes – incarceration, classification, and control, which set out, respectively, the 'how', 'who' and 'why' of administrative detention. It has drawn on various theories of judicial incarceration and social theories of classification more generally to overcome the limited amount of analysis of administrative detention itself.

So what has been learnt from this analysis of administrative detention? The development of administrative detention, like judicial incarceration, is a response to perceived social, economic and political problems, particularly in times of rapid social change or crisis. Like judicial incarceration, administrative detention persists because it fulfils certain functions for those on the outside, and not because of what it achieves for those incarcerated. Judicial incarceration ostensibly aims to reform and rehabilitate inmates as well as performing functions of confinement and exclusion, although the level of reform actually achieved is limited.

Administrative detention does not purport to benefit those detained, and functions only for confinement and exclusion.

Another key difference is that administrative detention incarcerates groups of people, rather than individuals. One is not convicted, put on trial, and sentenced for a particular act committed, in order to be subject to administrative detention. Instead, people are incarcerated because they belong to a certain category. Thus, as chapter 3 demonstrated, people have been detained in Australia because of their membership of a particular racial or ethnic group, or their arrival on a particular ship. Alternatively, from Douglas (1966), people are also detained because their status is ambiguous and they do not fit certain categories. As indicated in chapter 5, people are subject to immigration detention because they do not fit within the visa categories. So administrative detention is about the management of groups of people. As Feeley and Simon (1992) and Wacquant (1999, 2001) argue, judicial incarceration of groups of people is an exercise in state control over its population. Immigration detention in Australia is an attempt to control entry into the population. It is a response to social, economic and political problems attributed to people who are ethnically or racially different.

The question as to whether the end goal of this management process is permanent exclusion from the nation state remains uncertain. For example, the two theorists who specifically explore administrative detention have different positions on this issue. Goffman (1961: 12) argues that the main function of asylums is as 'forcing houses for changing people'. This means that the ultimate aim is that the inmate will eventually return to the community, albeit as a reformed person. For Agamben (1998), the 'camp' is a site of permanent exclusion from the nation state. This idea of exclusion is prevalent in many of the explanations about immigration detention examined in chapter 2. When considering the case studies of administrative detention in chapter 3, however, neither the purpose of reform, nor that of exclusion, seems satisfactory. In the next chapter, a more sophisticated theory about this issue of exclusion will be developed. Immigration detention is examined using the theoretical framework developed here. The three themes – incarceration, classification, and control – are applied to immigration detention specifically, in order to formulate a

theoretical explanation for the social and political function of immigration detention in Australia.

Chapter 5

Explaining Immigration Detention in Australia

This chapter conducts a theoretical examination of the policy, practice, and function of immigration detention in Australia. The aim of this chapter is to investigate the social and political function of immigration detention, with a view to provide a more sophisticated theoretical explanation for why immigration detention is an enduring part of Australian immigration policy. Chapter 1 explained that immigration detention does not meet its stated policy objectives. The practice has been demonstrated to be harmful to detainees, is financially costly, and breaches numerous international laws. Yet the policy continues as a key aspect of Australia's immigration policy, bipartisan support and broad support from within the Australian community. Why does immigration detention continue to form a key part of Australia's immigration policy? In failing to meet its policy objectives, it must fulfil some other functions. What, then, are the social and political functions of immigration detention in Australia?

In chapter 4, three theoretical themes were identified as important to our understanding of administrative detention. These themes – incarceration, classification and control – help us develop an understanding of the 'how', 'who', and 'why' of immigration detention. Applying theories of incarceration, this chapter analyses the geography, architecture, and surveillance capabilities of immigration detention. The chapter then turns to the examination of Mary Douglas' (1966) theory of classification in order to better explain why particular categories of people are subject to immigration detention, while others are not. Finally, this chapter explores the theme of control with regards to various aspects of immigration detention, including the political power gained by 'loud and quiet' moral panics (Welch & Schuster 2005), the function of the *Migration Act* in establishing a sense of order, the issue of asylum seekers 'breaking the rules', and the extra-legal nature of immigration detention.

Incarceration

Geography

The location and the architecture of detention centres are central to the meaning of immigration detention. Since the opening of the first detention centre in Port Hedland in 1989, decision-makers have located many of the centres in places that are difficult to access. Specifically, the locating of centres in Australia's deserts or on islands (both Australian or foreign) has both practical and symbolic impact on the conditions of detention.

Three detention centres have been located far from metropolitan centres. The Port Hedland centre, in the mining town of the same name, is located in the far north of Western Australia, equidistant from Perth and Darwin. Woomera Detention Centre was built out of disused army barracks in the desert, 485 km north of Adelaide and 180 north of Port Augusta. The Woomera township was built in 1947 to accommodate defence personnel involved in rocket testing and research, which is still conducted. The Woomera Detention Centre was notorious for having terrible conditions, overcrowding, and riots. It was closed in 2002. Baxter Detention Centre, the first centre to be built specifically for immigration purposes, opened in 2002 and closed in 2007, was located just outside Port Augusta in South Australia.

These centres, located far from major metropolitan centres, were difficult to get to. The placing of detention centres in these desert locations also had symbolic significance. From the time of white settlement, the deserts of central Australia have held a place in Australian mythology. At first believed to contain an inland sea, they became geographies laden with disappointment and futility when the mythical sea was never discovered. In her study of the desert in the Australian imagination, Haynes (1998: 78) cites from the diaries of the explorer Charles Sturt, who had several thwarted attempts to cross central Australia. She explains how the explorers understood the desert itself as a type of prison:

Sturt's unfortunate party was forced by continuing drought to camp for six months ... on Campbell Creek while attempting to reach the Centre. The several accounts by members of the expedition contain repeated references to a sense of 'detention' or 'prison'. Afraid to move from this spot because they

cannot find another source of water, the normally unemotional Browne records: 'It is impossible to move forward until rain comes. It would be equally impossible for us to retrace our steps ... We are thus completely imprisoned'.

In his diaries, Sturt explains that the desert caused a sense of 'ruinous detention', through 'the invisible "barriers" of monotony and thirst' (Haynes 1998: 78). His entry for 27 January 1845 records, as summarised by Haynes (1998: 78-9):

[Sturt writes] '... it became evident to me, that we were locked up in the desolate and heated region, into which we had penetrated, as effectively as if we had wintered at the Pole'. At best he speaks of trusting to 'the goodness of Providence to release me from prison when He thought best' and of giving up 'all hope of success in any future effort I might make to escape from our dreary prison'. When, finally, rain falls, Sturt records it in terms of liberation: 'we have at length obtained our freedom'. However, the relief is temporary: the land remains obdurate and Sturt finally bursts out: 'the idea of detention in that horrid desert was worse than death itself.'

In 2000, about 300 detainees broke out of the Woomera Detention Centre and spent 24 hours in the Woomera township. When it became apparent to them that leaving the township and travelling through the desert by foot was impossible, they agreed to return to the centre. The desert, ultimately, proved a more effective method of detention than the fences surrounding the centre.

Locating detention centres on islands achieves similar practical problems and symbolic meaning. Between 2001 and 2008, as part of the Pacific Solution, two centres operated in the small Pacific nation of Nauru, and one on Manus Island, an island in Papua New Guinea. These centres have been replaced by two detention centres on the Australian territory of Christmas Island, which, since December 2008, have been the location for accommodating asylum seekers who enter Australia by boat. Facilities at Horn Island in the Torres Strait have also been used for temporary detention purposes. These centres are difficult to access because of distance, cost of travel, and irregular flight schedules which, again, has the effect of restricting visits by lawyers, journalists, and other visitors. In addition to distance and cost, Nauru and Manus Island also required the grant of a visa to enter the country. The prominent human rights lawyer Julian Burnside (2007)

described the trouble of getting a visa to Nauru, and the fact that this did not ensure entry to the country. He explains (2007: 89):

I tried to get to Nauru in order to mount a habeas corpus action there, which would challenge the legality of the detention of the refugees. The action was duly lodged, and a date for the hearing was fixed: Anzac Day 2004 ... I applied for the visa six weeks ahead of time. By the Friday before Anzac Day I still had not received a visa. I notified the Australian government solicitor that we would go to the Supreme Court judge at noon that day to mention the matter. At five minutes to noon, a visa came through the fax machine ... I then rang Air Nauru to book a ticket for the Sunday night ... I introduced myself by name and asked to book a ticket for the Sunday night. The person at the other end of the phone said, 'No, you can't get a ticket because you need a visa'. I said that I had one. She said, 'That's not possible'. I had to fax the visa through to Air Nauru before they could believe that I had in fact received one. Several thousand dollars later, I had a ticket. But when I arrived at Tullamarine Airport on Sunday night, I was not allowed to board the plane. Air Nauru staff told me that they had been ordered not to let me on the plane. Other Melbourne-based lawyers, briefed by the Australian government to act for the Nauruan government for the next morning in the habeas corpus action, were allowed to board the plane.

Dimasi (2008) highlights the difficulties with getting to Christmas Island, including that the cost of an air ticket from the eastern states of Australia is the equivalent of a ticket to Europe, and that there are only two flights per week. These conditions make it extremely difficult for lawyers working pro bono, journalists (particularly those not employed with major media organisations), refugee advocates, and researchers to visit these centres, which ultimately has an effect on the level of transparency and accountability of detention itself.

In addition to the difficulties with access, the geographical location of the detention centres, and the climates of these regions, also contributes to the conditions of detention and the experiences of detainees. In Woomera and Baxter, the temperature during the day can exceed forty degrees, and fall to below zero at night. The architecture of the centres, as we see below, does not accommodate this range of temperatures. Detainees at Port Hedland similarly complained of having no relief from the heat. Conditions that affect local

residents on the islands also affect the detainees in the centres. Because the supply ship carrying food only comes to Christmas Island once every six weeks, detainees, like the Christmas Island residents, experience cycles of glut and scarcity of food. Detainees on Nauru had access to running water for only a few hours each day, and complained of its poor quality (Burnside 2003, Briskman et al. 2008).

The use of deserts and islands as places to exile people has long been part of Australia's history, and reflects the white community's relationship with the Australian environment. As discussed in Chapter 3, the use of islands as sites for Aboriginal reserves, prisons and leprosarium, similarly held practical and symbolic functions. In short, these are sites that contain people through geography.

The Immigration Detention Network

As outlined above, as well as detention centres, other facilities are used for immigration detention, including immigration transit accommodation at airports, immigration residential housing, prisons, hospitals, psychiatric institutions, motels and rented apartments. Combined, these facilities constitute the immigration detention network, between which detainees are moved for administrative, health, or behavioural reasons.

Solzhenitsyn's *The Gulag Archipelago* (1973) described a network of labour camps in the Soviet Union in the first half of the twentieth century. Like an archipelago of islands, Solzhenitsyn described how the gulags were unconnected with the country around them, and what went on inside was known only to the political prisoners, who were transferred between camps apparently arbitrarily. Welch (2002) employs this idea to describe the United States' Immigration and Naturalisation Service 'jail complex', comprised of immigration detention centres, prisons and other institutions. Immigration detainees may be quickly and secretly transferred within this jail complex, losing paperwork, personal belongings, and connections with lawyers and relatives in the process.

Although far from the horrors of the Soviet Gulag, immigration detention centres operate as a similar network around which detainees are transferred. Detainees who have finished a jail sentence and are awaiting deportation are transferred between prison and immigration detention, and are often kept in prison for

periods of time awaiting completion of administrative procedures. Detainees are also transferred to psychiatric institutions and hospitals for treatment, under the watch of guards. This network operates in a similar way to that of Aboriginal reserves and missions in 19th and early 20th century, as described in chapter 3, where individuals were transferred between institutions for punishment or treatment, at the expense of kinship networks.

Architecture

The architecture of the centres, also, contributes to the experiences of detainees. The physical structures and layout are designed to deny access from outside, restrict visibility of the outside world from the inside, and to facilitate surveillance of detainees.

The most obvious aspect of the architecture is the razor wire and other fencing that surrounds the centres, indeed, the term ‘razor wire’ has become synonymous with immigration detention in Australia. A repeated theme in testimonies of detainees is the notion of being caged (Burnside 2003: 43):

Here is always dark and foggy. We can not see some meters away and everything is fence, fence, fence.

For some, the caging within the fence dehumanises them, and makes them feel like an animal (Burnside 2003: 42):

The government policy treat us in awful way. They put us in cages and put us in something like zoo area. I suggest to call the detention centres human zoo, that is correct name for this situation. There are fences, bars, razor wire, same thing like jail or zoo. I cried a lot when I saw the two year old child behind the fence. What did he do?

Another letter suggests that the main purpose of the razor wire is not to contain the detainees, but to keep others out (Burnside 2003: 148):

I believe people like you and the good people of Australia deserve to know about us, all this fences, ‘cage’ and razor wire made not to make us escape from detention but to make people in Australia don’t know nothing what is happening inside.

The purpose-built Baxter detention centre was surrounded by 2.8 kilometres of 9000 volt electric fencing, that triggers an alarm if touched. This made Baxter the first facility in Australia, including prisons, to use electric fencing to confine humans. When a spokesman for the Minister for Immigration Philip Ruddock was questioned on the use of electric fencing for this purpose, he responded that it was not electric but ‘energised’ fencing (Debelle 2002) that ‘is not going to burn your hand or electrocute you’ when touched (*Advertiser* 2002). Renovations to Villawood in 2005 replaced the razor wire with electric fences, and the North West Point detention centre on Christmas Island has electric fences.

In her book *Blind Conscience*, Margot O’Neill (2008) records an interview she had with former Minister for Immigration Philip Ruddock after the Coalition government lost power and he was no longer government minister. In this conversation, they discuss the issue of razor wire and electric fencing:

Philip: Look, razor wire has always been used as a descriptor to demonise the system. I in fact went out of my way to try to develop facilities that didn’t need or require that medium.

Margot: But they all had it.

Philip: No they didn’t. Nobody saw razor wire when they were at Baxter.

Margot: No okay, but it has an electric fence though.

Philip: Well I’m just making a point that nobody *saw* razor wire at Baxter. The way in which it was designed was you lived in ... and what people said was ‘You couldn’t look out’. Well there’s a degree of truth in that, the facilities were built so that you couldn’t see any razor wire (author’s italics).

The architecture of the centres creates an artificial environment that contributes to the mental and physical health problems of the detainees. As Ruddock described above, in the purpose-built Baxter and North West Point the compounds are positioned so that detainees can only look into the centre, and not out to the surrounding landscape, and therefore have no notion of the environment in which they are located (Burnside 2007: 116). Lights are kept on throughout the night, so that detainees never experience dark. The heat in the desert and on the tropical islands in the middle of the day, and the lack of cool or air-conditioned spaces, means that many detainees experienced sleeping disorders.

Often detainees sleep throughout the day and were awake at night-time (Burnside 2003).

The most recently constructed detention centre, North West Point on Christmas Island, was opened for operation in December 2008. This centre was been designed to overcome some of the architectural problems experienced at the other centres. The roofs in North West Point detention centre are all built on such an angle as to avoid roof-top protests, such as those seen at Villawood, Maribyrnong, and Woomera. To prevent people from hanging themselves, shower fixtures are designed at sharp angles so that nothing can be attached to them, and clothes hooks flick down when too much pressure is applied (Dimasi 2008). In addition, Dimasi (2008) notes that the building is constructed low to the ground so that detainees will be unable to see beyond the 'tropical jungle walls' of the detention centre. All the doors in the Christmas Island facility are controlled electronically by swipe card, so that detainees are easily denied access to certain parts of the building, and a lockdown of the centre can be implemented immediately. Finally, as a modern-day panopticon (Foucault 1977), every part of the Christmas Island facility is visible to surveillance cameras, which can also be streamed direct to Canberra.

Within the centres, different categories of people are accommodated in different compounds, which were separate and inaccessible to each other. The separation of categories of detainees is strategic. New boat arrivals are kept in a separate compound from detainees who had been in detention for a long period of time, presumably to prevent information about detention being passed between the groups.

Many of the detention centres have areas in which they can isolate detainees who are considered troublesome. In Villawood detention centre this area is called Stage One, in North West Point it is called Red Block, in Baxter it was the Management Unit and Red One, at Port Hedland Juliet Block. Within these areas, individuals are kept in solitary confinement in much the same way as prisoners are, and allowed out for only a few hours a day under supervision. The experience of Cornelia Rau brought the Management Unit at Baxter to the attention of the media. Experiencing severe psychosis, Rau was considered by staff as a

troublemaker and confined in the Management Unit (Whitmont 2005), when she actually needed medical attention and medication.

In his social history of incarceration in the United States, David Rothman (1971) emphasises how the architecture of early American carceral institutions was considered integral to achieving the aims of the institutions. Unlike in Europe where existing buildings that had been used for many purposes throughout the centuries were converted into prisons or asylums, Americans had to 'start from scratch' (Rothman 1971: 136). Interwoven into the architectural plans for the new carceral institutions, therefore, were the purposes, methods and values of the incarceration. The architecture was considered a 'moral science', as intimately involved with the 'curing' of inmates as the prison wardens or psychiatric nurses (Rothman 1971: 83). We can read from these purpose-built structures much about the everyday routines, and the higher aims, of the institutions.

The location and the architecture of the centres contributes to the picture of immigration authorities being in full control of the detainees. Both the location of the centres and the architecture are designed to limit the access to the centre from people outside, and of course, vice versa. They are also designed for full control over the detainees on the inside, including the use of solitary confinement for discipline purposes. Arguably, this environment contributes greatly to the damage to the physical and mental health of detainees.

Surveillance

Surveillance is a key aspect of detainees' experiences of detention, and it impacts in various different ways. In some cases, surveillance is invasive and can extend to an abuse of privacy. Yet in other cases, surveillance can be curiously non-existent, allowing for abuses to occur undetected and go unpunished.

The contract between the detention service provider and the Department of Immigration has a provision whereby the service provider is fined if detainees escape. This has led to the practice whereby detainees are 'mustered' for roll call a number of times a day, and throughout the night. The night musters are most disruptive to detainees, as detention staff enter their rooms and shine torches on sleeping people to make sure they are in their beds. As one detainee wrote (Burnside 2003: 56)

For one year they count me five times daily like a shepherd with the sheep.

A former detainee, an American woman, recalled for the *People's Inquiry* (Briskman et al. 2008: 133):

Two guards come into the women's dorm. One woman, one man, counting bodies in beds. I was particularly intrigued that they would send a man into the sleeping area of these women, who were unfortunately mostly Muslim women. If you know anything about Muslim culture, that is one of the least appropriate things you can do.

The lack of privacy can also lead to abuses inflicted by detention staff and other detainees. In a media investigation into Cornelia Rau's time in the Management Unit of Baxter Detention Centre, it was alleged that detention staff watched Rau through the windows of the room, and the toilet and shower in the units are exposed to the windows (Whitmont 2005).

Conversely, in an extreme case, a female detainee was repeatedly raped by other detainees, in front of her toddler, over a six month period in Villawood Detention Centre. This was able to occur because the door to her room was unlockable to allow for night musters (Hart 2006). This situation is illustrative both of the lack of privacy and security in detention centres, and of the 'blind spots' in surveillance by the authorities.

For Foucault (1977), surveillance is central to the function of incarceration. For Foucault, the power in Bentham's designs of a panopticon (see chapter 4) is not that the inmates are always observed, but that they are constantly aware that they *may* be being observed at that present moment. The inmate is always, then, sure of the power relationships within the institution. For Foucault, the purpose of this surveillance is to change the individual at a social and spiritual level: the inmate will regulate their behaviour at all times through fear of being observed.

The function of surveillance in immigration detention, however, is not to enforce behavioural change at the level that Foucault describes. Rather, surveillance is fundamental to establishing the 'law' of the detention centres. It is one aspect of the punitive environment, discussed in more detail in chapter 7. It is also a way of communicating to detainees who is in charge; detainees are left in no doubt about the power of the detention authorities. As we have seen with the examples above,

this power can be arbitrary. In the case of the night musters, the surveillance itself is invasive. In the case of the abused woman, the blind-spots in the surveillance demonstrate the arbitrary implementation of these measures. The latter case demonstrates that, while extensive surveillance exists, its purpose is not for legal reasons, such as providing a measure of duty of care, but to reinforce the arbitrary authority of the detention staff.

There is another aspect of surveillance that should be mentioned here. This is the lack of surveillance granted to non-government and intra-government organisations (including the United Nations), human rights groups, politicians from other parties, the media, and the general public. The lack of access, both for official inspections and for more casual visits, means that there is a lack of transparency of the detention centres, and that they have become an environment free of normalising contact with the wider Australian community. As we have seen, this is an environment in which abuses can and do happen.

Classification

One puzzling aspect of immigration policy is the fact that some categories of people are subject to detention, while others, arguably equally worthy, are not. For example, unauthorised asylum seekers who arrive by boat are detained, while those who arrive by plane are allowed to live in the community. Why are these two categories of asylum seeker classified differently, and why should one, and not the other, be subject to detention? This section examines the migration visa system using Douglas' theories of classification and ambiguity.

Classification and Ambiguity

Processes of classification determine legitimate and illegitimate status within nation states. Central to the process of classification is the migration visa system. This section examines Australia's migration visa system using Douglas' theory of classification and ambiguity as a framework for analysis. Chapter 4 examined Douglas' (1966) theories about classification and ambiguity with reference to determining social outsiders generally. These theories provide an unconventional but revealing way of understanding the visa system, and the role of immigration detention in facilitating adherence to processes of classification. Douglas' theory

offers an alternative explanation to racist theories about the function of immigration detention and for the decision about who is subject to detention.

In modern nation states, migration visa systems are methods of classification and ordering (Dauvergne 1999). With this system, codified in the *Migration Act*, Australia regulates who can enter the country, who can stay, and who may not stay and must be removed. Only people who have been positively classified within the visa system – that is, those who have been granted an entry visa – may enter Australia. Therefore, in order to gain entry to Australia, an individual must meet the requirements of certain visa categories including, for example, a student, business, tourist, spouse, skilled migration, or humanitarian visas. Australia has a complicated migration visa system with over 150 available visas (see for example Vrachnas et al. 2008: xxii). Failure to fit within these categories, to be deemed legitimate or ‘legal’ (as opposed to ‘illegal’) can lead to incarceration.

Douglas (1966) argues that processes of classification form the foundation of all human societies. The most fundamental of these categories are things that are clean and pure, and things that are unclean and impure. According to Douglas, all human societies are structured around social and religious rituals, beliefs, and taboos, that function as a means of maintaining the boundaries between these categories. Cleansing rituals, food taboos, even kinship networks, all have at their core beliefs about cleanliness and purity.

Two important aspects of Douglas’s theory of classification are relevant to this analysis of the migration visa system. First, Douglas (1966: 44) notes that many things are not inherently unclean, but rather, many things that are classified as such are better understood as ‘matter out of place’. For these things, social processes are implemented to redress the problem; the ‘matter’ is repositioned, and order is restored. Dirt, for example, is not ‘unclean’ when it is in the garden, but when it is walked through the house it becomes unclean. This is rectified, however, through the simple rituals of vacuuming, sweeping, dusting, mopping, and generally restoring ‘order’ to the house. Second, Douglas explains that what is most dangerous within this system of classification is not ‘matter out of place’, but things that are ambiguous, unclassifiable in some way. Ambiguity holds a dangerous power. By evading classification, ambiguity threatens the legitimacy of the whole system.

Douglas' theory applies to all human society including, she argues, the nation state. Her notion of 'social pollution' identifies areas of vulnerability and ambiguity in a society's classification system which, once breached, threaten social stability. Douglas explains (1966: 151-2):

Four kinds of social pollution seem worth distinguishing. The first is danger pressing on external boundaries; the second, danger from transgressing the internal lines of the system; the third, danger in the margins of the lines. The fourth is danger from internal contradiction, when some of the basic postulates are denied by other basic postulates, so that at certain points the system seems to be at war with itself.

We can apply Douglas' schema to the categories of people subject to immigration detention. Illegal foreign fishermen are perhaps the easiest to understand. They are, according to Douglas, 'pressing on external boundaries' by breaching national borders without a valid visa. They are, simply, categorised as foreign, and therefore have no right under law to enter Australian territory.

Asylum seekers who arrive by boat are a different problem to foreign fishermen. On one hand, the act of entering Australian territory without a valid entry visa means that, under Australia's migration visa system, asylum seekers should be automatically excluded. Entering Australia without a valid entry visa is a breach of the 'external boundaries'. But, on the other hand, Australia is a signatory to the *Refugee Convention*, which means that asylum seekers cannot be removed until they have been assessed against the criteria of the refugee definition. Being 'not yet classified', but also unable to be removed under international law, asylum seekers disrupt the national classification system. Their status is ambiguous; they may be refugees and eligible for a protection visa, but this is not yet determined. Before determination, therefore, asylum seekers are unclassified, and ambiguous.

Asylum seekers who arrive in Australia by boat are also, to a certain degree, 'matter out of place'. The political discourse around the fourth wave of boats in 1999-2005 identified the 'correct' way for people to seek asylum: join a queue at an embassy or a refugee camp, and wait for the grant of a visa. People in refugee camps are not 'matter out of place', indeed, for a country like Australia, they are in their correct place. It is only when asylum seekers leave the refugee camps do they become 'matter out of place'. According to Douglas' theory, 'matter out of place'

is polluting until it can be cleansed or re-ordered with the issue of a visa, or removal from the country. Immigration detention, within this schema, is the site for the cleansing and re-ordering of ambiguous asylum seekers.

Douglas' theory of social pollution also accounts for the issue of permanent residents who have had their visa revoked. Those who have been sentenced for a criminal offence, or have otherwise been judged to be of 'unsuitable character', constitute a 'danger in the margins' in Douglas' schema. Within this framework, permanent residency is a marginal space, the permanent resident is not quite a citizen, not quite an outsider. Any disruption in the margins is treated harshly. Nicholls (2007) points out that each year since 2000, more than 500 permanent residents are deported from Australia, making Australia's deportation program the largest in the Western world.

The final category of social pollution – 'internal contradiction, when some of the basic postulates are denied by other basic postulates, so that at certain points the system seems to be at war with itself' – is harder to understand within the context of immigration detention, but can readily be applied by examining categories of people subject to other forms of administrative detention. Douglas' wording seems to imply a threat upon society from groups of people already living in the community. This may be how we can explain the incarceration of large groups of Aboriginal people in reserves, and whole categories of enemy aliens in internment camps during the world wars, regardless of how long they had lived in Australia, or whether they had been naturalised.

According to Douglas' theory, then, people are subject to immigration detention because they are 'matter out of place', because they evade clear classification, or because they threaten social order from the inside. Like 'cleansing rituals' on a household scale, immigration detention functions to reinstate order on the level of the nation state, ultimately re-ordering an 'untidy experience' (Douglas 1966: 5). Douglas' theory offers an alternative explanation of the function of immigration detention, and the identification of who is subject to detention, to racist theories that are commonly applied to immigration detention. It leads us to an understanding of immigration detention that centralises issues of control.

Control

In 1993, Kathryn Cronin identified a ‘culture of control’ within the immigration department, and argued that this element of control was the best way of understanding the functions performed by the department. In this chapter we have seen how the physical infrastructure of detention centres, including their geographical positioning, their architecture, and surveillance within, all contribute to an environment of control. Similarly, Douglas’ theory of classification demonstrated how visa systems are a way of ordering – of controlling – the environment. In this section, the issue of control is explored directly. This section argues that theories that promote the idea that the Executive’s pursuit of control over national borders – or at least the need to be perceived to have control – better explains immigration detention in Australia than theories that promote racialist arguments.

This section has five parts. First, it examines the prevailing myth that control of Australia’s borders is possible, and how this myth shapes public perceptions and government policy. Second, the theory of moral panics is applied to discourse that indicates that asylum seekers are a problem that is out of control. The third part examines the idea that asylum seekers and others subject to immigration detention have broken ‘the rules’, and therefore must be treated accordingly. The fourth part examines the function of the immigration bureaucracy and how it has evolved, and how this contributes to a culture of control and effects experiences of detention. Finally, the fifth part examines the extra-legal nature of immigration detention, and how this contributes to a culture of control.

The Myth That Control is Possible

Australia is an island nation at some distance from its nearest neighbours. Control over its borders against unwanted arrivals is theoretically possible. Unlike Europe or North America, Australia does not share land borders, which in other areas of the world are relatively permeable. Although Australia’s coastline is not easy to monitor, the journey to get to the coastline is a much more difficult exercise. Similarly, its distant location means that it is most often the final destination for airline passengers, so it does not host large numbers of transit passengers that cause problems in other countries (Cronin 1993:45). Therefore, the tiny numbers

of undocumented arrivals, Cronin (1993: 86) argues, is evidence that Australia is a 'control model success story'. Cronin (1993: 84) adds that the control model is a result of Australia's unique history as well as the geography. In mid-nineteenth century Britain, all foreigners had unrestricted rights of entry and residence. Australia was a different matter – it was deliberately settled, and from the outset its population was 'self-consciously' selected, and certain people were excluded on racial, health, character or political grounds.

Critics of Australia's recent policies towards asylum seekers who arrive by boat often argue that, compared to the number of unauthorised arrivals in other Western nations, the numbers of asylum seekers who reach Australia's shores are tiny. This is indeed true: in the year 2000-01, at the height of the 'fourth wave' of boats arrivals, 4,141 asylum seekers arrived in Australia by boat without authority (DIAC 2001), while in 2001, 88,363 people applied for asylum in Germany, 90,410 applied for asylum in the United Kingdom, and 61,710 applied for asylum in the United States (UNHCR 2001). These figures are often cited by advocates pointing out the lack of logic and overreaction in the government's response to asylum seekers. The issue for Australian authorities, however, is not that the numbers of arrivals are big or small. Rather, by making it onshore, asylum seekers challenge the image that Australia's borders are controlled. The myth that control is possible thus forms the foundational ideal behind Australia's approach to asylum seekers and non-citizen residents.

The Discourse of the Uncontrollable Asylum Seeker

In the last decade, three discursive themes have dominated how asylum seekers have been presented in the media and in public discussions in Australia. Each of these in different ways frame asylum seekers as uncontrollable. The first compares asylum seekers to natural disasters, the second to a military invasion, and the third creates an image of asylum seekers as people who break the rules. This discourse reinforces the myth that control of Australia's borders is possible, and justifies policy responses aimed at reinforcing this myth.

Many authors have noted how much of the discourse relating to asylum seekers in Australia describes asylum seekers in terms of a natural disaster. Pickering's (2005: 24) analysis of the *Sydney Morning Herald* and the *Brisbane Courier Mail* between

January 1997 to December 1999, for example, reveals the fear that Australia would soon be overwhelmed by asylum seekers. Discourse included terms such as:

‘awash, ‘swamped’, ‘weathering the influx’ of ‘waves’, ‘latest waves’, ‘more waves’, ‘tides’, ‘floods’, ‘migratory floods’...

Natural disasters are forces of nature that cannot be controlled by the nation state, they transcend national boundaries, and do not obey national rules. This language is also dehumanising, intimating that this migration is not happening to *people*, but part of the world ‘out there’. Finally, this language is apolitical: it assumes the idea that asylum seekers are a phenomenon of the natural world, and not caused by wars or other political or economic situations that Australian governments could in some way intervene to improve the situation.

The second theme is the discourse that asylum seekers pose a physical threat. This threat is described with a conflation of criminal and military terms to describe onshore asylum seekers. As Pickering (2005: 26) observes, terms implying criminality, such as ‘record arrest’, ‘swoop’, ‘incident’, ‘criminal gangs’ and ‘illegal run’ are conflated with more military terms, such as ‘incursion’, ‘sustained assault on Australian shores’, ‘gathering to our north’, ‘massing in Indonesia’. In Parliament in 2001, Clyne (2005: 182) notes that asylum seekers were referred to as ‘queue-jumpers’, ‘illegals’, ‘illegal arrivals’, or ‘illegal refugees’. Pickering (2005) and Burke (2008: 3-4) argue that this military imagery justifies a military-like response, and has been used to argue the case for the use of the Australian navy, coastguard and Australian Federal Police to monitor the borders.

Finally, the third category of discourse is about breaking the rules. The myth of the queue-jumper is central to this discourse, and discussed below. Leach (2003) argues that the ‘propaganda’ of the children overboard affair framed asylum seekers as unnatural, un-human, and therefore ‘other’. The idea that parents could throw their children overboard meant that they failed to meet ‘contemporary Australian standards of decency and parental responsibility’, and were therefore undeserving of protection. The pleas for help from asylum seekers were interpreted as attempts to bully their way into the country (Clyne 2007).

Such discourse perpetuates, reinforces, and creates a particular atmosphere around the issue of asylum seekers. Importantly, it also justifies and demands a particular political response. While the discourse centres on the asylum seeker being ‘out of control’, the response, therefore, is for the government to implement control where it is lacking.

Noisy and Quiet Moral Panics

Stanley Cohen’s (1972) theory of moral panics is a useful tool for analysing Australia’s response to asylum seekers. His theory highlights the role of the media and public discourse in creating a panic response to a social phenomenon, and justifies subsequent policy changes that tighten civil liberties. Cohen’s theory of moral panics highlights the power of such discourse in the public imagination. The Anti-Discrimination Board of NSW (n.d.: 3), for example, has argued that the media coverage of the *Tampa* affair and asylum seekers more generally, the terrorist attacks in New York in 2001, the Bali bombings, and the international ‘war on terror’ cumulatively generated a ‘moral panic’ in Australia. Moral panics are characterised by heightened public concern about an issue that is disproportionate to its actual threat, and often lead to a conservative and authoritarian response that involves, in particular, the tightening of civil liberties. Both of these factors can be observed in the Australian response to onshore asylum seekers.

Cohen’s theory, however, has limited use in explaining the government’s treatment of asylum seekers in the first decade of immigration detention, and the detention and deportation of permanent residents with cancelled visas. In their essay comparing immigration detention practices in the United Kingdom and the United States, Michael Welch and Liza Schuster (2005) extend Cohen’s theory to develop a more sophisticated explanation of political responses to social issues. They compare the ‘noisy’ moral panic about asylum seekers in the UK, with the relatively ‘quiet’ moral panic about the same issue in the US. For the authors, the situation in the United States is interesting because of the secretiveness of the government’s response to the problem of asylum seekers, which, they argue, is ‘quietly concealed by government officials’ (Welch and Schuster 2005: 398). This has resulted in the policy implementation reminiscent of the practice of ‘disappearing’ people under totalitarian regimes (Welch and Schuster 2005: 409).

It is still, nevertheless, driven by a moral panic among authorities about border security, albeit a 'quiet' moral panic. In both countries, however, the solution to the problem of asylum seekers remains the same: 'subjecting asylum seekers to unnecessary detention in harsh conditions of confinement' (Welch and Schuster 2005: 398).

In 1989, Australian politicians were concerned about the arrival of the Cambodian asylum seekers (Brennan 2003, McMaster 2001), and opened the first immigration detention centre in Port Hedland. This response was closer to Welch and Schuster's 'quiet' moral panic than to Cohen's 'noisy' panic. McMaster (2001) and Brennan (2003) argue that the arrival of Cambodian boat people in 1989 were an embarrassment to the Australian government. The then Minister for Foreign Affairs, Gareth Evans, had played an instrumental role in negotiating a peace plan in Cambodia, and the continued arrival of asylum seekers contradicted his claim that the problems in that region were solved. Their confinement in Port Hedland, then, was more to keep them out of the public eye than gain political mileage from the policy. The positioning of detention centres in out-of-the-way places such as Port Hedland and Woomera indicates that the intention of the Australian government in 1989 and the 1990s was to keep the issue of detention quiet.

The secretiveness has continued in more recent years in cases of onshore asylum seekers when it is politically expedient. In September 2007, five West Papuan asylum seekers were detained in the Horn Island Detention Centre before being deported back to Papua New Guinea, with no processing of their applications for asylum. Very few Horn Island residents knew about the presence of these asylum seekers on the island, nor was the issue made public to the media (Hart 2007). The secretiveness of this operation indicates the sensitive nature of the West Papuan arrivals regarding the tension between Indonesia and Australia over the issue of West Papua. It also indicated one flaw in Australia's asylum policy, which aimed at limiting access to asylum seekers who come to Australia through other safe countries. For West Papuans, Australia is the first safe country on their journey, not the last of many. Similarly, people-smuggling disruption operations undertaken by the Australian Federal Police in Indonesia have been underway since 2001, and these are operations of which most Australians are unaware.

Finally, there is no noisy moral panic about other categories of immigration detainees. As explained throughout this thesis, detainees other than asylum seekers have received very little attention in the media, with advocates or academics. In his study of deportation in Australia, Glenn Nicholls (2007) points to the sharp rise in numbers of people who are deported from Australia each year since the mid 1990s. Since 2000, Australia has deported over 10,000 people each year, making Australia the largest deporting nation in the Western world. This figure includes between 40 and 120 deportations of long-term permanent residents on criminal grounds each year since 2000 (Nicholls 2007: 155). Far from being an issue of moral panic, this is an issue which is not known about within the Australian community.

Why are increasing numbers of permanent residents detained and deported? While there is no 'noisy' moral panic around this issue, their detention cannot be explained by reasons of political gain. Again, this issue can be best explained using theories of control, and in particular, the notion of 'breaking the rules'.

Breaking 'the Rules'

For obvious reasons, rules are important to any nation state. Laws, regulations and administrative procedures define a state and guide norms of acceptable behaviour in its population. Yet, quite separately from the official laws and administrative procedures, the notion of 'the rules' holds an important place in the Australian national consciousness. This section explores the publicly-held notion of 'the rules' as it relates to immigration. Essentially, the act of breaking the rules, just like breaking the laws, is met with punishment, but not necessarily through the judicial system.

In common parlance the notion of 'the fair go' is central to Australian national identity. Unlike the 'American dream', which encourages the rise of individuals by whatever means they can, the Australian 'fair go' reflects a more egalitarian sentiment. It is the idea that everyone should have the same opportunities to the liberal promise: to live successful and fulfilled lives. The word 'same' is crucial, however. A 'fair go' requires that everyone should have the *same* opportunities, that is, they must abide by the *same* rules. Anything less (or more) than this gives an unfair advantage, and thus, is no longer fair.

‘The rules’ as discussed here, therefore, are distinct from laws or administrative procedures. They are closer to the concept of natural justice, or simply a common sense attitude to how the world should work. Importantly, they are intimately tied to the Australian national identity; they express a sense of who ‘we’ are. In his essay *His Masters Voice*, David Marr (2007) argues that the idea that Australians are anti-authoritarian larrikins is a myth that is essentially misplaced. In fact, Australians are rule-abiding people, ‘deferential, businesslike and orderly’ (2007: 26), have never struggled for freedom, and are shaped still today by our British heritage. Marr (2007: 26) writes:

We aren’t the larrikins of our imagination. Australians are an orderly people who love authority. We grumble instead of challenging it. We despise politicians. Belittling them as a class is a cover for our own passivity. We elect leaders much as we hire electricians: we may whinge about the job and haggle over the bill, but essentially we leave them to get on with their work.

Marr (2007: 26) goes on to cite historian John Hirst:

Australians think of themselves as anti-authority. It is not true. Australians are suspicious of persons in authority, but towards impersonal authority they are very obedient. This is a country which for a long time closed its pubs at 6 p.m. and which pioneered the compulsory wearing of seatbelts in cars. Its people since 1924 have accepted the compulsion to vote. Its anti-smoking legislation is so tough that smoking is prohibited in its largest sporting stadium, the Melbourne Cricket Ground, though it is open to the skies.

Australians, in general, believe in rules and follow them, and this has direct relevance to our response to non-citizens seeking to live in the country. In addition to the *Migration Act*, a number of ‘rules’ pertaining to immigration have become entrenched in policy and public understanding. These rules are quite separate to immigration laws, but it is arguable that immigration detention is a policy response more to these rules than it is to actual migration laws.

The myth of the ‘queue’ for entering Australia is, at its essence, about rules. This is the notion that, by making their own way to Australia, and without waiting to be chosen, asylum seekers have taken the place of those who are patiently waiting their turn; in short, they have ‘jumped the queue’. The myth can be dissected into two separate parts for analysis. First, at its core of the myth of the queue is

another myth: that Australia can only give a limited number of protection visas each year. In reality, Australia could grant as many protection visas as it wants. Indeed, the number of protection visas granted annually (12,000 until 2005, then increased to 13,000) is an arbitrary figure that changes each year depending on need. The table below shows how the quota of 13,000 has been exceeded every year since 2003:

Category	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
Refugee	4134	5511	6022	6003	6004	6499
Special Humanitarian	8927	6755	6836	5275	5026	4625
Onshore Protection	788	895	1272	1701	1900	2378
Temp. Humanitarian Concern	2	17	14	38	84	5
Total	13851	13178	14144	13017	13014	13507

(DIAC 2009c)

Obviously, it would be unsatisfactory to grant protection to such large numbers of people that the government would be unable to provide adequate services for them. Yet this is currently not a scenario that Australia faces. Therefore, by applying for protection, onshore asylum seekers do not dislodge another application for protection, and do not take up precious places in the ‘queue’.

Second, many commentators have pointed out the impossibility for many asylum seekers to join the queue, even if there was one (see Leach and Mansouri 2004). The very act of fleeing, and the nature of the regimes from which they seek protection, mean that often asylum seekers do not own or carry personal identification, let alone travel documents and passports. Leach and Mansouri (2004) point to the absurdity of the idea that an asylum seeker could ask their government, from whom they are persecuted, if they could have a passport. Moreover, in many of the Middle-Eastern and Asian countries through which asylum seekers pass, there are no Australian embassies in which asylum seekers can apply for Australian protection. Some of the refugee camps in the region are home to tens of thousands of people, and the likelihood that one would be chosen from the camp for resettlement in a third country (Australia being one of the few countries that offers such resettlement) is slim. Most often, asylum seekers remain in refugee camps for years on end – with little personal security, health, education or employment opportunities – until it is determined safe to return to their home country, or the host country withdraws its protection.

Yet the idea of asylum seekers as ‘queue-jumpers’ has had much currency in Australian popular opinion. By coming to Australia and asking for protection, asylum seekers have broken neither international nor domestic laws. Moreover, the *Refugee Convention* requires that asylum seekers should not be discriminated against for the method in which they enter a country to seek asylum. The myth of the queue, therefore, is about rules, derived from our Australian ideals of ‘a fair go’ and the right way that things ought to be done. It has nothing to do with the law. When, during the 2001 election campaign, then Prime Minister John Howard asserted that ‘we will decide who comes to this country and the circumstances in which they come’, he claimed for Australia – or more precisely, the Executive – the right to set the rules.

Michael Clyne (2007: 203) argues that the language of queue-jumpers invokes two reactions from the Australian public, based on two ‘moral principles’. The first is the schoolmaster principle: if asylum seekers don’t behave themselves, they have to be punished. The second is the schoolchild principle: ‘it ain’t fair, they pushed in’. Both are grounded in notions of fairness, and both require, on moral grounds, punishment of the guilty party.

By not following the rules, asylum seekers who have made their way to Australia have shown that they are less worthy of Australia’s protection than those who wait patiently in refugee camps (in the queue). Moreover, they have shown that they do not respect the notion of fairness and are therefore unlikely to be suitable for integration into the Australian community: they would be ‘un-Australian’. The response from the Australian government, and supported by the Australian public, is incarceration in detention centres. The outcome reveals a poignant symmetry. Just as the response by the Judiciary for breaking the laws is incarceration in prisons, the response by the Executive for breaking the rules is incarceration in detention centres.

Immigration Bureaucracy: Implementing Control

The notion that asylum seekers must follow the rules implies that there are consequences if they do not. Rules are black and white – they are either adhered to or not – and breaking them elicits a specific response. As explored in depth in Chapter 6, the administrative framework for dealing with onshore asylum seekers

has incrementally removed any amount of discretion available to migration officers. Therefore, if an onshore asylum seeker meets the admission criteria, he or she is allowed to enter and live within the country. If not, they are detained until they are deported. The lack of flexibility and discretion allowed to immigration officers within the *Migration Act* means that administrative procedures are automated, contributing to the level of control over immigration detention.

The lack of discretion granted to migration officers can be found in parts of the *Migration Act*, such as section 189 that states that if an officer ‘reasonably suspects’ that a person does not have a valid visa, then the officer ‘must’ detain the person until their visa status is confirmed or they are removed from the country. The emphasis on the word ‘must’ means that officers have an obligation to act on their suspicion, but no corresponding obligation to confirm whether their suspicions are correct (see Crock et al. 2006: 157).

A number of inquiries into the immigration department identify the issue of department ‘culture’ as a problem resulting in numerous cases of wrongful detention and cases of abuse and neglect within detention. The Palmer (2005) report into the wrongful detention of the permanent resident Cornelia Rau, the Comrie (2005) report into the wrongful detention and deportation of the citizen Vivian Solon, and 10 separate Ombudsmans reports (2006a-e, 2007a-e) into wrongful detention and ill-treatment of detainees, found that the department culture contributed to these problems. Palmer (2005) observes that the department culture focused on process and was geared towards achieving quantitative results, rather than seeking the best outcome for the clients. Similarly, in his study of deportation in Australia, Nicholls (2007) argues that compliance overrides all other considerations in decisions of deportation, including the length of time the deportee has lived in Australia, and the impact that deportation would have on the deportee or their family. For Nicholls, the immigration department functions like an ‘unthinking, unstoppable machine’ (2007: 11), and deportation can ‘all too easily function like an apparatus or a series of unstoppable processes in which there are only anonymous functionaries and nameless victims’ (2007: 170).

In *Modernity and the Holocaust*, Zygmunt Bauman (1989) argues that the function and nature of bureaucracy itself must be central in all explanations for the

holocaust of European Jews in the 1940s. Responding to the argument that the holocaust was a temporary return to a barbaric pre-modern primitivism, Bauman argues that, to the contrary, the ‘necessary condition’ for the Holocaust is modern bureaucracy. Modern bureaucracy created the environment of ‘matter-of-fact efficiency’ that forms one of the most cherished aspects of modern civilisation, and that enabled the genocide of European Jewry. According to Bauman (1989: 15), ‘mass murder on an unprecedented scale depended on the availability of well-developed and firmly entrenched skills and habits, in short, which best grow and thrive in the atmosphere of the office’.

Two parallel processes are central to a modern efficient bureaucracy. The first is ‘the meticulous functional division of labour’ (1989: 98). By this, Bauman means that each administrator has responsibility for his or her own specific task, which are compartmentalised from other tasks within the organisation, and importantly, removed from the ultimate outcome of the exercise. Hence the administrator has only an abstract, ‘detached awareness’ of the end result of their labour. The second, related process is the ‘substitution of technical for a moral responsibility’ (1989: 98). Each administrator is judged only on the technical accomplishment of his or her specific task, and it is only for this task that he or she is responsible. Bauman explains (1989: 102):

The instinct of workmanship ... focuses fully on proper performance of the job in hand. The practical devotion to the task may be further enhanced by the actor’s craven character and severity of his superiors, or by the actor’s interest in promotion, the actor’s ambition or disinterested curiosity, or by many other personal circumstances, motives, or character features – but, on the whole, workmanship will suffice even in their absence. By and large, the actors want to excel; whatever they do, they want to do well ... Morality boils down to the commandment to be a good, efficient, and diligent expert and worker.

For Bauman, however, efficient bureaucracy was more than simply the method for enabling the holocaust. Rather, the very conceptualisation of an ideal Aryan society was made possible because of the emerging bureaucratic mindset. A bureaucratic sensibility categorises, classifies, and places things in order. It identifies things that are in conflict with this order, and ‘prompts us to view society as an object of administration, as a collection of “problems” to be solved’

(1989: 18). Ultimately, bureaucracy has a 'logic and a momentum of its own' (1989: 104).

The Palmer (2005) inquiry into the detention of Cornelia Rau came to conclusions that confirm Bauman's theory about bureaucracy. For example, Palmer (2005: x) found:

During Ms Rau's detention the DIMIA management approach to the complexities of implementing immigration detention policy appeared to be 'process rich' and 'outcomes poor', with the predominant, and often sole, emphasis being on the achievement of quantitative yardsticks rather than qualitative performance. The organisation structure and arrangements fail to deliver the outcomes required by the Government in a way that is firm but fair and respects human dignity.

Similarly, the Comrie (2005) report into the deportation of Vivian Solon concluded that Solon's deportation happened as a 'dehumanised mechanical process'. After the Palmer (2005) and Comrie (2005) inquiries were completed, the Department changed its operational theme to 'People, Our Business' as part of an overall strategy to change department culture and implement more 'client-focused' procedures (DIMIA 2005), perhaps as a reminder to staff that the subject of their work was people's lives.

The Extra-Legal Nature of Detention

The limits placed on visits and scrutiny of detention centres by both individuals and regulatory organisations means that, in effect, detention centres are extra-legal spaces. The lack of regulation, transparency and accountability relating to daily life within the centres means that the failure to protect detainees' rights is not only possible, but has occurred in numerous cases. By extension, detention centres are places where illegal things can happen. This is not to say, however, that detention centres are 'out of control'. Instead, detention centres are sites of arbitrary control, imposed by detention staff, and this is crucial to the experiences of detainees, and therefore the meaning of detention.

This chapter earlier outlined problems stemming from the lack of scrutiny and regulation of detention centres, and chapter 1 discussed how surveillance by non-government and international organisations, the media, academics, and the general

public, has been limited since 1989. Even the normalising influence of visits by individuals is made difficult. The effect is that detention centres become sites of arbitrary rules, enforced at the whim of the detention staff. The arbitrary rules enforced within detention centres are a common theme in accounts from visitors and detainees. One visitor explained (ACHSSW 2006: 32):

You could take paper and then you couldn't take paper. You could take a cane basket and then the next day you couldn't. It's just these completely arbitrary ridiculous rules. They wanted to count photos on the way in and on the way out and one time I'd taken these photos in and they hadn't counted them, but on the way out they insisted they had to count them even though they didn't know how many had come in. The latest thing about the photos was that I could take photos in, but not photos of me, only ones without me. Someone else could take in a photo of me, but only if I wasn't there, and they would seriously tell you this sort of stuff and you just have to stand there.

The use of isolation (management) units to confine detainees was also made arbitrarily by detention staff, as are other punishments. The first report of the *People's Inquiry* (ACHSSW 2006: 41) cites a 2004 ACM document outlining the five stage management process for people who 'have demonstrated unacceptable behaviour or who have demonstrated behaviour that has threatened the security and good order of the facility': first is placement in 'management unit', then through four stages of increasing freedoms, including visits, phone calls, 'time out' of the room and the ability to earn merit points. Detainees who 'demonstrate consistent good behaviour are rewarded by progression on to further stages of opportunity'.

The idea of the extra-legality of carceral institutions is a recurring theme with certain writers. In *Madness and Civilisation*, Foucault (1967: 37) wrote about the *Hôpital General* in Paris as an extra-legal site:

From the very start, one thing is clear: the *Hôpital General* is not a medical establishment. It is rather a sort of semijudicial structure, and administrative entity which, along with the already constituted powers, and outside of the courts, decides, judges, and executes ... A quasi-absolute sovereignty, jurisdiction without appeal, a writ of execution against which nothing can prevail – the *Hôpital General* is a strange power that the King establishes

between the police and the courts, at the limits of the law: a third order of repression.

In *Homo Sacer*, Agamben (1998: 174) also describes ‘the camp’ as an extra-legal space:

a space in which the normal order is de facto suspended and in which whether or not atrocities are committed depends not on law but on the civility and ethical sense of the police who temporarily act as sovereign.

Within detention centres, the lack of outside legal scrutiny means that illegal things can happen there, and abuse and general violence can and does occur. The case of the repeated rape of one detainee, described above, is one example. Another example is the prevalence of illicit drugs within detention. In 2003, detention staff on Nauru were charged with drug dealing (*SMH* 2003). In 2008, the media reported dealing of drugs and drug use within Villawood detention centre (Dikeos 2008), again alleging that centre guards were doing the dealing.

The management of detention centres by private corporations puts in place a level of separation between what happens in immigration detention and the government: while the government ostensibly holds duty of care for detainees, they can also, quite truthfully, claim ignorance of specific cases. This hands-off approach means that the conditions and treatment that detainees experience as punishment, as discussed in Chapter 7, is made possible.

Conclusion

Many scholars have offered racist theories as an explanation for both the policy and the implementation of immigration detention. This explanation is ultimately unsatisfying, because it has been developed in response to only one group of detainees: asylum seekers. A racist argument does not account for other categories of people subject to immigration detention, nor does it explain why some groups of people are allowed to live within the community, despite seemingly breaking the same rules as those detained.

This chapter has argued that the concept of control is more useful as a broad framework for examining and explaining the processes behind immigration detention. The notion that control of Australia’s borders is possible has been part

of the Australian consciousness since white settlement. In addition, the notion that Australians generally believe in, and follow, rules, has created a society that values administrative procedure and order. This theory explains why those who fail to follow the rules – even arbitrary, cultural common sense notions of natural justice – are punished. It also explains how the alienation of administrators from the outcome of their labour, and the dehumanisation of the people subject to the bureaucratic process can lead to bureaucratic immigration systems that harm people.

This argument is not intended to dismiss the existence of racialism in Australia, nor the impact that this racialism – however latent – has had on Australia's response to asylum seekers. Such an argument would be misguided. The admissions by many Coalition Members of Parliament that Australia's border security was an attempt to retrieve votes from the One Nation movement (recounted in chapter 1) is evidence that, at the very least, the harsh policies of the early 2000s were in part aimed at appeasing a xenophobic section of the Australian population. Yet to argue that the Australian policy to lock up people who arrive by boat is a sign that our politicians are racist is too simplistic. If it was the case, then Australia would also have a policy of detaining onshore arrivals who come by airplane, and perhaps would not resettle 13,000 refugees per year, nor accept approximately 180,000 migrants per year.

The issue of the increasingly strict regulations around immigration in general supports the argument of control. Mares (2009) explains that over the last decade, the number of people accepted for migration in Australia has risen sharply, but at the same time, selection of migrants has become stricter. Temporary migration is now favoured over permanent migration, and fewer people are allowed to migrate to Australia for reasons such as family reunion. People are instead increasingly selected on their contribution to the economy, based on a list of areas in which there are skills shortages. Potential migrants are more likely to be accepted if they are a baker and willing to work in a rural area, then, than a grandmother who wishes to live with her Australian-born grandchildren. At the centre of this shift is the same core value as the policies regarding onshore asylum seekers – decisions about who is able to migrate to Australia is made by the Executive. A person does not have the right to migrate to Australia simply because she becomes a

grandmother, instead, she has to be chosen by Australian authorities according to their own specific guidelines.

The idea that one of the roles of federal government is to determine who lives in Australia has been a consistent idea since Federation in 1901 (Reynolds and Lake 2009). Combined with a myth that control of Australia's borders is possible, different forms of administrative detention have attempted to implement this control. Yet the myth of control is just a myth: Australian authorities cannot stop people entering the country by boat. Nor, as a signatory to the *Refugee Convention* can it turn them away once they have arrived. This dilemma is reminiscent of what Garland (2001b: 200) describes in relation to prisons: states cannot ensure that crimes will not be committed; the best they can do is to control people – through confinement or punishment – after they have committed a crime, in an attempt to deter others. The same reasoning applies to immigration detention: it is an attempt to impose control over the people who break the rules, *after* they have done so. Immigration detention represents the will of the government to control national borders, despite the impossibility of actually doing so.

The final two chapters explore this paradox of control at the national borders and the function of immigration detention in more depth. Chapter 6 outlines how the Executive has restricted regulation of immigration detention by the Judiciary, the Parliament, and other regulatory organisations. The Executive has achieved a high degree of control over who is detained and the conditions of that detention, at the expense of the checks and balances important to a liberal democracy. In the unregulated space created by the lack of checks and balances, chapter 7 examines the experiences of detainees, and asks whether people are punished in detention.

Chapter 6

Executive Control over the Policy and Practice of Immigration Detention

The separation of powers as enshrined in the commonwealth Constitution is a fundamental principle of Australia's democratic political system. The three arms of government – the Executive, the Judiciary, and the legislature – provide checks and balances over each other. This chapter argues that the policies of immigration detention have been characterised by the incrementally increasing powers of the Executive. This power has been achieved through the diminution of the powers of the judicial and legislative arms of government, and by dismissing criticisms about detention policy and practice from non-government actors. The end result was that for a short period between 2001 and 2005, the Executive had unregulated control over the lives of people subject to immigration detention.

To justify increasing Executive control over immigration detention and other migration decisions, consecutive governments have articulated a populist ideology about migration matters. This is the view that migration matters should be determined by the Australian people – via their elected government – and not by the courts or by human rights organisations. The extension of this view is that the Executive is best placed to enact the public will, and that migration policy decisions should not be laboured down by constitutional liberalism concerned with the proper democratic checks and balances. Prime Minister John Howard's famous 2001 election assertion that 'we will decide who comes to this country, and the circumstances in which they come', is a clear articulation of this position. This chapter argues that migration matters, arguably more than any other area of government, are susceptible to this view.

This chapter examines how Executive control over immigration policy, and particularly around immigration detention, was sought by a multifaceted erosion of the various aspects of the 'checks and balances' of Australian government. Each of the six sections of this chapter deals with different aspects in turn. The first section examines the incremental amendments to the *Migration Act* that limited the power of the Judiciary to regulate the policy and practice of

immigration detention. The second examines the relationship between the Executive and the Parliament, focusing specifically on the period 2001-2005, during which many standard Parliamentary procedures were overridden to facilitate dramatic changes to migration law. The third section explores the role of the Refugee Review Tribunal (RRT) and the political pressure it has received from ministers over certain decisions. The fourth section examines the issue of ministerial discretion, and the unchecked powers of the Minister for Immigration to determine individuals' fate. The fifth section examines the Executive's response to criticisms of immigration detention by domestic and international regulatory bodies.

These five sections examine, primarily, Executive power with regards to asylum seekers in detention. Asylum seekers, however, are not the only category of immigration detainee. The sixth section of this chapter examines the issue of Executive control over the administrative processes relating to cancellation of permanent residency visas on character grounds. As with policies regarding the detention of asylum seekers, the policies concerning the detention and deportation of people whose visas have been cancelled have been developed to reduce the regulatory capabilities of the other arms of government.

This chapter maps both the gradual changes to the *Migration Act* that increase Executive control, and notes the periods characterised by high levels of tension between different arms of government. Key changes to the Act began in 1989, the same year that immigration detention was introduced. The 'Executive' in this thesis, then, includes the Hawke and Keating Labor ministries (1983 – 1996), the Howard Coalition ministries (1996 – 2007), and the Rudd Labor Executive from 2007. Both major parties introduced laws to control migration decision-making and reduce external interference whilst in government. The Howard Coalition government was most forceful in pursuing this objective, and domestic and international events conflated to enable a small window of Executive control from 2001 to 2005. One aspect of Labor's 2007 election campaign was a promise to return accountability and transparency to government policy and practice, including migration policy. Since 2007, the Rudd Labor government has reversed some of the most controversial aspects of the Howard Coalition migration policies, but many aspects remain. The emphasis on 'the Executive' in this

chapter, rather than on a particular government, illustrates that unregulated Executive power is a risk inherent to democracy.

Whilst this chapter always refers to the governing party and the minister responsible for specific decisions, this is not a study of the policies of the two different parties. Indeed, many Labor and Coalition detention policies are striking in their consistency, and such a study would make a relatively uninteresting project. Instead, the focus of this chapter is the role of 'the Executive' in general terms, and its relationship with the Parliament, the Judiciary, and other regulatory bodies, within the context of migration matters. In such a study, the continuities between the parties and their shared ideology about Executive control over migration matters become more intriguing. Such a study ultimately raises important questions about the health of Australia's liberal democracy.

Executive Control over the Asylum Decision-Making Process

This section explores five areas of the visa determination process that illustrate the struggle of the Executive for control over asylum decision-making, including decisions about detention. These five areas include judicial review, the legislature, the Refugee Review Tribunal (RRT), ministerial discretion, and review from domestic and international non-government organisations. The relationship between the Executive and each of these actors with regards to immigration decision-making raises important questions about the separation of powers in the Australian constitution. A study of each area reveals that the regulation of the entry and stay of non-citizens has increasingly been regarded as a populist democratic decision. Constitutional liberal democratic principles have been viewed as, at best, a hindrance to achieving desired policy outcomes.

Judicial Review of Migration Decisions

Refugee law comprises three overlapping areas of law: international law, constitutional law, and administrative law. Only since the 1980s has refugee law been recognised as a discreet legal discipline. Since then, refugee law has become one of the most substantial sources of work for the High Court, as well as being the single largest source of work for the Federal Court (Sackville 2004). Also during this short time the legislation has expanded. The *Migration Act* has grown from 35 pages in 1958 to nearly 500 pages, plus voluminous regulations, in 2002

(McMillan 2002: 16). This section provides a chronological overview of the relevant changes to the *Act*. It focuses specifically on those changes that illustrate tension between the Executive and Judiciary over asylum matters, and shows how political decisions regarding refugee policy have been developed with judicial decisions in mind. It demonstrates that policy has developed in a way that attempts to exclude the Judiciary from asylum determination process as much as possible.

The 1970s and 1980s: The Early Days of Judicial Review of Migration Decisions

The *Immigration Restriction Act 1901* controlled immigration with various mechanisms, including the unfair and arbitrary dictation test, and considerable discretionary powers of migration officers. The introduction of the *Migration Act* in 1958 ended the dictation test and the discretionary powers of the migration officers, and implemented in its place sweeping powers of the Minister to admit, exclude or expel non-citizens without independent or judicial review (Crock 1992: 439). There were no procedural guidelines or decision-making criteria in the early versions of the *Migration Act*, nor in department documents. The immigration department had a reputation for arbitrary and overtly political decision-making (Crock 1992: 11). Officers made decisions on migration matters with little training or supervision (Crock 1992, Martin 1989). In her history of migration law, Crock cites anecdotal evidence that indicates decisions were often made more on the grounds of dress and presentation than on qualifications and hardship (Crock 1992: 11, see also Martin 1989). The *Migration Act* made no reference to refugees until October 1980, and responsibility for determining the status of applicants within Australia was not vested in the Minister until 1983. During the 1970s and early 80s, decisions about refugees were made behind closed doors and in an ad hoc manner. This meant that the grant of refugee status was a highly political process, with little accountability (Crock 1992: 280).

According to Crock (1992), a survey of case law before the 1980s reveals a Judiciary that was largely supportive of government initiatives in the area of immigration. She suggests two possible reasons for this: that within the Judiciary there was a certain amount of social conservatism with regards to the entrance of non-whites into Australia, and that the courts had a particular view that migration decisions should be made by the Executive and that their role in this area should

be one of non-interference (Crock 1992, McMillan 2002b). The fact that courts were largely supportive of first stage decisions when it came to migration matters, and the high cost and procedural complexity of the judicial system, meant that judicial review of administrative decisions was rare until the late 1970s (Crock 1992: 26).

Two significant changes in the end of the 1970s led to a massive increase in the number of migration decisions being reviewed in the Courts. The first was the establishment of the Federal Court in 1976. The Federal Court has jurisdiction to determine the legality of administrative decisions. The second was the introduction of the *Administrative Decisions (Judicial Review) Act 1977* (hereafter *ADJR Act*), which commenced operation in 1979. The *ADJR Act* simplified the procedures for judicial review, making it accessible to claimants. It also codified the grounds on which the validity of an administrative decision could be challenged, and it created a right to obtain a written statement of the reasons for an administrative decision. In effect, the *ADJR Act* made administrative decisions accountable. Proceedings under the *ADJR Act* could be heard in the Federal Court. Crock (1992: 42) describes the *ADJR Act* as having a ‘revolutionary’ effect on the relations between the Judiciary and the Executive. With the *ADJR Act*, the Federal Court gained the power to intervene directly in the decision-making process, and as a result, there was a surge of judicial review of refugee decisions in the 1980s. By the end of the 1980s the courts had fully incorporated an approach to migration issues that emphasised the two fundamental principles of administrative law: natural justice and procedural fairness (Crock 1992). The High Court’s decision in *Kioa v West (1985)*, for example, upheld the notion that in deporting a person the Minister was required to observe principles of natural justice. As Crock (1992: 42) explains, ‘the courts changed the actual interpretation of the [*Migration*] Act. From the administration’s viewpoint, the effect was explosive’. As a result, there was a surge of judicial review of refugee decisions in the 1980s. An important consequence of this increase in judicial review was that the ‘intimacy’ of politicians’ involvement in every aspect of refugee determination system became problematic (Crock 2004: 5).

1989 was a watershed year in refugee law and policy (Crock 2004). During this year Australia experienced high numbers of boat arrivals of Cambodian refugees,

which, as described in Chapter 1, was a potential political embarrassment for the then Labor government. In 1989, also, in response to the Tiananmen Square Massacre, Prime Minister Bob Hawke publicly promised asylum to every Chinese student currently residing in Australia, if they did not want to return to their home country. The Prime Minister made this promise, publicly, without consultation with his ministers or the Department of Immigration (McMaster 2001). The first major reform to the *Migration Act* in 1989 had at its core measures aimed at encoding the procedures for the refugee decision-making process. The reform set out clearly and in great detail the steps of processing an application and the criteria that must be applied in order to make a lawful migration decision. This meant that the Minister or Prime Minister could not grant applications as they wished, but no longer could they deny them as they wished. Instead, a strict and complicated procedure was introduced. One effect of these migration regulations was that the successful completion of the application procedure itself became a test for the entry and stay, above the criteria of the needs or desirability of the applicant. As Crock (1992: 48) explains:

The *Act* stipulated that applications for a visa or an entry permit must be made on the correct form, in accordance with the Regulations and be accompanied by the correct fee. If the applicant meets the criteria set out in the regulations, the legislation requires the grant of a visa or entry permit. Should the applicant fall short of all the requirements, the *Act* forbids the grant ‘in any circumstances’.

Following the correct procedure thus became one of the first ‘tests’ on entry to the country. The changes also forced judicial scrutiny of migration matters away from issues of merit or fairness, towards narrower questions of statutory interpretation.

The 1990s: Tit-for-Tat Over Judicial Powers of Review

During the 1990s, the Executive and the Judiciary played out a ‘tit-for-tat’ exchange over refugee decisions and legislation (McMillan 2002a, 2002b, Crock 2004, Vrachnas et al. 2008) that resulted in a ‘fine-tuning’ (Cronin 1993: 83) of the *Migration Act*. In most cases this exchange took the form of judicial interpretation of the legislation including international jurisprudence and the Refugee Convention in the first instance, followed by a legislative response from the

Parliament. Cambodian refugees were at the heart of this ‘tit-for-tat’ exchange, whereby ‘each major refugee “win” in the court [was] met by “remedial legislation”’ (Crock 2004: 5).

The amendment to the *Migration Act* (*Migration Amendment Act 1992 Part 2 Division 4B*) that enacted the policy of mandatory detention was a good example of this exchange between the Executive and the Judiciary. Cambodian asylum seekers who had been detained at Port Hedland since 1989 mounted a case challenging the legality of their detention. The amendment to the *Act* was passed two days before the case was heard. Section 54s of the *Act* now provides that ‘a court is not to order the release from custody of a designated person’ (the term that replaced the term ‘unauthorised entrant’), and section 54U ensures the primacy of the amendment over any other law in force in Australia ‘written or unwritten’, except the constitution (Crock 1992: 303, 462).

The then Minister for Immigration, Gerry Hand, was explicit in Parliament in explaining that the policy of mandatory detention was intended to limit the ability of the courts to regulate policy and practice. Hand (1992) stated:

The most important aspect of this legislation is that it provides that a court cannot interfere with the period of custody. I repeat: the most important aspect of this legislation is that it provides that a court cannot interfere with the period of custody. No law other than the Constitution will have any impact on it.

This view had bipartisan support, with Liberal Member of Parliament Michael MacKellar (1992) agreeing that:

One of the great problems that have occurred, particularly since this Government has come to power, is that the immigration program has been taken over by the lawyers. Successive Ministers for Immigration have found it extraordinarily difficult to administer properly their responsibilities under their oath of office, simply because the lawyers and the courts have assumed an ever increasing role and to that extent in many ways have taken control of the program away from the Minister and the government of the day. We need to make sure that the legal system does not preclude the government of the day and the Minister of the day from exercising their responsibilities properly. I think this has occurred to a very great extent, and I am very pleased to see that

the amendments coming before the House today go at least some way towards resolving that problem.

The mandatory detention laws were passed quickly. Similarly, during a court challenge in which Cambodian asylum seekers sought compensation for undue length of time spent in detention between 1989 and 1992, the Labor government acknowledged that it had detained some non-citizens without authorisation (Crock et al. 2006: 176), yet still passed the amendment (*Migration Amendment Act No 4 1992*) to cap compensation payable to at one dollar a day.

The case of *Chu Kbheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) (hereafter *Lim*) was arguably the most significant judicial decision about the detention of asylum seekers, and formed a precedent for subsequent cases. *Lim* was a case brought by Cambodian asylum seekers challenging the constitutionality of their detention by the Executive. In *Lim*, the High Court acknowledged that the Executive did not have the power to detain a citizen without a court order. The detention of ‘aliens’, however, was considered a different matter than the detention of citizens. Detention of aliens may legitimately come under the jurisdiction of the Executive, then, as section 51 of the constitution grants the Executive power to create laws regarding aliens. The Court found that the detention of Cambodian asylum seekers was not for purposes of punishment, but an administrative process to facilitate removal. In this case, also, the ‘legal fiction’ of the three-walled prison was developed: the Cambodians, according to the High Court, were not being detained, they were simply being restricted from entering Australia, and could leave and travel to any other country as they wished (Crock et al. 2006: 179).

Also in 1992, the *Migration Reform Act 1992 (Cth)* limited judicial review of administrative decision-making. The two principles of this Act underpinned this objective. The first principle was that challenges to visa refusal and refugee determination decisions had to, in the first instance, appeal to either the Immigration Review Tribunal (IRT) (superseded by the Refugee Review Tribunal [RRT] in 1993). This was a positive step to provide a second stage of merit review, yet it also serves to keep decision-making about asylum seekers out of the courts. The second principle was that judicial review was thereafter possible in a Federal Court, but only under the modified part 8 of the *Migration Act*, rather than

the *ADJR Act*. Part 8 of the *Migration Act* excluded some grounds that had previously been available under the *ADJR Act*, in particular a breach of natural justice, unreasonableness, and relevant and irrelevant considerations (McMillan 2002a: 17). Crock and Saul (2002: 58) explain that under part 8 the Federal Court cannot intervene even if the Department's decision breached the common law rules of natural justice, is so unreasonable that it could have been made by no reasonable person, is made in bad faith, appears to be biased, is made taking irrelevant considerations into account or was made without taking relevant considerations into account, or constitutes an abuse of power.

The *Migration Reform Act 1992*, however, did not decrease the numbers of cases of judicial review of refugee decisions. To the contrary, they steadily increased throughout the 1990s. In fact, judicial review also now included the decisions of the RRT and AAT and the professionalism of their members (McMillan 2002b). Neither did the *Migration Reform Act* divert cases from the High Court. As the High Court has the exclusive jurisdiction to provide administrative law remedy for the actions of a Commonwealth officer, many proceedings continued to be commenced before the High Court. By the end of the 1990s refugee and migration decisions contributed to a large proportion of the workload of both the Federal and the High Courts. McMillan (2002b: 335) describes:

... a steady and striking rise in the immigration caseload of the Federal Court – rising from 84 cases filed in 1987-88, to 320 in 1993-94, 673 in 1996-97, 914 in 1999-2000, and 1340 in 2000-01. By 2002, over 50% of the decisions of the Court at trial and full bench level were in migration matters, having risen from 9 percent in 1993-94, and 19 percent in 1998-99. The caseload of the High Court has risen sharply as well. In 1998-99 the Court received only 65 applications in migration matters in its original jurisdiction and for special leave to appeal. By August 2002 the Court had 407 active cases before it, receiving new applications (over the previous month) at an average of 17 per week.

This led to tensions between the High Court and the Executive. As McMillan (2002a: 18) explains, 'judges of the High Court responded with an uncharacteristically blunt and public message that was critical of Parliament and the Government for having restricted judicial review in the Federal Court and thus contributing to the growth of the High Court's caseload'.

2001 to 2005: Legislation in the Wake of the Tampa

The greatest example of the tit-for-tat exchange between the Executive and the Judiciary was the *Tampa* episode in 2001. Chapter 1 outlined the *Tampa* episode and the domestic and international political conditions that formed the background to the most dramatic changes to asylum laws. This section focuses specifically at the introduction of the seven bills that came to be known as the *Tampa* laws. A number of social and political factors in the second half of 2001 created an environment in which the government was able to introduce a number of laws affecting the way onshore asylum seekers were received in Australia with little dissent from the Opposition. From 1999, boatloads of asylum seekers started arriving in the ‘fourth wave’ of onshore entrants, to date the largest. The ‘fourth wave’ asylum seekers were not from Asia, but the Middle East. The numbers of boat arrivals peaked in mid 2001. 2001 was also an election year, with the incumbent Coalition government behind in the polls. Domestic politics was influenced by the rise of Pauline Hanson and her One Nation movement on a racist, anti-immigration platform. One Nation had managed to secure one million votes in the previous 1998 federal election. Internationally, the terrorist attacks on the United States on 11 September 2001, added to widespread public sense of panic. These factors created a social and political environment in which some major changes to asylum laws could be passed, quickly, and with little opposition.

The *Tampa* laws include the *Migration Amendment (Excision from Migration Zone) Bill 2001*, the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001*, the *Border Protection (Validation and Enforcement Powers) Bill 2001*, the *Migration Legislation Amendment Bill (No 1) 2001*, the *Migration Legislation Amendment Bill (No 5) 2001*, the *Migration Legislation Amendment Bill (No 6) 2001*, and the *Migration Legislation Amendment (Judicial Review) Bill 1998 [2001]*. The first three of these bills were popularly termed the ‘Pacific Solution’, and the latter four dealt more generally with the powers of the courts to regulate Executive action on this issue.

The Pacific Solution is the collective name given to a number of border control strategies implemented in the *Tampa* laws. These strategies include: the creation and excising of the ‘migration zone’; offshore detention and processing of asylum seekers in Nauru and Papua New Guinea; patrols of Australian territorial waters

by Australian Navy, who are given broad powers to deter and deny access to Australian territory; and 'upstream' disruption strategies targeting people smugglers in Indonesia involving the Australian Federal Police and Indonesian police and intelligence. Different aspects of the Pacific Solution, which was abandoned in January 2008, have been discussed throughout this thesis. Within the context of this chapter, what is important is how the offshore processing of applications took away the right of asylum seekers to the usual channels of appeal.

Asylum seekers who came to Australian territory that had been excised from the migration zone were taken to Nauru or Papua New Guinea for processing their applications for refugee status. Importantly, they were not eligible to apply for residency visas in Australia, so if their applications for refugee status was successful, they still had to apply to Australia or other countries for residency. There are a number of other differences between how asylum seekers are processed on Nauru and PNG, and how they are processed on the mainland. First, they are denied independent assistance when lodging their claims. Second, the department officers do not have to apply Australian statute and case law that they would have to apply in Australia. Third, applicants on Nauru or PNG have no right to appeal if they are rejected in the first instance. That is, they cannot access the RRT, the AAT, the courts, or ministerial discretion. Crock (2003) notes that UNHCR's recognition rates of groups of Iraqi refugees in the Pacific Solution in the same time period were far higher than the Department's recognition rates, suggesting that the department may have been overly strict in their determination criteria knowing that there was no appeal to their decisions. In short, the Pacific Solution enabled the Executive to completely control the processing of applications of some 1,500 asylum seekers.

A second important part of the *Tampa* laws was the introduction of the privative clause. In 1997, the government had introduced a bill to replace part 8 with a privative clause to restrict the Federal Courts judicial review powers of migration matters, in effect restricting the ability for individuals to seek legal remedy for administrative errors. The bill received much opposition in Parliament, and was quashed at that time. It was revived and enacted in 2001 as part of the *Tampa* package. The clear intention of the clause is to provide blanket immunity of migration decisions from the Judiciary. In addition, other clauses restricted access

to judicial review, such as section 468A, which imposed 'strict and unrealistic' time limits on the application for judicial review (Kerr 2006: 206).

The privative clause survived a constitutional challenge of the full bench of the High Court in *Plaintiff S157/2002 v Commonwealth*. The plaintiff sought declarations from the Court that both section 474 and section 468A were inconsistent with section 75(v) of the constitution, that holds that the Judiciary has jurisdiction to review acts of officers of the Commonwealth. The full Court unanimously found that, if the privative clause was to limit judicial review, it would be unconstitutional. But since it does not, the clause was upheld as constitutionally valid. As Kerr (2006: 211) states, 'the High Court upheld the validity of s474 only on the basis that a privative clause does not, and cannot, mean what it says'. This case was important because it delineated the powers of the Executive in relation to the Judiciary. The High Court clearly stated that the Parliament could not enact laws that overrode the separation of powers, and in so doing, reiterated the limitations on the power of the Executive within the constitution (Gelber 2004: 338)

Most decisions made under the *Migration Act* are now defined by section 474 as 'privative clause' decisions. Section 474 states that privative clause decisions are 'final and conclusive', cannot be 'challenged, appealed against, reviewed, quashed or called into question in any court', and cannot be subject to the grant of an administrative remedy 'in any court on any account'. The privative clause was strengthened in 2005 to include decisions by the tribunal that were only purported decisions (Bagaric et al. 2007: 429). Since the introduction of the privative clause, there have been just as many applications to the Federal Court, but the success rate has been reduced to 5% from the previous 10-15% (McMillan 2002a: 20). According to McMillan (2002a: 20), Federal Court decisions since 2001 have been 'more restrained and less adventurous'.

Crock (2004) notes that Australia's refugee jurisprudence is recent and generally conservative. Judges who have interpreted the Refugee Convention to conform to the spirit of human rights have been in the minority. Australian courts tend to rely more on domestic than international law (Crock 2004: 9). However, Crock (2004) notes that since the 1990s the courts have become far more literate with the *Refugee Convention* and international jurisprudence on refugees. In cases where there

has been no political pressure, the trend has been to move in keeping with international jurisprudence. The High Court's treatment of the one child policy and domestic violence cases are good examples. In 2000, the High Court recognised that second children in China could be recognised as a persecuted social group. Similarly, the Court recognised that a Pakistani woman fleeing domestic violence could be regarded as a refugee. In each of these cases the Minister vigorously objected, but the ruling was in keeping with other court rulings around the world.

In 2001, as a response to recent debates in courts about the definition of refugee, and the corresponding trend in looking to the jurisprudence in other countries, the government defined the meaning of some key terms in the Convention. By defining these terms, it essentially narrowed the definition, by cutting off avenues for interpretation by judges. This was unprecedented within Western nations. Previously, there had been a reluctance for nations to codify a national-specific definition that may be at odds with the definition applied in another country. The Coalition government, however, made the changes with the view that the courts were expanding the meanings of key terms. Between 1999 and 2003, the Full High Court heard 27 cases relating to migration law, most of which involved persons claiming to satisfy the Convention definition of 'refugee'. The decision of the government to delineate the term refugee was a further measure aimed at stemming the perceived broad interpretation within the courts.

Summary

This section has outlined how the political struggle over control of asylum decisions between the Executive and the courts resulted in the incremental changes to the *Migration Act*. In recent years, the High Court's readiness to debate and interpret the Refugee Convention, to look to international jurisprudence, and come up with more generous grounds on which to grant protection to refugees, is regarded as a challenge to Executive control over the entry and settlement of refugees in Australia. The Executive has tried to overcome this loss of power by increasingly moving away from a largely open-ended system that relied on discretionary decision-making, to a stricter codifying of definitions and judicial powers. The tit-for-tat exchange between the courts and the Parliament has continued, and has resulted in an 'incremental hardening' (Crock 2004: 6) of

refugee laws and policies. Yet to pass these laws, the support of the Parliament is needed. The next section examines the relationship between the Executive and the Parliament during the five years from 2001, and argues that Executive control was achieved with Parliamentary support.

The Executive and the Parliament

The *Tampa* laws were introduced in September 2001 during a moment significant for the level of Executive control over the Parliament in the area of migration laws. A culmination of domestic and international events resulted in the Executive successfully pushing the *Tampa* laws through Parliament, and undermining standard Parliamentary procedures to do so. This section examines the debates in Parliament around the *Tampa* laws. During this short period, the Executive was able to gain control over the legislating arm of government. As some of these debates illustrate, this was achieved because both the government and the opposition supported a populist approach to migration matters.

As described above, the *Tampa* laws consisted of six pieces of legislation. The first, the *Border Protection Bill 2001*, was introduced to Parliament on 29 August 2001, but failed to pass. On 29 August, the standoff with the *Tampa* was still taking place: the government had refused the *Tampa* permission to dock at Christmas Island, and the *Tampa* was refusing to return to Indonesia, as requested by the Australian government. As this was happening, an *amicus curiae* challenge had been taken to the High Court, challenging the constitutionality of the effective detention of asylum seekers on the *Tampa*. Within this context, Prime Minister Howard (2001a) introduced the first *Border Protection Bill*, and urged Parliament to pass the bill immediately:

This is an unusual bill for unusual circumstances. I am seeking, unusually, the authority and the support of the Parliament to facilitate the passage of the bill through all stages in both houses of Parliament tonight ... I ask the opposition to support the measure so that it can pass into law as soon as possible ... As I said, it is an unusual situation, but it does require a very quick, comprehensive and unambiguous response from the representatives of the Australian people ... It is in the national interest that, in legal terms, what we have done today is put beyond all shadow of a doubt. It is in the national interest that the courts of Australia do not have the right to overturn something that rightly belongs to

the determination of the Australian people, as expressed through their representatives in this Parliament.

The opposition's response was ambiguous. Opposition leader Kim Beazley originally supported the government's view that a bipartisan response was required. In doing so, he deferred to the Executive and undermined his own role as opposition leader in the house of debate. Beazley (2001) argued:

In these circumstances, this country and this Parliament do not need a carping opposition; what they actually need is an opposition that understands the difficult circumstance in which the government finds itself, and to the very best of my ability I will ensure that that situation prevails ... we believe more generally that policies in the area of immigration, which are quite fraught in debate in this country, are best settled on a bipartisan basis, that is the view that we intend to pursue.

Ultimately, however, the opposition did not support the bill, and the motion failed to pass. The grounds on which the opposition blocked the motion were procedural (Beazley 2001):

I find the circumstances here quite extraordinary. The opposition will not support the *Border Protection Bill 2001* ... The opposition has had this bill for about 40 minutes now. There is no explanatory memorandum, but we are told the bill has to be passed through all stages tonight.

Three weeks later, the bill was introduced to Parliament again, as part of a package of six pieces of legislation that have come to be known as *Tampa* laws. During these three weeks, a number of external events altered the global and domestic context in which Parliament made their decisions about supporting the *Tampa* laws. First, a deal was reached with Nauru that asylum seekers rescued by the *Tampa* could be housed there. Second, in the High Court, Justice North found in favour of the *amicus curiae* challenge that the government had acted illegally by detaining the asylum seekers. Third, the terrorist attacks on 11 September in the United States caused widespread public panic, heightened national security procedures, and distrust of Muslim people. And fourth, John Howard's tough approach to the *Tampa* had improved his ratings in the opinion polls leading up to the 2001 election. This time, the *Tampa* bills passed the House of Representatives with support from the opposition.

In the Senate, the debate surrounding the *Tampa* laws emphasised the way the government was undermining the role of the Parliament to debate and review bills. The Democrats senator Andrew Bartlett (2001) was most vocal in his opposition to the way the bills were being ‘railroaded through the Parliament’ by failing to follow standard Parliamentary procedures that enable debate. He took the unprecedented step of opposing a standard procedural motion – ‘that these bills may proceed without formality’ - in order to highlight his opposition.

Those words we hear all the time – ‘that the bills proceed without formalities’ – have quite significant impacts ... In virtually all circumstances that is okay, in our view, but let us not be under any illusion that these bills are anything other than quite extraordinary ... there are fundamental concerns about these bills that go to the heart of the rule of law. To just wave them through without consideration and give permission for them to be brought on today – if the Senate so chooses – or for other notices of motion for various stages of the bill to be moved without notice is not appropriate given the extraordinary nature of these bills ... What needs to be emphasised and drawn to the attention of the public in relation to these bills is not only the content of the bills ... but also the process that is being followed ... Unfortunately, the power of the Executive over the Parliament and the power of the party system over the Parliament has now got to such a stage where, I believe, this is a clear example of the will of the Parliament possibly being overturned and overridden. That is of great concern in terms of the fundamental underpinnings of our whole system of government. One of those three arms or legs, which ever you prefer, is clearly being weakened to a significant degree in relation to these bills and this process that we are currently following. I believe this is something that really should send alarm bells ... this goes to our whole system of government and our legal principles ... Once it is accepted practice to allow some of those fundamental legal and procedural principles to be undermined, to be ignored or waived, to empower the government to be above the law ... then we are seriously undermining the whole fabric of the protection of the civil liberties and the legal and human rights of the Australian community.

With the support of the opposition, the bills passed.

The lack of true separation between the Executive and the Parliament has always been regarded as a weak aspect of the separation of powers. Having a majority of members from the governing party, and cultures of strong party discipline,

necessarily means that the ability of the Parliament to provide checks and balances on the Executive is limited. What occurred in the passing of the *Tampa* laws, however, was striking not only because of the opposition support for the bills, but also that it allowed the bills to pass in a timeframe that would not have allowed even moderate scrutiny. As demonstrated, this was accompanied by a discourse of deference to the Executive. Prime Minister Howard (2001a) articulated this view well while expressing support for the original *Border Protection Bill 2001* in August:

As every member of the House will know, the law is often an unpredictable thing ... It is in the national interest that, in legal terms, what we have done today is put beyond all shadow of doubt. It is in the national interest that the courts of Australia do not have the right to overturn something that rightly belongs to the determination of the Australian people, as expressed through their representatives in this Parliament.

Despite claiming that the liberal party was a 'broad church', under Prime Minister Howard the Liberal party was characterised by unusually strong party discipline. This party discipline was temporarily severed in 2005, when a small group of liberal backbenchers, led by Member for Kooyong Petro Georgiou, challenged their own party on their policy of detaining children in detention. This challenge, which some commentators argued should have been done by the opposition, led to the removal of children and their guardians from detention centres and housed in less oppressive Immigration Residential Housing facilities (See O'Neill 2008). In 2005, Georgiou was also instrumental in ensuring that further changes to the *Migration Act* failed. The proposed legislation would have excised all Australian territory, including the mainland, from the migration zone. This meant that every asylum seeker who arrived anywhere in Australia would be detained and have their applications for protection considered on Nauru. This bill failed to gain support and was withdrawn even before it was introduced into Parliament, with Georgiou and four Liberal colleagues promising to cross the floor to oppose it.

This brief period in 2001, and arguably extended until the Georgiou 'rebellion' in 2005, was a time in which the Executive dominated the processes of Parliament, and ultimately undermined the role of the legislature as the third arm of government. With senate control from 2004 to 2007, the Coalition government was able to pass other radical laws in areas such as industrial relations. It is

significant, however, that the *Tampa* laws were passed before the Coalition gained majority in the senate in 2004. This indicates that the opposition, like the government, were driven to act according to populist principles, and the processes of Parliament were treated as an unnecessary hindrance to the speedy processing of laws.

The Executive and the Refugee Review Tribunal

The Refugee Review Tribunal (RRT) is the first stage of appeal for a negative decision made by the Immigration Department on an application for a protection visa. The RRT has a quasi-judicial status, and, being neither administrative nor judicial and between both in the decision-making process, has some specific pressures from each. In particular, pressure from the Minister for Immigration in 1996 over certain RRT decisions demonstrates that, again, the RRT has felt the impact of the Executive pursuit of control over refugee determination matters.

The Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) were established in the Migration Act in 1989 and 1993 respectively. The RRT was preceded by the Determination of Refugee Status Committee, set up in 1978, and the Refugee Status Review Committee set up in 1990. The purpose of the MRT is to provide merits review of negative decisions on visa applications made by the Department of Immigration. The RRT is more specialised and provides merits review of negative decisions on applications for protection visas for onshore applicants only. Although they have separate areas of review, the MRT and the RRT operate as a single organisation for the purposes of financial management, and members and staff are appointed to both Tribunals.

The RRT has the power to affirm, vary, or set aside decisions, remit a matter for reconsideration with directions, or substitute a new decision. Overall, it is a positive aspect of the visa application process providing the opportunity for merits review of cases before entering into the expensive – in terms of money, emotion and time - judicial system. The lack of codification of the RRT processes, however, leads to a degree of uncertainty about proceedings. How each particular review proceeds depends on the nature of the issue in dispute, the number of members, whether lawyers are members, and the timeframe for adjudication

(McMillan 2003: 27). Lawyer Julian Burnside has been highly critical of the RRT process on these grounds. He argues (Burnside 2007: 52):

The RRT members do not have to be lawyers. The Act does not prescribe any qualifications for membership of the tribunal. They are often appointed for a short term, typically 12 to 18 months, but can be re-appointed. If their decisions please the government, their chances of re-appointment appear to improve. The decisions of the RRT are often a matter of life and death, but applicants are not entitled to be legally represented at RRT hearings, even though they are often not skilled in English. The proceedings are generally inquisitorial, and are frequently characterised by sharp, hostile questioning apparently calculated to destroy the applicant's claim for refugee status. When hearing cases, tribunal members sit alone, not as a panel of three or five as is common in, say, sports disciplinary tribunals.

Burnside (2007) emphasises that the decisions made in the RRT can be matters of life and death, and that the lack of codification means that the ability to get decisions correct is limited. This lack of codification, also, has left the tribunal open to criticism from both the Executive and the Judiciary.

In 1996, in a clear example of Executive pressure, Minister for Immigration Philip Ruddock publicly chastised two RRT members for their decision to support the application for refugee status of a Pakistani woman fleeing domestic violence. In an interview with the *Australian* newspaper (Steketee 1996), Minister Ruddock stated that 'the view I take would be if there are tribunal members who have fixed term appointments who clearly make decisions outside the international law in relation to determining refugee claims, their appointments would be ones I would be highly unlikely to renew'. The following day a spokesperson confirmed the comments, stating that Mr Ruddock had 'made it clear that members of the RRT would not be reappointed if they made decisions that went beyond the law' (cited in Legomsky 1998). Thirty-five RRT members whose terms expired in June 1997 applied for reappointment. Sixteen were not renewed, and were replaced with members of the Department's choosing. As evidence that members were concerned about their reappointments, the usual 'set aside' rate of 15% dropped to 2.7% in April 1997, the month the interviews were taking place to determine reappointments (Legomsky 1998: 5).

The RRT also suffers the inherent problem of their decisions being compared with the judicial decisions that come after. McMillan (2003) argues that RRT members try to ‘second-guess’ the court’s decision, and find accordingly, so that there is no embarrassment if the court overturns their original decision. This consciousness of the court’s presence is observable, according to McMillan (2003), in that the tribunal reasons statements are written in language that reveals that the Judiciary is the primary audience, rather than the parties before the tribunal. McMillan (2003: 27) argues that some judges have the view that ‘special vigilance is required’ when reviewing the proceedings of a tribunal, and that this ‘judicial overreach’ is inappropriate.

An extra stage of merits review in the migration decision-making process is an important aspect of providing a system of procedural fairness, and the length of time it takes to get applications decided by the tribunal is weighed against the benefits of an extra stage of independent review. Yet for the RRT to reach sufficient standards of accountability, it has to be ensured of protection from interference from both the Executive and the Judiciary.

Ministerial Discretion

The considerable discretionary powers granted to the Minister for Immigration in the Migration act are a key, and controversial, aspect in the asylum decision-making process. Section 417 of the *Migration Act* grants the Minister discretionary powers to reverse a previous decision which may be used after all other avenues of appeal – the RRT and sometimes (but not necessarily) the Judiciary – are completed. Ministerial discretion is non-compellable, non-reviewable, and non-delegable. More than any other aspect of the asylum process, the level of discretion available to the Minister in the *Migration Act* exemplifies the extent of Executive control over asylum decision-making, and makes the Minister personally responsible for these decisions. Ministerial discretion also plays an important role in the decision to cancel residency visas on character grounds, which is examined in later in this chapter.

Prior to 1989, immigration officials had broad discretionary powers in determining visa applications. Discretion was exercised at all levels of the department; there was little accountability, and no written guidelines or procedure

manuals. As already noted in this chapter, anecdotal evidence suggests that immigration officers made decisions about visas based on the applicants' appearance, rather than on the issue of need (Crock 1992, Martin 1989).

The 1989 changes to the *Migration Act* codified department procedure for immigration decisions, but it also maintained discretion at the level of the Minister. These original discretionary powers were small, but were increased substantially in 1999, 2001 and 2003 (Carrington 2003: 1). The original intention was that this discretion was to balance the hard guidelines of the department decision-making processes. Where the department and review tribunals have no flexibility in the implementation of the regulations, the minister may substitute a more favourable decision that sits slightly outside of the framework. In this way, the decision to grant the minister with discretionary powers was intended to insert a sense of humanity within otherwise strict guidelines, or, in other words, provide a level of complementary protection without codifying complementary protection in law.

In contrast to the strict mechanics of immigration procedures, there is no codification for how discretion is to be used. The powers are broad: they can be used to substitute a favourable decision, vary processes, order release from detention, or, as discussed below, cancel visas on character grounds (Carrington 2003: 6). Section 417 states that Ministers have the right to substitute a favourable decision if it is 'in the national interest'. Yet, as Dauvergne (1999) argues, whilst the term 'national interest' occurs a number of times through the *Migration Act*, it is never defined, and has been used interchangeably to describe, among other things, economic benefit, and the moral benefit from humanitarian migration.

Equally, discretion is triggered by informal request: there is no formal application process, and there are no strict procedures for how the attention of the Minister is sought. Carrington (2003: 8) outlines the three informal avenues for seeking Ministerial intervention. In the first case, a member of the RRT or MRT can refer cases for consideration. Second, individuals can make requests in writing to the Minister. They can request on their own behalf or through a third party such as a lobby group or MP. Third and most often, ministerial discretion is sought by Department officers who assess every negative tribunal decision against criteria

set out in the ministerial guidelines, and bring to the minister's attention those that fall within the guidelines.

After request for discretion is made, there is no certainty that the Minister will consider the application. Different ministers have had different approaches to Ministerial discretion. Whilst Minister for Immigration, Philip Ruddock required that every failed application was sent to his office, which contributed to a workload of several thousand applications each year. From taking office in 1996 to the October 2003, Ruddock used his ministerial discretion 2,513 times (Evans 2008). Yet not all applications will make it to the Minister personally. Although the discretionary power is non-delegable, it is also non-compellable, meaning that an applicant cannot demand that a minister review his or her application. A high percentage of requests are vetted by the ministerial intervention unit, which employs more than 50 staff. Officers are able to decide which cases should go to the Minister, and which should not (Carrington 2003: 6).

There is also a problem with transparency with decisions made by ministerial discretion. The minister is required to table a document in Parliament every six months detailing all cases he or she has considered, and the reasons for the decision made. In practice, this has not resulted in transparency of the process. In recent years each case has been tabled with a proforma-like description of the situation that reveals nothing about which elements of the case led to the minister making a positive decision. Finally, Ministerial discretion decisions are non-reviewable. The Minister's word is final, and cannot be challenged in a tribunal or a court. A ministerial decision falls outside of the jurisdiction of the Commonwealth Ombudsman.

Two unintended outcomes arose from this system of Ministerial discretion. The first is that asylum seekers and their advocates, aware that they may one day have to rely on the good will of the Minister to remain in the country, are reluctant to speak out about the conditions of their detention, or other experiences at the hands of Australian authorities. This has the effect of silencing asylum seekers on issues including basic human rights. Second, ministerial discretion means that ministers are personally invested in his or her decisions. Without guidelines for 417 decisions, much depends on the minister's own personality. In her evaluation of the department, Proust (2008) noted how the department had shied away from

making recommendations on cases that the minister had to decide (see also Nicholls 2008). Shortly after becoming Minister for Immigration in November 2007, Chris Evans (2008) expressed shock at learning the extent of his discretionary powers. He explained:

One of the first things that struck me when I took on this role was what extraordinary powers I had as minister; the range of powers from determining the character of a person – such as Dr Haneef – to the deportation of long term residents with criminal convictions – to whether or not a new born baby can be allowed to live with its mother in community detention ... You would not expect the minister responsible for social security to make decisions on an individual's pension or the Treasurer to decide on your tax return, nor would the public accept such intervention as appropriate.

He likened his powers to 'playing God', and vowed to reduce these powers in the interest of 'integrity, confidence and efficiency of the immigration system' (Evans 2008). Legislation reducing the degree of ministerial discretion has yet to be introduced into Parliament.

The Executive Response to Domestic and International Criticism of Detention

Australia's detention policies and practices have received strong condemnation from domestic and international monitoring bodies and human rights organisations such as the United Nations Special Rapporteur for Human Rights, Amnesty International, and Human Rights Watch. Consecutive governments have approached this issue in two ways: first, to deny access to detention centres by non-government organisations, and second, to reject and discredit the findings of the reports. It is in the responses to these reports that the Executive has most clearly voiced the view that immigration, and specifically detention, is a matter for the Executive only. Here a populist ideology about migration matters is strongly articulated: that decisions about who Australia allows into the country is a matter for the Australian public, and the Executive are the best placed to implement the public's will. This section outlines some of the strategies and responses to external investigations of detention centres.

It has already been discussed how the lack of access to detention centres relates directly to aspects of transparency of the policy. This applies to the media, to

other Australian political parties, to Australian and international non-government organisations. As described already in chapter 5, media access to the centres was strictly limited, to the extent that no-fly zones existed above the centres, and an exclusion zone of nearly a kilometre was established around Woomera detention centre, and a journalist was arrested for breaching the zone (ABC 2002). The restriction of media is ostensibly to protect the privacy of detainees, yet when detainees at Port Hedland petitioned to allow access to the media, it was still refused (Burnside 2007: 109).

Members of political parties were barred from entering the centres, including Senators from the Greens in 2007 (Nettle 2007). In his book *Ruddock Goes to Geneva*, Zifcak (2003) describes the difficulties experienced by the UN Commissioner for Human Rights (UNCHR) in seeking access to the centres. After 'protracted negotiations' lasting 5 months in 2002 (Zifcak 2003: 29), the government reluctantly agreed to the visit, with Minister Ruddock stating 'well, I'm not immediately bowled over by every request that comes from Mrs Robinson [the UNCHR]' (cited in Zifcak 2003: 29).

The report by the UNCHR envoy Justice Bhagwati was scathing of the conditions of the centres, and concluded that 'the human rights situation of persons in immigration detention in Australia is a matter of serious concern' (cited in Zifcak 2003: 60). Similar reports criticising the conditions and operation of detention centres have been published from Amnesty International, Human Rights Watch, the United Nations Working Group on Arbitrary Detention, the United Nations High Commissioner for Human Rights, the Commonwealth Ombudsman, various federal Parliamentary committees, the Medical Alliance (covering just about all of the nation's health professionals) and the government's own advisory body, the Immigration Detention Advisory Group (O'Neill 2008: 163). Fourteen times over ten years the United Nations treaty bodies found that mandatory detention violated the prohibition on arbitrary detention in article 9(1) of the *International Convention on Civil and Political Rights* (Nicholls 2008).

The general approach, employed more enthusiastically by the Coalition government, was to dismiss the findings outright, and to discredit the authors of the reports (Zifcak 2003, O'Neill 2008). For example, in response to HREOC report into the detention of children *A Last Resort*, Minister Vanstone (2004)

argued the recommendations of the report would be to ‘send a very dangerous message’ to people smugglers that ‘if you bring children you’ll be able to be out in the community very quickly’ (cited in O’Neill 2008: 164), and that:

The government rejects the major findings and recommendations contained in this report. The government also rejects the Commission’s view that Australia’s system of immigration detention is inconsistent with our obligations under the United Nations Convention on the Rights of the Child (CROC) ... The HREOC report is very disappointing (cited in Austin et al. 2007: 107).

The same language had been used repeatedly by Minister Ruddock. Responding to a Commonwealth Ombudsman’s report in 2001, Ruddock stated ‘You can take it that I am very disappointed at the quality of the work that the Ombudsman has done’ (cited in O’Neill 2008: 164). Similarly, in response to a report by the UN Working Group on Arbitrary Detention published in December 2002, Ministers Downer and Ruddock (cited in O’Neill 2008:164) issued a joint press release stating ‘The report is a very disappointing effort. It contains fundamental factual errors ... Yet again a UN human rights body has produced a report misguidedly critical of Australia’.

There was also a direct strategy to undermine the reputation of the researchers involved in reviews of immigration detention. O’Neill (2008: 159) recounts a conversation between psychologist Louise Newman, Minister Amanda Vanstone, and some ministerial staffers in June 2004 where this strategy was made explicit. In response to Newman’s assertion that there was plenty of evidence that detention was damaging to detainees, a staffer retorted: ‘Oh well – just watch this space. We’re getting organised and we’re going after that so-called research.’ Soon afterwards, leading researchers into the mental health of detainees Professor Derrick Silove and Zachary Steel were publicly targeted with complaints of unethical research.

One final strategy involved the withdrawal of support for organisations critical of immigration detention. In the Coalition’s budget, the budget for the Human Rights and Equal Opportunities Commission (HREOC) budget was reduced by 40 per cent over three years. Structural reforms of HREOC had the effect of ‘significantly weakening the organisation’s capacity to undertake wide-ranging inquiries’ (Zifcak 2003: 65). As well as budget cuts, former HREOC

commissioner Sev Ozdowski (cited in Briskman et al. 2008: 263) recounted the direct pressure he received from the former Minister for Immigration Philip Ruddock over his decision to inquire into children in immigration detention:

After HREOC approved the Terms of Reference for the Inquiry I met with Minister Ruddock and informed him of the Commission's decision. The minister in response expressed his upmost displeasure in no uncertain terms. The minister simply told me that: 'If you dare to conduct the inquiry there will be no job for you as long as I sit around the cabinet table'.

Zifcak (2003: 61) reports how, in an attempt to further block international scrutiny of immigration detention, Australia refused to support the new optional protocol to the *International Convention Against Torture* in 2002. The protocol would have permitted representatives to visit prisons and detention centres without providing advance notice. In a vote in the UN Economic and Social Council in July 2002, Australia, along with China, Cuba, Egypt, Japan, Libya, Nigeria and Sudan voted against the protocol. The *Convention* was eventually ratified by the Rudd Labor government in May 2009.

The result of these multiple strategies to dismiss, discredit and undermine the ability of bodies to investigate immigration detention again illustrates the government's conviction that immigration detention was a matter for the Executive. Human rights and other regulatory organisations were regarded as simply hindering the ability of the Executive to implement an effective border control mechanism. In the process, again, fundamental principles of democracy were sidelined, with real consequences for those detained.

Summary

These five sections have explored how the Executive has increasingly sought to control asylum decision-making processes, at the expense of the principle of separation of powers, and other liberal democratic checks and balances. In each case, such action has been justified by discourse that reveals a populist ideology about matters of asylum – that the Executive should, and does, act on the wishes of the Australian people. This ideology is shared by both the Labor and Liberal parties, and thus arguably facilitated the period of near total Executive control of asylum matters between 2001 and 2005. The next section examines similar

processes with regards to another category of immigration detainee: people who have had their visas cancelled on character grounds.

Executive Control over the Detention of People Awaiting Deportation

The second category of people in immigration detention are people who have entered Australia on a valid visa which is no longer valid, and are detained awaiting deportation. Within this broad category there are two sub-categories of detainee. The first is people who have had their residency visas cancelled on character grounds. These people are often referred to in the shorthand as ‘character cancellations’ or ‘501s’, after the relevant section in the *Migration Act*. The second sub-category is people who have overstayed their visas, or have breached the conditions of their visa, such as students who work more hours than their visa allows. This section of the chapter first examines issues relating to the detention of character cancellations. It then examines the detention of people suspected of being in Australia without a valid visa. As with asylum decision-making, the processes involved with detaining and deporting people on character grounds is characterised by Executive control and a lack of review. The lack of regulation over this process has resulted in problems caused by administrative errors, and Executive disregard for principles of procedural fairness and natural justice.

Detention of Character Cancellations

The *Migration Act* has two powers for deporting people on character grounds: sections 200-201 (introduced in 1992), and section 501 (introduced in 1999). There is a large amount of overlap between these two sections. Sections 200-201 provides that the Minister may deport a non-citizen who has been in Australia for less than ten years, and who has been convicted of an offence that is punishable by imprisonment for one year or more. Under sections 200-201, authorities had no power to deport permanent residents if they had been living in Australia for ten years or more, excluding any time spent in prison. Until 1999, a person who had lived in Australia for longer than ten years was considered an ‘absorbed person’. The notion of an absorbed person acknowledges ties with the nation, including family and community, that would have developed over the ten years

residency period. It also implicitly recognises the social circumstances or other factors that lead to the crime being committed, aside from the notion of a 'bad character'. For absorbed persons, a prison sentence in Australia was considered just punishment, and deportation would mean unnecessary hardship for both the individual and their family.

In 1999 the *Migration Act* was amended to include section 501, which made mandatory the cancellation of permanent residence of non-citizens if they breached the conditions of their visa, regardless of how long they had lived in Australia. Section 501 supersedes much of sections 200-201, which although mostly unused remain part of the *Migration Act*. Section 501 does not recognise the status of absorbed persons, allowing for the detention and deportation of people who have spent considerably longer than ten years in Australia.

Section 501 is deployed in two circumstances. First, it restricts entry into the country on 'character grounds', which is a decision reserved entirely for the Ministers' discretion. Second, it facilitates the deportation of permanent residents on character grounds. Most often, this power is deployed after an individual has been imprisoned for a crime for longer than twelve months, or if he or she has been imprisoned for a number of smaller crimes with sentences totalling longer than two years. A person whose visa is cancelled in this situation moves straight from the judicial prison system to immigration detention to await deportation. In this scenario, the cancellation of the visa is mandatory. Between 1999 and 2008, more than 500 people were deported under this section, very frequently to countries they have not resided in since they left as children. Minister Philip Ruddock made most use of this section: in the three years 2000-01 – 2002-03, Ruddock cancelled 459 visas on character grounds (Nicholls 2008).

There are many administrative and ethical issues with section 501. In 2006 the Commonwealth Ombudsman (McMillan 2006) conducted an 'own motion' investigation into the application of section 501 to long-term residents, in response to a number of complaints about how the law was implemented. The investigation found a number of problems with the law, including that many decisions to deport were based on factual error and there were no steps taken to clarify details; that most people issued with an 'intent to deport' had no warning; that many people deported did not realise that they were not citizens; and that

considerations such as the deportee's health or the best interests of their children were not taken into account. McMillan (2006: 20) also found significant inconsistencies with the process of how people who meet the conditions for character cancellation were brought to the attention of authorities:

The process of identifying those liable for cancellation might best be described as *ad hoc*. The investigator was unable to locate any information in the s 501 policy and procedural framework indicating how visa holders liable for cancellation should be identified. In practice, the way such visa holders come to DIMA's attention varies between States ... Sometimes State police or correctional services will advise the Department when they believe a person convicted of a crime or undertaking a custodial sentence is not, or may not be, an Australian citizen. Sometimes former police officers now working in DIMA's Compliance area will be aware of the visa status of a convicted person. Sometimes non-citizens will be identified through dob-ins or information from community organisations.

McMillan (2006: 20) also notes that many people subject to deportation were unaware that they were not citizens, or were unaware of the type of visa that they held, and further, were unaware that it could have been cancelled. Many long-term residents who had come to Australia as babies assumed they were citizens. McMillan argues that it is 'entirely possible' that they were unaware of their visa status, because until 1994, there was no requirement for permanent residents to have a specific subclass of visa. After 1994, all permanent residents were deemed to have a particular type of visa, but were not necessarily advised of this by the Department. Nor were they advised in 1999 that the enactment of section 501 could apply to them.

Nevertheless, once an individual has been brought to the attention of the Department and the decision is made to cancel the visa, the individual becomes an unlawful non-citizen (section 15 of the *Act*), is then subject to mandatory detention (section 189), and removal from the country (section 198). A decision by the Minister or delegate under section 501 must be made in accordance with the requirements of natural justice (procedural fairness) (section 501[2]), unless the Minister personally decides that the cancellation of the person's visa is in the national interest (section 501[3], [4]) (McMillan 2006: 12).

Ministerial control over character cancellation decisions was, for Minister Ruddock, an important part of the legislation. As with ministerial discretion with asylum decisions, this was regarded as the role of the Executive, rather than ‘merely appointed’ officials. He argued in the second reading of the bill that introduced section 501 (Ruddock 1998):

I will retain a discretion, as this bill provides. It is a discretion that ought to be in the hands of the minister. It reflects the fundamental principle that has operated in this area over time; that is, that the government of the day – rather than unelected, merely appointed, individuals who very often seek to assume powers that the Parliament has never intended that they should have – ought to be able to take responsibility for these matters ... I am putting very strongly the view that the elected legislature and its delegates ought to have responsibility, and not unelected judges or tribunal members who are intent on creative decision making which puts them in the position where they are making the laws.

Minister Ruddock went on to argue that the courts have been too lenient in this area, placing too much weight on the impact deportation would have on family, rather than the protection of society as a whole. He argues (Ruddock 1998):

I do have a concern that sometimes the rights of a child in Australia of someone who has been selling drugs, for instance, are given greater weight than the rights of the many children of other Australians who are abused by those who are trading in those sorts of products. I do have a view about that, and I do not apologise for it ... I think we have gone overboard on the Convention on the Rights of the Child ...

The opposition did not dispute these grounds, with the Labor member for Reid Laurie Ferguson (1998) arguing:

We have to put a degree of faith in the current Minister for Immigration and Multicultural Affairs and his long term commitment to Amnesty International and human rights. We have a person in the job who would, on balance, be responsible in these matters.

Again in this debate, the notion that migration decisions should be made by the Executive was prominent, and that no safeguards within the system were necessary.

Decisions to detain and deport made by the Minister for Immigration are not reviewable on merit, cannot be reviewed by the Administrative Appeals Tribunal, and they fall under the privative clause of the *Migration Act*. This means the only review available is under the narrow grounds of jurisdictional error in the Federal Court. Further, they cannot be scrutinised by the Commonwealth Ombudsman (McMillan 2006). According to the Ombudsman's report (McMillan 2006), whilst Minister, Philip Ruddock made his personal wish clear that he personally wanted to consider each proposal for visa cancellation of long-term residents. Of the 236 decisions made in 2002-2003, the Minister made 189 (80%), and the department 47 (20%). By comparison, these statistics were reversed for decisions made by Minister Vanstone.

People subject to character cancellation often spend a long time in detention – after their prison sentence – awaiting deportation. It is often hard to secure documents for the destination country if one has spent their entire life in Australia. At 12 March 2008, there were 7 individuals who had been held in detention for more than 500 days pending deportation, another 7 who had been held between 200-500 days, and 15 who had been held for less than 200 days (Nicholls 2008). Stateless people, for whom entry to a third country cannot be secured, face indefinite detention (McMillan 2006: 35).

Many ethical issues, also, are raised by these deportations. The ethics of deporting someone after they have served a prison sentence is in effect punishing them twice, and significantly more harshly, using administrative (not judicial) processes. All had criminal records, but in some cases the crimes were minor property offences (Edwards 2007). The punishment also extends to the family from whom the deported person is permanently separated. Further, it undermines claims regarding the rehabilitative function of judicial sentencing. There are also ethical questions about the responsibility of the community to the misbehaviour of the individual, especially one who has spent their entire lives in Australia. The notion that criminal behaviour is entirely due to 'bad character', and that the community is not at all responsible, is an extremely controversial premise in criminological literature. The social context of the crime has long been incorporated into judicial sentencing decisions, but is entirely ignored in the mandatory implementation of section 501.

This latter issue was raised by the Ombudsman (McMillan 2006: 27) in the case of Mr SZ, who came to Australia from the Former Yugoslav Republic of Macedonia (FYROM) at the age of nine years. Having been apparently abandoned by his mother at birth, Mr SZ was raised by his grandparents in FYROM, then by his father in Australia from the ages of nine to eleven, at which point he was placed in foster care. At the time of his deportation he was a drug addict and had been diagnosed with paranoid schizophrenia, depression, and hepatitis C, and it was noted that many of his crimes were committed to support his addiction. The fact that Mr SZ had spent his teenage years in state care in Australia raises questions about the culpability of the Australian government in Mr SZ's situation. Neither this issue, nor Mr SZ's health conditions, were taken into consideration in the decision to deport.

To try to minimise these problems, the National Centre for Character Cancellation was established in February 2007. In 2007 it employed 38 staff as a way to centralise decision-making and minimise problems. Interestingly, this Centre was set up quietly, with lawyers working in this area unaware of its existence (Edwards 2008, Nicholls 2008). The Centre continues its work under the current Labor government.

Detention of Other Categories of People Awaiting Deportation

People suspected of being unauthorised non-citizens, due to either over-staying their visa, or breaching the conditions of their visa, are also subject to mandatory detention and deportation. In 2005, the case of the detention and pending deportation of Australian permanent resident Cornelia Rau brought the issue of immigration detention into the headlines. Rau had been incorrectly suspected of being an unauthorised non-citizen when, suffering schizophrenia, she identified as a German citizen but could not produce documentation of her identity. Rau was detained first in Brisbane Women's prison, and then Baxter detention centre, for a total of ten months, before she was correctly identified and released. During much of her time at Baxter she was kept in isolation as punishment for what was perceived to be 'bad behaviour', but was in fact the symptoms of her mental illness.

The Palmer (2005) inquiry into Rau's detention brought to light the aspects of the *Migration Act* that enabled the detention of a permanent resident with few administrative checks to ensure that this was the correct procedure according to law and circumstance. In particular, section 196 of the *Act* states that a person 'must' be detained if a department officer 'reasonably suspects' that he or she is an unauthorised non-citizen (see also Crock et al. 2006: 154). This was combined with other administrative problems including the 'siloing' of information between States and different sections of government, the lack of training of department officers, 'deep seated cultural and attitudinal problems' within the immigration department, and a failure of Executive leadership (Palmer 2005: 17).

Rau was identified as a permanent resident in Baxter before she was deported. In another high profile case, Vivian Alvarez Solon, an Australian citizen, was deported after being brought to the attention of immigration authorities because of an accident. She was hospitalised in Lismore base hospital and then admitted as an involuntary patient to Richmond Base Psychiatric Unit in 2001. Three months after her accident, wheelchair bound and still requiring medical treatment, Vivian was deported to her birth country of the Philippines. The Comrie (2005) investigation this case found that case officers had made the assumption that Vivian was a sex slave, and that 'this assumption appears to have influenced the way in which her case was handled' (Comrie 2005: x).

Both the Palmer (2005) and Comrie (2005) reports were scathing in their criticism of the implementation of the *Migration Act* with regards to detention and deportation of people suspected of being unauthorised non-citizens, raising issues of the lack of accountability, transparency and regulation, and the disregard for principles of procedural fairness and natural justice. After the publishing of their reports, the Commonwealth Ombudsman identified 201 further cases of wrongful detention between July 2000 and April 2005 (Crock et al. 2006: 155). These included the case of Australian citizen 'Mr T', who was detained three times (once in 1999 and twice in 2003) for a total of 253 days because he was suspected of being an unauthorised non-citizen. Of the 201 people brought to the attention of the Ombudsman, fifty-six people had been detained for more than three weeks, with one detainee held for up to six years, one for up to four years, and twelve for up to three years (Crock et al. 2006).

Summary

The automatic, mandatory nature of the character cancellation process has been criticised for the inhumane or unfair outcomes for the people and their families. A common analogy has been to describe the role of the department in these character cancellation decisions as a ‘machine’. In his investigation of the Vivian Alvarez Solon matter, Neil Comrie (2005: 31) described her deportation as the result of a ‘dehumanised, mechanical process’. In his study of deportations, Glenn Nicholls describes the deportation process as an ‘unthinking, unstoppable machine’ (2007: 11), and an ‘apparatus or a series of unstoppable processes in which there are only anonymous functionaries and nameless victims’ (2007: 170). What these analogies point to is the absence of the checks and balances that usually accompany liberal bureaucracies, and that would normally restrain maladministration and the excesses of arbitrary power.

Conclusion

This chapter has argued that incremental refinement of migration laws – particularly those regarding who can seek asylum, and the removal of unwanted migrants – has been motivated by a populist ideology regarding migration matters. The idea that, ultimately, it is the citizens of Australia who should decide who can join the Australian community, privileges the Executive as the only arm of government who can implement the wishes of the Australian public. As Pringle and Thompson (2002: 129) argue about the *Tampa* episode, it demonstrates ‘an understanding of democracy as resting on popular will expressed through a strong Executive’. When John Howard reiterated the notion that ‘we will decide who comes to this country and the circumstances in which they come’, it seems that the ‘we’ refers to a supposed intimate relationship between the ‘people’ and the Executive. ‘I believe’, Howard explained in 2001, that ‘these are things that should be decided by democratic governments’ (Pringle and Thompson 2002: 131), and by inference, not the Judiciary, and not the Parliament. As this chapter has demonstrated, arguments such as these have been used to justify increasing Executive control over migration policy and practice.

This is not an ideology unique to the Coalition government of 1996-2007, although the major changes to *the Migration Act* and migration decision-making

processes occurred under this government. To the contrary, migration law and policy is one area that both major parties have understood should be controlled by the Executive, with little input from the other arms of government. In Parliamentary debates about the *Tampa* laws, this ideology was evident in the opposition Labor Party's position as well (Pringle and Thompson 2002). Furthermore, as Crock (1992) notes, historically the Judiciary also agreed with this position, and before the 1990s, curial decisions often deferred to the decisions of the Executive.

In her article 'Confronting Chaos', Catherine Dauvergne (1999) argues that migration laws, more than many other laws, are designed so that government implementation of the laws can respond to the political and social climate of the time. The *Migration Act* itself facilitates this process through the inherent malleability of the stated purpose of the *Act*. Section 4(1) states the purpose of the *Act*:

The object of this *Act* is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

The phrase 'national interest' is purposefully vague, Dauvergne (1999: 30) argues. Nowhere in the *Act* is the national interest explicitly articulated: in some places the national interest refers to an economic imperative, in other places a humanitarian goal. There are some aspects that are non-negotiable, such as the mandatory detention and deportation of unauthorised non-citizens. Yet there is also a lot of flexibility in other areas. The broad discretionary powers of Minister for Immigration, to be exercised in the 'national interest', are amorphous and subject to change. Also able to be changed is the number of annual intake of migrants and refugees, and it does so from year to year. In recent years there has been a move away from family migration to skilled migration, and similarly away from permanent to temporary migration. These decisions are political decisions, and although there are recognisable broad trends, may be altered on an annual basis according to domestic economic, social and political factors.

The result is that migration laws sit uncomfortably with liberal democratic political principles. Mandatory detention laws, in particular, violate core liberal principles of fairness, protecting the rights of the individual, accountability, and

proportionality (Davies 2007: vii). Basic foundations of a liberal democracy, such as the dispersal of government power and the fundamental right to freedom from arbitrary incarceration, have been abandoned. Similarly, mandatory detention laws also conflict with fundamental democratic principles of transparency and accountability.

Most important, Executive control over migration decisions and the corresponding marginalisation of the Judiciary, and to a lesser extent the Parliament, undermine the principle of separation of powers that forms the foundation of Australia's constitution. This chapter has argued that the checks and balances provided by the separation of powers are contrary to the populist principles that underlie migration policy. The following chapter examines one specific way that the separation of powers has been undermined, with reference to the issue of the treatment of detainees.

Chapter 7

Punishment in Immigration Detention

Chapter 6 has explained how the Executive has incrementally removed powers of regulation of immigration detention from the Judiciary and other regulatory organisations. The intention was for the Executive to have control over the policy and implementation of immigration detention. To a large extent this has been achieved, with the Judiciary and other regulatory organisations having very little power to intervene in matters concerning immigration detention. Discretionary powers of migration officers, similarly, have been removed, so that all unauthorised non-citizens are detained automatically. The outcome, paradoxically, is that immigration detention has become a space of arbitrary decision-making and power, where much of what occurs in detention is at the discretion of the detention staff. The outcome is a control regime that has punitive effects.

This final chapter examines the consequences of the policy and practice of immigration detention. Specifically, it examines the question of punishment in detention. As explained in Chapter 1, immigration detention, as a form of administrative detention, must be for administrative purposes only. The principle of separation of powers in the Constitution provides that only the Judiciary may incarcerate for purposes of punishment. The High Court in *Lim* reinforced this point: that the Executive may detain asylum seekers, but it may only do so if the detention was administrative in intent. If immigration detention was punitive, it would breach the Constitution.

To date, the courts have not found that immigration detention is punitive. Yet a vast number of testimonies from former detainees claim that their experiences of detention were punitive. How should we respond to these experiences? On one hand, the claims carry no legal weight because of the lack of success of such cases in the courts. On the other hand, the subjective experiences of detainees conform to criminological theories of what constitutes punishment, and the many objective studies of these experiences indicate that the treatment they receive is punitive. What are the implications of these experiences for the social and political function of immigration detention?

This chapter has three sections. The first section examines how this question has been dealt with in the courts. To date, the courts have not found that detention is punitive. But does this mean that immigration detention is in fact not punitive? The second section outlines the two key criteria of punishment: hard treatment and moral censure. It then examines in depth the experiences of detainees according to these two criteria. In doing so, this section argues that the experiences of detainees conform to the criteria of punishment. The third section discusses the implications of punitive immigration detention for Australia's liberal democracy.

For evidence, this section draws on a number of primary and secondary sources. The primary sources relate the subjective experiences of immigration detention. These include letters from detainees published in the collection *From Nothing to Zero* (Burnside 2003); interviews with detainees published in *Lives in Limbo* (Leach and Mansouri 2004), and testimonies given to the People's Inquiry into Detention, published in the first report of the *People's Inquiry into Detention* (ACHSSW 2006) and the subsequent book *Human Rights Overboard* (Briskman et al. 2008). The secondary sources include objective analyses of experiences of detention. These include Human Rights and Equal Opportunities Commission (HREOC) inquiries into the general conditions of immigration detention and individual claims of human rights abuses.

Punishment and Detention in the Courts

Four key court cases have challenged the constitutionality of immigration detention on the grounds of punitive treatment: *Lim* (1992), *NAMU* (2002), *Behrooz* (2004) and *Al-Kateb* (2004). In each case, the High and Federal Courts have found that immigration detention does not breach the constitution because its purpose is for the confinement of aliens and not citizens, and because it is not punitive in *intent*. In each case, the conditions of detention were deemed irrelevant to the legal status of immigration detention.

The High Court case of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) (hereafter *Lim*) was a landmark case regarding immigration detention and created a precedent for subsequent cases. The case of *Lim* involved two groups of Cambodian asylum seekers who arrived in Australia

in 1989 and 1990 and were detained in Port Hedland detention centre. The claimants challenged the legality of their detention on the grounds that their detention breached the separation of powers. At the time of their detention and High Court challenge, the *Migration Act* did not call for their detention. In detaining the Cambodians, therefore, migration officials were acting on Executive order, outside the framework of the *Migration Act*. Two days before the Court decision was handed down, however, Parliament amended the *Migration Act* to introduce the policy of mandatory immigration detention (see chapter 6).

The High Court found that, while administrative detention of citizens was beyond the powers of the Executive, the Executive does have the power to detain non-citizens ('aliens') for administrative purposes under section 51(xix) of the Constitution. The court asserted, however, that this power be limited to what is considered 'reasonably necessary' to achieve the stated administrative purposes of facilitating admission or deportation. In outlining the limitations, Justices Brennan, Deane, and Dawson (in *Lim* 1992: 119-120) stated that immigration detention laws:

... will be valid laws if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered ... [if it is not so limited] the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the Executive powers to exclude, admit and deport an alien. In that event, they will be punitive in nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.

Thus the court placed 'significant restraint' (Dias 2004: 23) on Executive power to detain. It should be noted that when the *Lim* decision was handed down, the *Migration Act* limited the length of detention to 273 days. Later court decisions upheld the *Lim* decision that detention was 'reasonably necessary', but failed to consider the significance that the time limit had been removed. Another aspect of the *Lim* finding was reliance upon the legal fiction of the 'three-walled prison' (Crock et al. 2006: 179). This is the notion that asylum seekers were not detained, but were merely being restrained from entering Australia, and that if they wanted to end their detention they were able to leave Australia at any time. Thus the

judges were able to argue that the complainants in *Lim* were not completely detained, and that their continued detention was a matter of their own choosing.

Subsequent cases specifically raised the question of the punitive conditions of detention. In *NAMU v Secretary, Department of Immigration, Indigenous and Multicultural Affairs* (2002) (hereafter *NAMU*), a Syrian family sought release from detention on the grounds that the adverse consequences of the conditions of detention on the family were beyond what was reasonably necessary, and that detention was therefore a breach of the separation of powers. The challenge failed, with the full Federal Court finding that it is the intent of detention that determines the constitutionality of detention, and not the consequences and conditions of the detention. As Dias (2004: 25) explains, 'if a punitive purpose is to be found, it must be discovered from the legislative structure of the regime for detention rather than from the consequences of the detention on individual detainees'.

The case of *Behrooz v Secretary, Department of Immigration and Multicultural Affairs* (2004) (hereafter *Behrooz*) had a similar outcome. Mr Behrooz, an Iranian man, had escaped from Woomera detention centre in 2001 after being detained for nine months. He argued that the conditions of detention in Woomera were so bad that they constituted punishment and his detention was therefore constitutionally invalid. It followed, therefore, that he could not be charged with escaping from detention because his detention was unconstitutional (Gelber 2005). The High Court found that, since the Executive has the power to detain non-citizens as confirmed in *Lim*, and that this detention could not be punitive, then immigration detention, by definition, was not punitive (Gelber 2005: 314, Crock et al. 2006: 179). The conditions of detention were therefore regarded as legally irrelevant. The Court (cited in Dias 2004: 24) concluded:

We do not accept that harshness of conditions in a detention centre means that a detention centre ceases to have the character of a detention centre by reason that the harshness of conditions is contrary to the power of detention in the *Act*.

Put simply, immigration detention cannot *be* punitive, because constitutionally it is *not allowed* to be punitive, and therefore, it is not. Such circular logic means that, in the eyes of the High and Federal courts, the conditions and personal

consequences of detention are irrelevant to the question of whether detention is constitutional. Dias argues (2004: 25) that these findings suggest that the Constitution is concerned with 'form and not substance'. Gelber (2005: 314) argues further that while a legal differentiation between citizens and non-citizens in relation to immigration detention might assist in upholding Australian domestic law, but it is untenable when read against international human rights obligations. International human rights treaties, including the ICCPR (article 9[1]) and the UN Convention on Human Rights (article 3), make no distinction between citizens and non-citizens with regards to arbitrary and inhumane detention.

In the case of *Al-Kateb v Godwin* (2004) (hereafter *Al-Kateb*) the High Court ruled that the indefinite detention of a stateless person was lawful. Mr Al-Kateb was a stateless Palestinian man, born in Kuwait to Palestinian parents, but was never granted Kuwaiti citizenship. He arrived in Australia by boat in 2000 and applied for a protection visa. His application was rejected, and in 2002 he requested that he be returned to either Kuwait or Gaza. Neither country would accept him, so he was rendered stateless. The High Court found that the *Migration Act* did allow for the indefinite detention of stateless people, and that this was lawful under the constitution.

To date the courts have rejected any challenge to the constitutionality of immigration detention on the grounds of it being a punitive environment. Importantly, however, the conditions of detention have never been assessed to determine whether they are in fact punitive. Each court case dealing with this issue have dismissed the conditions of detention as irrelevant to the constitutional question. But just because the courts haven't found it so, does this mean that immigration detention isn't punitive? What makes certain conditions or treatment punitive?

Punishment in Immigration Detention

Despite these court findings, detainees repeatedly attest that their experience of detention is punitive. How can we understand these experiences outside of the court decisions described above? The courts have limited their judgement to the question of the *intent* of detention policy and law, and not examined the *outcomes* of this policy. But to social and political theorists the question of whether

immigration detention is punitive is crucial to explaining its function. This section examines and assesses selected detainee's accounts of immigration detention against criteria that define punishment, and aims to demonstrate that immigration detention is in fact punitive.

According to leading criminologist Tim Newburn (2007: 516), two criteria are required for conditions or treatment to constitute punishment: sanctions and censure. Sanctions, or 'hard treatment' (Duff 2003), refers to the physical experiences of punishment. These may include death, flogging, hard labour, incarceration, isolation, sleep deprivation, and so on. In contemporary Western nations, incarceration, fines, community service, and even the death penalty are forms of sanction. Incarceration may be combined with other aspects of hard treatment, such as isolation or hard labour.

Censure is the expression of disapproval about the act of wrongdoing (Newburn 2007: 516). Censure connects the hard treatment with the act of wrong-doing. It also reinforces a structure of authority within society. The wrong-doer has acted against society, and the authorities, speaking on behalf of the whole society, condemn this. It is crucial that punishment contains a degree of censure, for without censure, hard treatment is simply abuse.

Incarceration is not inherently punitive. For short periods of time, under good conditions, and where the needs of the inmate are met, some forms of incarceration may not be punitive in either intent or outcome. This chapter argues, however, that the outcome of immigration detention is inherently punitive, and moreover, that it is punitive on a systematic level. Some individuals may have had a relatively good experience of detention, and do not claim that their detention was punitive. Yet the numbers of accounts of detention that claim to be punitive are so large that it could be argued that these are the exceptions. This section now methodically outlines the hard treatments of detention. These include the general conditions, incommunicado detention, dehumanising treatment from staff, handcuffing, use of chemical restraints, violence, and solitary confinement. Detainees' experiences of the expression of censure are also considered. The section closes with a discussion about claims that immigration detention is worse than prison.

A Note on the Sources

In order to develop an argument about punishment in immigration detention, this chapter draws on primary accounts and secondary analysis of the experiences of detainees and other people who have been involved with detention. The primary accounts include letters from detainees to Australian correspondents reproduced in the book *From Nothing to Zero* (Burnside 2003), and testimony given to the *People's Inquiry into Immigration Detention*. The *People's Inquiry* was a citizen-led inquiry held in ten metropolitan and regional centres in Australia. It received 200 verbal and 200 written submissions from former detainees and others who had experience of immigration detention. The testimonies from the *People's Inquiry* were published in two forms: the first as the *Report from the People's Inquiry into Immigration Detention*, authored by the Australian Council of Heads of School of Social Work (ACHSSW: 2006) and the book *Human Rights Overboard* (Briskman et al. 2008). Although there is some duplication between these two publications, some evidence is included in one but not the other, so this chapter refers to both where necessary. Secondary analyses included reports from the HREOC and Ombudsman's investigations into immigration detention.

In documenting the sources, this chapter provides as much detail about the person giving testimony as is available from these publications. Accordingly, this is often limited for privacy reasons. Throughout this chapter phrases such as 'a detainee', or 'a former detention worker' may be the only information provided. This has the effect of limiting our understanding of the different conditions between the centres, or our ability to make connections between multiple testimonies from the same person. Nevertheless, the sources are extensive, and provide compelling evidence for the argument at hand.

It is also important to note that the cases cited below are not one-off, individual cases of ill-treatment, abuse or censure. When considered together these cases demonstrate that such treatment is systematic within detention. The examples cited here represent a small number of a large body of testimony from detainees. As a former health worker at Woomera told the *People's Inquiry* (cited in Briskman et al. 2008: 132):

Each story on its own risks being dismissed as not very important if you only hear one of them, but when you link them all together you recognise that a

detainee's life is just filled with these little cruelties. I think that's one of the things that drive people mad in the detention setting.

Similarly, a lawyer explained (cited in Briskman et al. 2008: 183-4):

There will be many individual stories about guards mistreating detainees and I wouldn't want that explained away as, 'Well you can't stop individual instances like that.' It became clear to me that this mistreatment of asylum seekers is institutional, because I spent over a year of my life communicating directly with the Minister for Immigration and her Department. For them to have failed to respond to our concerns about breaches of human rights can't be explained away as an oversight or an accidental occurrence. It's a deliberate policy.

A final note about detention staff is required. This chapter develops the argument that detention centres are environments in which detention staff have a high degree of arbitrary power. This is not to say that all detention staff abuse this power – far from it. Many detention staff have a good respectful relationships with detainees. The system of immigration detention, however, is largely unregulated and lacking in transparency. This means that despite its legal 'intention', whether or not detainees are treated well by individual staff, the system as a whole does not protect detainee's health and well-being. As the lawyer above explained, the problems are often at the department or ministerial level.

It has been documented, however, that many detention staff do not treat detainees in a respectful way. The ABC *Four Corners* program 'The Guard's Story' (McDermott 2008) reported on a so-called 'crash and bash' team of guards who treated detainees poorly. The Commonwealth Ombudsman (cited in Briskman et al. 2008: 114) found that 'ACM staff were found to lack cultural awareness, or failed to appreciate that the conditions of detention should not be punitive'. Another former detention officer told the People's Inquiry (cited in Briskman et al. 2008: 114):

I was once told at Maribyrnong you are the cat, they are the rat and don't forget that. The general mind set is the same at Baxter. Officers are not told that it's not against the law to apply for asylum. There is a lot of emphasis placed on control and restraint of people, but I felt that the biggest thing missing was the key issue that these people essentially haven't done anything wrong.

The key argument developed in this chapter is that immigration detention is a largely unregulated environment, where the day-to-day conditions and the interactions between detainees and staff undergo no review. This means that immigration detention is a system in which whether detainees experience good or poor treatment is up to the discretion of detention staff, and where detainees can experience punitive conditions and treatment with no recourse for rectification.

Hard Treatment in Immigration Detention

General Conditions of Detention

Many independent observers agree that immigration detention is not a healthy environment suitable for the accommodation of people waiting for completion of an administrative process. The general conditions of detention include the remote location of many centres, the architecture of the centres, the use of razor wire and electric fences, the overcrowding, lack of sufficient facilities, and the harsh day-to-day rules and environment. A solicitor provided a concise summary of the general conditions of Woomera detention centre as his submission to the *People's Inquiry into Immigration Detention* (ACHSSW 2006: 30):

Two working toilets for 700 people, both leaking, sand on the floor to 'mop up' the leaking effluent; four working showers, hot water only available after midnight; not allowed to take food from dining room for children or sick adults; no coffee / tea / food between meals, only water; no airconditioning, fly screens or heating; temperatures during the day reach 45 degrees, at night it falls below freezing; there are millions of flies; inmates have to queue for meals, medical attention, phones (two for 1300 people) for up to two hours; persons seeking medical attention (including painkillers for broken leg, raging fever, tonsillitis etc) each have to queue in the open for up to 1 ½ hours to obtain their medication in front of the nurse; nails may only be cut by the nurse, who will do one person per day; women must queue each day for their ration of tampons / disposable nappies; there is no baby food or formula, one woman with a six-month old baby who was struggling to maintain breast feeding was advised to feed the baby powdered chicken stock mixed with water; food is beyond description, many will not eat it.

A former detainee recounted his first impressions of Nauru (Briskman et al. 2008):

I had never seen such a place in my entire life. It was scorching hot; you couldn't even see the trees. There wasn't enough drinking water and the water itself was completely sour. The windows were covered by plastic, no electricity, not enough food and we couldn't see anything except stone.

Food is also a big problem in detention, and the strict rules regarding meal times made detention a particularly difficult environment for children and parents. A friend of an asylum seeker told the People's Inquiry (Briskman et al. 2008: 119):

If the children slept through breakfast there was no food until lunch. She was still breastfeeding, but gradually she was trying to get the baby off the breast and they wouldn't give her milk between meal times. They weren't allowed to bring food back to their cubicle and anyone knows how much growing children need. She would put some bread down her front to take back for the children and a guard saw this and made her take the bread out, then threw it on the ground and stepped on it.

The picture of the general conditions of detention emerges piece by piece through the testimonies of former detainees and staff members. The testimonies contain a myriad of small grievances that together creates a punitive environment that causes harm to people who are subject to it for long periods of time.

Incommunicado Detention

Many detainees were held incommunicado within detention centres, and between compounds within the centres, throughout the 1990s and early 2000s. This is contrary to international laws against arbitrary imprisonment (Poynder 1997). Combined with the long periods of detention, separation from families, and distance from lawyers and advocates, the fact that detainees did not have the ability to contact people outside detention contributed considerably to the stress of detention. At Woomera detention centre, for example, one phone was installed six months after the centre opened, and for the first few months detainees were only able to make international phone calls (Mares 2002: 48). For a centre detaining about 1,500 people, all separated from their families and in need of legal assistance, one phone was clearly inadequate. A former detainee explained to the *People's Inquiry* (ACHSSW 2006: 29) the difficulty they had in making phone calls:

One phone was installed six months after we were transferred there. At the beginning there was nothing. It was after a long, huge pressure before they

installed that. You have to buy a phone card of \$20 which can last only seven minutes. And there was only one phone and you have to go in a long queue. There was one phone for the whole camp, approximately 1500 persons.

Lack of communication technology, or denying detainees access to that technology, meant detainees were unable to get in touch with their families, many of whom they have been unable to contact for many months, were in danger themselves, or whose futures depended on the successful asylum application of the detainee. The stress caused by being unable to contact family members was considerable. A former detainee at Woomera told the *People's Inquiry* (ACHSSW 2006: 29):

We told them that we would like to maintain contact with our families. So we wrote letters and we gave it to the people in charge of the camp. They didn't take any action about sending these letters for around four months. We were waiting for correspondence from our parents, and we found out later that they kept these letters. So we have done a hunger strike for three days. Later on they gave us a set formatted letters with little square and all we can write in that square. Nothing but a short segment suggesting we are fine and ok and in Australia. That action was only in place six months after our detention.

Lack of access to communication technology meant that detainees also had problems contacting lawyers, supporters in Australia, or other people who could give advice or legal support for the application for asylum, which is required by international laws against arbitrary imprisonment (see Poynder 1997). New detainees were often kept in separate parts of the detention centres than detainees who have been there a while, and the effect, if not the intent, was that there was no transferral of information between the older detainees and the new arrivals how to access legal advice, or what they need to say to get their applications started (Briskman et al. 2008: 66, HREOC 2000, 2005). A HREOC (2000) report recommended that compensation should be paid to two detainees who were kept in isolation, or 'separation detention', in Port Hedland for three months, were not able to make contact with the outside world, were not advised of their right to legal assistance, and did not receive a response to for legal assistance in a timely manner. Another Human Rights and Equal Opportunities (2005) report found that a detainee at Curtin was kept in separation detention for seven months, and was not allowed any contact with the outside world, including his brother who

was in another part of the centre. A former detainee explained to the *People's Inquiry* how they were able to seek legal advice (Briskman et al. 2008: 66):

After our first interview the manager of the camp came and said to us that we can't have a visa and we have to go back to our own country. He said we could hire a lawyer with our own expense, but nobody had any money or access to telephone, fax or mail. Eventually we started to talk to the people in the main compound who were behind two layers of fences 15 metres away. We had to talk quietly because guards were everywhere. People on the other side who had access to phone told us they know a migration agent. They tied his number on a stone and threw it to us. Most of us talked to DIMIA about getting a lawyer. The manager came to us angry that how could we get the phone number.

Section 193(2) of the *Migration Act* removes any requirement from an officer to advise detainees of their right to apply for a visa, to give them any opportunity to apply for a visa, or to provide any access to advice (legal or otherwise) in connection with an application for a visa (Poynder 1997). In addition, all asylum seekers have the right to contact UNHCR, but they are not informed of this right, nor are they given the resources to do so (Crock et al. 2006: 188). As Amnesty International has pithily pointed out, detainees have rights, but no right to know their rights (cited in Crock et al. 2006: 193).

Dehumanising Treatment from Detention Staff

A widespread complaint from former detainees and visitors to detention centres concerns the dehumanising treatment meted out by detention staff, and it is a common theme in many accounts of detention. These accounts support the argument that the lack of regulation of centres means that the detention staff can exert arbitrary control. The dehumanising treatment was often petty, yet the unrelenting nature of such treatment set the tone of the detention environment as a whole. As a refugee lawyer explained to the *People's Inquiry* (cited in Briskman et al. 2008: 132):

I think the humiliation of detention just can't be overstated – the many and varied ways in which each individual detainee is humiliated from the time they wake up in the morning until the time they go to sleep, and even while they are sleeping they are humiliated.

One man who spent six years in detention told the People's Inquiry (cited in Briskman et al. 2008: 133):

I know the meaning of humiliation because I have been humiliated. Not only me. They provoke people, they harass people and they enjoy that. I never seen their regret or they feel sorry for us. Their job is simply to look after us but we been judged by them, why we came to Australia by boat. We do all the legal things, request form, ask officer for your own rights, which are not privileges. And they will deny you and provoke you. In detention, there is no law. Everything depend on individual officer. Our life depend on his kindness, which should not be.

A former nurse at Woomera supported this account (cited in ACHSSW: 29):

I've seen and heard the guards laughing at the pain and suffering of the people imprisoned at Woomera. Singing to the Iraqis who have had a rejection; 'I'm leaving on a jet plane, goin' back to see Saddam Hussein'. Witnessed the guard making a detainee beg for soap. No English did this woman speak, she had learnt the word soap from someone. To the guard she said 'soap'. The soap was proffered and withdrawn when she reached for it, again and again until she said please. Imagine being intimate with your husband to have a guard burst into your room at any time, and then imagine the further humiliation when he shares his story with anyone who'll listen.

Another dehumanising practice includes the referring to detainees by a number, and the regular roll calls or musters throughout the day and night. Another former detainee told the *People's Inquiry* (cited in Briskman et al. 2008: 132):

The first day we were given a number and I was told that from now that's how I will be known. You will be ABC123. That was one of the most difficult things for us because having your normal freedom taken away from you and at the same time you lost your name. One of the most difficult things for me was that there were three different headcounts. There was one at 6 in the morning, one at midnight, and another one at 2 in the morning, so no matter who you are, even a baby, they will have to wake you up, you show your card or you shout your number loudly.

Another former detainee who spent six months at Woomera also complained to the *People's Inquiry* about the treatment by staff during head counts (cited in Briskman et al. 2008: 133):

He poke people with his finger or with a stick to uncover their faces. Sometimes I forced myself to stay awake until they finished their patrol to make sure that the treatment of the children would be in a normal way, to do all that for him, uncover the faces of the children. But unfortunately there is no regular schedule for their visit. You never know when, so you have to be always cautious.

Dehumanising treatment can also be considered an aspect of censure: the expression of disapproval from authorities for a (perceived) act of wrongdoing. At the very least, it points to the fact that whether detainees were treated well or not is a matter of discretion of the detention staff.

Handcuffing

Handcuffing and other physical restraints are used whenever a detainee leaves the detention centre, unless on an organised excursion. This includes trips to the doctor, dentist, a hospital or a court. Handcuffs are a key symbol of criminality, and detainees explain that they understand their handcuffing as a communication that they are considered criminals by Australian authorities. One detainee wrote to a correspondent (cited in Burnside 2003: 49-50).

When I went for surgery I had to go in handcuffs. When I protested the guard said 'it is the law, we do it for everyone'. I felt I had lost my dignity as I was still handcuffed in front of the doctor. In the hospital they thought I was a criminal and not a patient.

Similarly, another detainee wrote (cited in Burnside 2003: 115):

When I went to court in Perth they took me in manacle. It made me very sad. I don't have any crime, so why they took me with manacle [leg cuffs]? When I looked at manacle I cried. I essentially didn't believe that one day I would be with manacle and in that time I thought that death is better than this life.

A doctor held in detention told the *People's Inquiry* that he had twice refused to go to hospital for a heart problem because he didn't want to be handcuffed

(Briskman et al. 2008: 128). A refugee advocate reported the case of another detainee (cited in Briskman et al. 2008: 128):

That man had once before had a major operation, and he had come to in recovery handcuffed to the bed. He'd put in complaints and he got a letter of regret from DIMIA over that. So when we are fighting to get his x-rays done, they finally got the appointments and they were going to handcuff him. He said: 'But I don't have to be handcuffed. Here's the letter to say that was wrong that I was handcuffed in the hospital before'. They said: 'If you won't be handcuffed, you don't go', and they walked out. So he was left for another week with this really bad back.

The use of handcuffs may be necessary for detainees who have failed security checks and have been assessed to be a flight risk. As discussed in Chapter 1, however, only a very small number of asylum seekers have had adverse security assessments: in 2004-05, only 2 asylum seekers out of 4,223 assessed by ASIO were given adverse assessments (Senate 2006). That detainees are mandatorily handcuffed, or are denied medical assistance because they refuse to wear handcuffs, emphasises punitive nature of the detention environment.

Chemical Restraints

Chemical restraints have also been used in immigration detention to sedate detainees and to facilitate deportations. Chemical restraint involves the involuntary administration of intra-muscular injections of drugs for the purpose of controlling detainees' behaviour. The drugs are either anti-psychotic medication or large doses of sedatives in the valium family, although information on precisely which drugs are administered has not yet been confirmed (Price 2003). Chemical restraints are, therefore, another aspect of detention that is used at the discretion of detention management, and is largely unregulated.

In Port Hedland in 1995 a mass suicide attempt was 'resolved' by chemically restraining detainees and placing them in isolation. In a similar situation, chemical restraint was used again in 1996 to resolve a mass suicide attempt of 22 detainees, including 4 children (Price 2003). Chemical restraints have also been used to facilitate deportation. The HREOC report *For Those Who've Come Across the Seas* (1998: 126) records the use of chemical restraint of detainees prior to deportation, often in the early hours of the morning. A former detention officer described his

experience in chemically restraining a detainee in order to deport him the *People's Inquiry* (cited in Briskman 2008: 221):

We have an 'extraction', he's high risk, whatever that meant. I didn't know anything then. I just followed orders. We get this guy out of bed early in the morning. We pull the sheet off him. He's in his pyjamas. He clings on to the bedstead. This is a steel bedstead. My job is to unwind his fingers, struggling, shouting he won't go. There are nurses. First time I'd seen a 'chemical restraint' used. They must have broken about three needles on him. I'm thinking there must be a better way, this bloke's not an animal.

We put him in the fishbowl, it's like a cage. There were about six big blokes like me. Another tries to get these injections into him. But it's not working. He's shouting he won't go back. Anyway, we get the handcuffs on him. We get him out of the cage and into the van to the airport. He's saying, 'I want my shoes.' His t-shirt is torn. He's saying 'I can't go without my shoes'.

When we get him into the aircraft, we handcuff him to the seat. But he pulls the whole seat out of the floor. That was it. We got him off the plane and took him back. Next week we did it again. This time he went quietly. 'Just give me the tablet,' he said, 'don't inject me with that'.

In 2001 Minister Ruddock introduced a bill to give detention staff even greater powers to use chemical restraints. The bill failed to pass, but staff still have the power to administer chemical restraints in specific circumstances.

Violence, Physical Abuse, and Self-Harm

The many accounts of violence and physical abuse indicate that detention is a physically unsafe place. Many detainees recall violence on a daily basis. This violence may be perpetrated by the detention staff against detainees, by detainees against the staff, by detainees against each other, or by detainees against themselves in the form of self-harm or suicide attempts. In situations of incarceration sporadic incidents of violence are not uncommon. Like the other aspects of detention discussed here, however, the frequency of violent situations indicate that this is another outcome of the unregulated detention environment. A visitor to Baxter makes the case of the widespread occurrence of violence and physical abuse (cited in Briskman et al. 2008: 177):

I was talking to the men that we visit...and I said I know that some people had been assaulted and they looked at me and they said 'everyone's been assaulted at some time'. One man told me that he had one hand handcuffed to his ankle and one wrist handcuffed to the other ankle at one time when he was in Management. A woman told me that she and her husband and child were dragged by the feet and she was showing me the scars on her feet from that incident.

A former Woomera worker explained how incidents such as these went unreported, despite the efforts of some of the staff (cited in Briskman et al. 2008: 208):

A lot of my reports never went through to the organisations they were supposed to. A lot of my reports on children were stolen, went missing. One incident was two young boys sleeping in their beds with their mum and dad, and two officers dragged them in their boxer shorts across the compound which is gravel. Their feet, their body, their legs were cut to smithereens.

Violent military tactics were often used to break up protests by the detainees. No care is taken within detention to shield children from violence of the guards. A HREOC (2004a) report found that, in 2002, a seven year old child's human rights were breached when he was hit with a baton and subjected to tear gas as part of a break-up of a detainee protest. The HREOC investigator comments in this report that they are unaware of any other seven year old child who has been subjected to tear gas in Australia. Similarly, a psychologist who had worked at Woomera told the *People's Inquiry* (cited in Briskman et al. 2008: 206):

I saw tear gas used two to three times on groups that included children. I also saw water cannon used four to five times on groups involving children during demonstrations. On one occasion ... [I saw] a water cannon drive through a fence while women and children were present. I also saw adolescent children cuffed behind their backs and carried by their elbows.

Violence was also a way for detainees to gain attention to their needs, which were otherwise sidelined or deliberately obstructed. One health worker described how detainees knew that the tactic of property damage worked to get their demands met (cited in Briskman et al 2008: 161):

If they needed something for their children or for themselves they would ask nicely and ask nicely. It wasn't until either something got broken or the microwave got dropped on the floor, in the next 20 minutes what they wanted would be there even if they had been asking for months. Most of the detainees would say you wouldn't train an animal like that, to not give until it misbehaved. It was so demeaning to put people through that as well.

Professor Richard Harding, the Western Australian Inspector of Custodial Services, concurs that the procedures in detention were set up to produce violence from detainees. He reported on his inspection of detention centres in 2001 (cited in Briskman et al. 2008: 162):

It is no coincidence that riots occur in a system that lacks accountability. Anyone who knows the simplest thing about prison riots knows also that unacceptable conditions against which there is no recourse ... are a precursor to riots. We do not have riots in our detention centres because we have a riotous group of refugees. We have them because we run appalling systems.

The violence within detention centres contributes to the mental illness experienced by a large proportion of detainees. It impacts especially on children. The HREOC (2002a) investigation into the case of six-year old Shayan Badraie, for example, argued that witnessing violence against his father and self-harm of other detainees were crucial moments in his declining mental health. Again, the lack of regulation of detention centres means that detainees are not protected from violence from staff or each other, and that the physical safety of detainees is determined by the arbitrary power of detention staff.

Solitary Confinement

Each detention centre has a solitary confinement or 'management unit' in which detainees can be confined separately from the rest of the centre population. These units are small one-person rooms similar to a prison cell, in which detainees are locked and kept under surveillance. In Villawood detention centre this area is called 'Stage One', in North West Point it is 'Red Block', in Baxter it was the 'Management Unit', at Port Hedland 'Juliet Block'. The conditions of management units vary between centres. In all cases, they are small sparsely furnished rooms, lockable from the outside. In North West Point detention centre, the management unit 'Red Block' are 'small metal cells in which the beds

were moulded out of the same piece of metal flooring', with 'a small caged exercise enclosure about the size of an average bedroom' (Taylor 2009). In some cases, there is a toilet and shower within the room, in other cases, such as Port Hedland, detainees are escorted to use toilet facilities. Some have no outside window. Some have reported to have a window that is whitewashed so the room remains darkened (HREOC 2005). Some have fluorescent lights that are left on twenty-four hours a day (Carrick 2005), or turned off for extended periods of time. In isolation, detainees are given no access to telephone facilities, so there is no way for them to contact friends, family or lawyers. Management units have CCTV monitoring of all areas in the room, including the shower.

The decision to deploy solitary confinement is up to the discretion of centre management. Ostensibly, detainees are confined in solitary units because they are considered a danger to the other detainees. A letter from the Immigration Department to the *Jewish News* (Hoskin 2002) claimed that:

Nobody is kept in 'solitary confinement' at any Australian detention facility. If it is determined that a detainee presents a danger to themselves or to others they may be separated for a short time - typically 48-72 hours maximum - and kept under close observation.

A HREOC (2002b) report found that in 2000, five men were kept in solitary confinement at Port Hedland for six and a half days, during which time they were let out for two fresh air breaks of ten to fifteen minutes each. They had to request to use the toilet and were escorted by up to five guards to use the toilet, waiting between ten minutes and an hour for this escort to be arranged each time. They were not provided with a change of clothes. Detainees have been subject to solitary confinement because they are considered trouble-makers, or as punishment for participation in riots (see below ACHSSW 2006: 52). Permanent resident Cornelia Rau was detained in the Management Unit for much of her ten months at Baxter because her psychotic behaviour, including 'screaming uncontrollably, eating dirt, failing to clean herself and otherwise acting in grossly inappropriate ways' (Crock et al. 2006: 157) was considered attention-seeking (see also Whitmont 2005).

Sometimes children were subject to solitary confinement with their parents. The *People's Inquiry* heard of the transfer and solitary confinement of a man and his three-year-old son in Port Hedland detention centre (ACHSSW 2006: 52):

They took part in a hunger strike at Villawood because of the way they were being treated. At 2am, a removal team forced their way into the recreation room and took all of the people out, including him and his three-year old son. One of the officers tried to legcuff and handcuff the little boy who was screaming, being woken from a sleep by these strange men in riot gear and attacking them. One of the other officers was so moved by the little boy's writhing as they tried to leg-cuff him with these ties that he objected and stopped the officer doing it and said 'you can't do that to a kid'.

They whipped them on to a private aeroplane at Bankstown airport and flew them over to Port Hedland, the father and the son, in the early morning hours. They arrived at 4pm the following afternoon local WA time, and locked them in an isolation cell and kept them locked up for thirteen days in this isolation cell. They would only let them put once or twice a day for ablution and toilet and the father explained that he had to let the little boy defecate and urinate on a pile of clothing in the corner of the room because there wasn't a toilet provided and the guards wouldn't respond to his pleading to let the little boy go to the toilet. He would take the clothes out when they were allowed out once or twice a day and wash them and dry them – they would dry very quickly – and then put them back and the little boy would have to use that. On the first day they were there they were not fed or watered from the time they left Sydney until well after they arrived at the Port Hedland centre which was about 15 hours.

A Commonwealth and Immigration Ombudsman (2009) report into the case of 'Mr X' has explained how isolation was used to separate a man from his seven-year old daughter, who was subsequently deported without her father's knowledge. The man was kept in isolation for a few months, and was allowed to see his daughter – for whom he was the primary carer – for an hour every afternoon. One afternoon, when the daughter didn't come to visit her father, the centre manager told the father that she had been taken on a shopping trip. At that very time, she was in fact being deported to her mother in Iran, under authorisation by the centre manager. On finding out the truth the following day,

the man suffered a complete mental breakdown and was kept in isolation for a further two weeks.

A spokesperson for the Department of Immigration explained that the minimum period of time a detainee in isolation would spend outside their room was four hours per day, and that this time was usually longer (Carrick 2005). Some detainees who have spent time in isolation report, however, that in some cases they were only allowed out of their cell for short periods, or not at all (ACHSSW 2006). As described above, the man and his son detained in isolation in Port Hedland were allowed out once or twice a day to use the toilet, and for long enough to enable the father to wash the clothes used to collect the urine and faeces of his three year old son. Another man in isolation at Villawood, which had a toilet in the room, found that, depending on who was in charge, he would be allowed out twice a day if he said that he needed to smoke a cigarette, for the length of time it took to smoke. Some days, however, he was not allowed out at all (Carrick 2005).

A psychiatrist told the *People's Inquiry* that behavioural management strategies to deal with people in psychological distress were 'completely inconsistent with mental health management'. If a person in a psychiatric institution was isolated, they would be checked every 5 minutes, and isolation for more than hour was considered a 'critical incident' (ACHSSW 2006: 41). In immigration detention, however, detainees are confined with no consideration as to how this would affect their physical and mental health. Detainees are often not told how long they will be kept in isolation, and the period of isolation can extend for weeks and months.

Expression of Censure

Censure, or the expression of wrong-doing, is the second criterion of punishment (Newburn 2007: 516). It connects the punishment with the act of wrong-doing, and creates a relationship of cause and effect between the act and the punishment. Censure, therefore, transforms harsh treatment into punishment. For censure to be effective, the wrong-doer must be made aware of what he or she has done and why it has been condemned. The expression of censure, according to Durkheim (in Garland 1990: 48-81), also reinforces the social hierarchy: the act of punishing reinforces the position of authority in society as protector and as the law-maker.

To immigration detainees, censure is expressed in two ways. First is a general expression of censure, articulated through general discourse by government ministers and the media, and communicated indirectly to immigration detainees through the media, and through the detention policies themselves. The second expression of censure is more direct and comes from some of the detention staff, and is evident in both the language and the treatment meted out by the staff. Both of these expressions of censure transform the harsh environment of detention into a punitive one.

A number of researchers and commentators have analysed the political and popular discourse about asylum seekers arriving by boat in the late 1990s and early 2000s (see especially Klocker and Dunn 2003, and Clyne 2007; Leach 2003; Leach and Mansouri 2004; Manne 2004; Mares 2002; McCullum 2002; Pickering 2001, 2004; Rodd 2006). These works identify the discursive strategies employed by politicians and the media to reject asylum seekers' need for protection, to label their journeys 'unfair' or 'immoral', to dehumanise them and their relationships with their families, and most important, to portray the act of seeking asylum as deviant or criminal.

Leach and Mansouri's (2004) interviews with former detainees directly investigate the question of whether detainees were aware of this general discourse. The interviewees reveal that they were indeed aware of the accusations of criminality. Leila, an Iraqi refugee, explained (cited in Leach and Mansouri 2004: 115):

The Australian government looks at us as if we were criminals. We didn't commit any crimes; we came to Australia looking for freedom and peace ... so why do they call us these names? When we were in the camp, the officers used to look at us like we were criminals. We left because of the criminal president of Iraq. We come to Australia and they call us criminals ... is it possible for a child who is two, or five or ten to be a criminal?

Another refugee, Hasan, explained (cited in Leach and Mansouri 2004: 115):

These expressions that we hear from radio stations, newspapers and other media increase the depression that we suffer. We came here to save our lives ... all these expressions really hurt us. Every once in a while, a minister comes up and says we're illegal. Why illegal? Did we steal anything or commit a crime?

We came here for protection, why did we leave our country? Our country is not poor, maybe richer than Australia, we came here because we suffered.

The expression of censure was communicated more directly to detainees by some of the detention staff. A former detainee at Port Hedland told the *People's Inquiry* (cited in Briskman et al. 2008: 135):

From time to time somebody come and say, 'The way you came to this country was an invasion way, not a polite way, so that's why people don't really like you. If anybody wants to go back home then we are more than happy to send them, but don't ever think you are going to get in Australia.' People start to get scared of how they are going to get out, will they be accepted or will they be challenged?

On some occasions this discourse was communicated directly from politicians to detainees. A former detainee at Nauru told the *People's Inquiry* about a visit by then Minister for Immigration Philip Ruddock (cited in Briskman et al. 2008: 118):

People are very hopeful thinking that he is going to come and show some sympathy. All women and children went outside in that scorching weather to welcome him. He doesn't even say hello to us, he just tells us that we will try our best to get you out of the country, because you are the people who came by the window. You didn't use the door, you don't deserve to stay here and we will use any method to get you out.

Detainees felt censured by the representation of their situation in the media, and by direct communication from detention staff. When this censure is combined with the hard treatment experienced in immigration detention, immigration detention is punitive.

Detention Centres: Worse Than Prison?

The aspects of immigration detention discussed above cumulatively create a punitive environment, where detainees feel like they are punished for their method of entering Australia. In addition, detention centres are institutions managed by corporations that specialise in operating prisons, and staff experienced in prison work are often transferred to detention centres. Arguably, this too contributes to the punitive nature of immigration detention. Yet there are some aspects of immigration detention that are harsher than prisons, and many

detainees have expressed the opinion that detention centres are worse than prisons.

As discussed above, detainees may be detained for an indefinite period of time. Unlike judicial incarceration where a prisoner enters jail with the knowledge of how long he or she will be incarcerated, and is able in some cases to shorten this sentence with good behaviour, there is no way for immigration detainees to know how long they will be detained. The 'unknown' length of their detention is one of the more destabilising aspects of immigration detention for detainees, and this has been found to impact significantly on detainees' mental health (see for example Steel et al. 2004, Leach and Mansouri 2004). Individual subjective accounts compare detention against prison unfavourably. A former detainee who was jailed for escaping from immigration detention explained to the People's Inquiry (cited in Briskman et al. 2008: 176):

The jail was better for me because I used to go to English class every day. I knew I have to stay for seven months, that's it, but in detention I didn't know. The people in jail have more rights. They had the right to study and contact the university, was organised time for everything. It was library, internet, you could get some information.

Another detainee wrote to a correspondent (cited in Burnside 2003: 53-4):

Some officers are good, but a lot of officers that come here before they were working in jail and their behaviour is very bad. Every time they say bad word and they think here is prison and we are prisoner. Although here is worse than jail and the laws in jail are better than here.

One does not have to rely solely upon the subject accounts of detainees. The Inspector of Custodial Services for Western Australia, Richard Harding, told the ABC program *Background Briefing* (Morton 2002) that he supported the view that detention centres were worse than prisons. He explained:

These places are worse than prisons. The detainees who commit an offence and end up in the WA prison system, all prefer it in terms of the human interaction, in terms of the location, in terms of the relative respect with which they are treated by staff.

One reason why detainees find detention ‘worse than prisons’ is because prisons are subject to strict regulations concerning the conditions of incarceration. While each state and territory determines its own regulations, the national *Standard Guidelines for Corrections in Australia* (2004), for example, provides:

... outcomes or goals to be achieved by correctional services rather than a set of absolute standards or laws to be enforced ... a statement of national intent, around which each Australian State and Territory jurisdiction must continue to develop its own range of relevant legislative, policy and performance standards that can be expected to be amended from time to time to reflect ‘best practice’ and community demands at the state and territory level.

With regards to the use of solitary confinement – to be used only as a ‘last resort’ – the *Guidelines* (2004: 18) outline the procedures that need to take place before a prisoner is isolated:

1.77 Prisoners placed in segregation for the security and good order of the prison are to be managed under the least restrictive conditions consistent with the reasons for their placement.

1.79 The prisoner should be informed verbally and in writing of the reason(s) for the segregation and the period of the segregation placement.

1.80 Every prisoner who is placed in segregation ... should be visited daily by a member of the prison management and as frequently as practicable (preferably daily) by a representative of the medical officer.

1.75 Prolonged solitary confinement, corporal punishment, punishment by placement in a dark cell, reduction of diet, sensory deprivation and all cruel, inhumane or degrading punishments should not be used.

It should be reiterated that these are guidelines for best practice and not necessarily implemented in state and territory prisons. But the fact that the use of solitary confinement in immigration detention does not come close to meeting this best practice in prisons, highlights the difference between levels of regulation of detention centres compared with prisons. Without regulation, detention staff have arbitrary authority to make decisions that can have huge impact on detainees. Specifically, detention staff have so much discretion that they can make detention

centres punitive environments, with conditions worse than prisons, with little regulation or accountability for their actions.

Conclusion:

Punishment, Immigration Detention, and the Australian Constitution

By demonstrating that the experiences of sanction and censure are so widespread that they directly or indirectly affect all detainees, this chapter has argued that immigration detention is a punitive system. While some detainees do have positive experiences of detention, these are exceptions. The punitive effects of detention are the result of an environment that is lacking in regulation, transparency, and accountability. This means that detention staff have a high degree of discretion with regards to the rules of detention and the treatment of detainees. With a staff culture that is unsympathetic to the situation of detainees, this makes for a punitive environment that is, in many ways, worse than prison.

The Executive has maintained the position that that immigration detention is not punitive. The courts have repeatedly upheld the argument that only the intention of detention policy is relevant to the question of constitutionality. Yet, for an inquiry into the social and political function of immigration detention in Australia, the unintended consequences of detention policy – what is produced, what is made possible – are crucial. Such an inquiry reveals the nature and extent of Executive power in Australia, and the limits of constitutional protection against arbitrary action. Immigration detention centres in Australia are sites of Executive control that are punitive in effect.

The results of this are significant. On an individual level, it has resulted in considerable harm to many detainees. Some detainees have experienced ongoing physical and psychological effects from their time in detention. Of the 19 deaths in detention, a number were preventable (Briskman et al. 2008: 21). The inability of the courts to act as a check and balance to the Executive has left the Executive with near unrestricted power over the lives of non-citizens under its control. The conditions of immigration detention are also a clear infringement on the human rights of those detained.

This result is also significant for what it reveals about the health of Australia's liberal democracy. While the constitution provides that the Executive has the power to make decisions regarding non-citizens, including the power to detain them, the checks on Executive power have been negligible. The Parliament has rarely provided a strong check and balance to Executive power, and the popular support for immigration detention policies has meant that immigration detention policy has bipartisan political support. On the other hand, the ability of the courts to challenge immigration detention has been incrementally removed over the last decade, as described in Chapter 6. On top of this, the Judiciary has in the past exhibited a reluctance to make decisions against the Executive in relation to migration matters (Crock 1992). Yet although the High Court hasn't found against the Executive in relation to punishment in detention, it has been careful to emphasise on numerous occasions that the limits to Executive power lie with the issue of punishment, and to warn the Executive against overreaching its powers. In reality, however, the Executive has been largely unrestrained by the Judiciary in the policy and implementation of immigration detention.

The issue of citizenship is an important one in this discussion. While ostensibly the constitution sufficiently protects citizens from arbitrary power, it does not do so for non-citizens. Yet the automatic way in which the *Migration Act* authorises that people *suspected* of being unlawful non-citizens *must* be detained has resulted in many citizens and people with valid residency visas being wrongfully detained (Crock et al. 2006: 155). In reality, then, there are insufficient provisions to ensure that citizens or people with valid residency visas are not subject to immigration detention, and that the conditions of detention centres are better than in prison.

The *Migration Act* does not place limits on the conditions of immigration detention. The only legal restriction upon the conditions of detention is the constitution (Gelber 2005). Yet, while the High Court has argued (in *Lim* and elsewhere) that there are limits to Executive power with regards to citizens, it has also argued that administrative detention is acceptable for the management of non-citizens. The consequence of the Court's position is that the implementation of the policy of immigration detention remains largely unregulated, and the treatment that detainees receive is at the discretion of detention staff. The result is

a control regime with punitive effects, which breaches, at the very least, the spirit of the Australian constitution.

Conclusion

When writing the social history of carceral institutions in the United States, David Rothman (1971) posed a number of key questions about the 'enduring nature' of incarceration. One of these questions arose from Rothman's observation that carceral institutions inevitably failed to meet the stated objectives of the authorities that implemented them. Why, then, does incarceration persist, to the extent that it has become one of the defining features of contemporary Western societies? Rothman suggests that incarceration persists not because it fulfils its intentions for the people on the inside, but rather, that it fulfils certain social and political functions for people on the outside. An examination of any form of incarceration, therefore, is an examination of certain social and political needs of the society in which it operates.

This thesis set out to explain why the policy of immigration detention in Australia continues to form a key aspect of the immigration strategy, despite not meeting its stated objectives and incurring high social and financial costs. It argued that, because the policy objectives are not met, then immigration detention must fulfil other social and political functions. It asked, then, what are the social and political functions of immigration detention? The thesis has provided genetic and theoretical explanations for the use and persistence of immigration detention. It outlined the consequences of the policy and its implementation. Finally, it explained the significance of the policy and implementation of immigration detention for liberal democracy in Australia.

This thesis explains that immigration detention is the most recent of a number of forms of administrative detention that have been implemented throughout Australia's history. Aboriginal reserves, quarantine stations and enemy alien internment camps are institutional predecessors to immigration detention. Like immigration detention, they were political responses to perceived social problems of the time. Aboriginal reserves were implemented to respond to concerns about the dying race, and later, concerns about miscegenation. Quarantine stations were implemented at the time of social preoccupation with hygiene and disease, and also the idea that certain diseases were tied to certain races. Enemy alien internment camps, during the two world wars, were a response to fears that the

threat to Australian society could come from within the community, and that people of 'enemy' genealogy should not be trusted.

These three forms of administrative detention share a number of similar characteristics. First, they regulated the entry of people seeking to enter Australia, and facilitated the removal of certain people already living within the community. Second, these forms of administrative detention did not provide total exclusion from the community, but where people are released from detention and allowed to live within the community, they are left with no doubt about the extent of Executive power in Australia. Third, on the most part, these forms of administrative detention are sites of Executive control with little regulation from the courts or other regulatory organisations. The functioning of the institutions was characterised by lack of transparency and accountability. The treatment that detainees received, therefore, was left to the discretion of the staff. Not all administrative detainees have a negative experience of their confinement. Yet the overwhelming impression left by accounts and testimonies of people detained Aboriginal reserves, quarantine stations, and enemy alien internment camps, is that the conditions and treatment received within these institutions is not consistent in tone with their ostensibly administrative function.

This thesis has drawn together social theories to develop a framework for explaining the social and political function of administrative detention in modern nation states. The three concepts of incarceration, classification, and control explain the 'how', 'who', and 'why' of administrative detention. Administrative detention has long been a political mechanism deployed to solve perceived social, economic and political problems, particularly in times of social change. More specifically, it is a response to social, economic and political problems intertwined with ethnic, racial or class differences. Administrative detention is often used to incarcerate groups of people, and these people are detained according to their administrative category, and not because they have committed an offence. With administrative detention, governments are able to control the categories of people that are able to enter and live within the nation state.

This thesis has applied these theories of incarceration, classification and control to explain the contemporary policy and practice of immigration detention in Australia. It has argued that at the foundation of the policy of immigration

detention is the myth that control over our national boundaries is possible. Australia's vast and complex visa system classifies people in great detail, and ambiguity or non-conforming to this system of classification may lead to detention. Added to this is a particular notion of natural justice in our national character: the idea that people should follow the 'rules' and that one category of people should not be treated with more favour than others. Theories about moral panics are used to explain how the severe treatment of those who fail to follow 'the rules' is politically expedient. Finally, the idea of a national emergency makes the detention of whole categories of people under harsh conditions seem proportionate and necessary.

The consequences of Executive control over the policy and implementation of immigration detention has been the creation of a control regime with punitive effects. This thesis outlined how the Executive has incrementally restricted the regulation of immigration detention by the courts and other organisations. Discretion over the decision to detain has been removed from migration officers. The *Migration Act* states that a migration officer 'must' detain an individual if he or she is suspected of being an unauthorised non-citizen.

Ironically, the lack of regulation over the policy and practice of immigration detention, and the removal of discretion regarding the decision to detain, has meant that the day-to-day character of immigration detention centres is largely determined by detention staff. Detention staff have enormous power to shape the conditions of detention and the treatment of detainees. The subjective experiences of detainees describe immigration detention as a punitive environment. This is supported by objective analyses that measure these experiences against criminological theories of punishment and human rights protection instruments. Immigration detention centres are control regimes with punitive effects. Punishment in detention is systematic, and although some detainees do not experience detention as punitive, these are exceptions.

This finding has significance for Australia's liberal democracy. It indicates that Australia's liberal democracy has insufficient checks and balances to limit Executive power, particularly with regards to non-citizens. The constitution grants the Executive powers to make laws regarding non-citizens, including laws requiring their detention. These laws – the *Migration Act* – do not stipulate limits

to the form that this detention might take, nor set any guidelines for the treatment of non-citizens in detention. The constitution places one limit only: that immigration detention must not be punitive, because only the Judiciary can incarcerate for punitive purposes. Both the Judiciary and Executive have maintained the legal fiction that immigration detention is not punitive because by definition it cannot be. In reality, however, the constitution's limits on Executive power have been breached. The management of people at the boundaries of the nation has taken priority over the adherence to sovereign frameworks such as principle of separation of powers.

This thesis has contributed to knowledge about immigration detention in Australia by examining immigration detention within the context of the broad carceral category of administrative detention. This framework for investigation has enabled immigration detention to be situated within a history of administrative detention, which reveals a number of continuities in both the practice of incarceration, and persistent social concerns. Positioning immigration detention as a form of administrative detention also sharpens the theoretical investigation of the former. Administrative detention has received little theoretical attention, and this thesis has drawn together theories of judicial imprisonment with more general social theories to develop an explanation for the social and political function of immigration detention in Australia.

It is not only asylum seekers who are subject to immigration detention, and this thesis has examined the function of immigration detention for all categories of detainee. In doing so it has identified broad social concerns about the categories of people who should be allowed to enter and remain within the Australian community. Public anxiety about boat arrivals is one aspect of broader concerns about national identity, economic security, and control over national borders within the context of globalisation.

The consequences of immigration detention outlined here can contribute to the discussion about a bill of rights in Australia. The current restrictions on Executive power – the separation of powers, domestic rights laws and international treaties – have been insufficient in protecting the rights of non-citizens in detention. To act as a method for regulating the policy and practice of immigration detention and other forms of administrative detention, a bill of rights, whether constitutional or

legislative, would need to stipulate specifically to protect the rights of non-citizens.

Importantly, there are also many aspects of this study that can enhance investigations into the social and political function of immigration detention in countries other than Australia. As many countries move towards stricter regimes of border control, immigration detention is increasingly being used to restrict the movement of asylum seekers and other undocumented migrants. In each country, however, immigration detention does not simply emerge from nowhere. Each country has a history of incarceration, and exploring this history, and how the contemporary practice of immigration detention fits within this history, is an extremely valuable exercise. In addition, the theoretical framework developed in this thesis is not specific to the Australian context, but could be used to guide an analysis of administrative detention in any country in any period of history.

Within Australia, it is hoped that the arguments developed in this thesis will contribute to a discussion about the future of immigration detention. If immigration detention is to continue as part of Australia's immigration strategy – and in the immediate future this seems likely – then there needs to be discussion about how to improve the conditions for detainees. As a starting point, strong regulations need to be implemented on the conditions of detention, the length of detention, and on the level of discretion held by detention staff. If immigration detention continues to be used, then it must be implemented in accordance with the constitution, and with domestic and international law.

The last words of this thesis recall Rothman's (1971) optimism about the human capacity to develop new solutions to social problems. Administrative detention – and immigration detention – in Australia has been enduring, but it doesn't have to be an inevitable part of our social and political landscape. Rothman argues that the very exercise of observing how incarceration has been reused and revised throughout history inherently breaks the cycle. As he (1971: 295) succinctly writes, 'an awareness of the causes and implications of past choices should encourage us to a greater experimentation with our own solutions ... We need not remain trapped in inherited answers'.

References

- A v Australia*, 1997, 560/1993, UNHRC, 3 April, IIHRL 30.
- Aboriginals Protection and the Restriction of the Sale of Opium Act 1897 (Qld)*.
- Act to Provide for the Protection and Management of Aboriginal Natives of Victoria 1869 (Vic)*
- Administrative Decisions (Judicial Review) Act 1977 (Cth)*
- Advertiser* 2002, 'Electric Fences Replace Razor Wire at Baxter', 13 April.
- Advertiser* 2005, 'Closed Centre Costing \$260,000', 18 July.
- Agamben, G. 1998, *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller-Roazen, Stanford University Press: Stanford.
- Al-Kateb v Goodwin* 2004, HCA 37.
- Allard, T. and Clennell, A. 2001, 'Howard Links Terrorism to Boat People', *Sydney Morning Herald*, 7 November.
- Arendt, H. 1973, *The Origins of Totalitarianism*, Harcourt Brace & World: San Diego.
- Asylum Seeker Project (ASP) 2003, *Welfare Issues and Immigration Outcomes for Asylum Seekers on Bridging Visa E*, The Hotham Mission, <http://www.ajustaustralia.com/resource.php?act=attache&id=109> [accessed 6.1.10].
- Attwood, B. 1989, *The Making of the Aborigines*, Allen & Unwin: Sydney, Wellington, London, Boston.
- Attwood, B. and Markus, A. 1999, *The Struggle for Aboriginal Rights: A Documentary History*, Allen & Unwin: Crows Nest.
- Austin, P., Silove, D. and Steel, Z. 2007, 'The Impact of Immigration Detention on the Health of Asylum Seekers', *Yearning to Breathe Free: Seeking Asylum in Australia*, eds. D. Lusher and N. Haslam, The Federation Press: Annandale.

Australian Council of Heads of Schools of Social Work (ACHSSW) 2006, *We've Boundless Plains to Share: The First Report of the People's Inquiry into Detention*, http://achssw.org.au/images/pdf/PIDFirstReportNov_2006Final.pdf [accessed 10.1.10].

Australian National Audit Office (ANAO) 2004, *Management of the Detention Centre Contracts – Part A, Department of Immigration and Multicultural and Indigenous Affairs*, The Auditor-General Audit Report No. 54.

Australian National Audit Office (ANAO) 2005, *Management of the Detention Centre Contracts – Part B, Department of Immigration and Multicultural and Indigenous Affairs*, The Auditor-General Audit Report No. 1.

Australian National Audit Office (ANAO) 2008, *Department of Immigration and Citizenship, Administration of Detention Debt Waiver and Write-Off*, The Auditor-General Audit Report No. 2.

Bagaric, M., Boyd, K., Dimopoulos, P., Tongue, S. and Vrachnas, J. 2007, *Migration and Refugee Law: Cases and Commentary*, Cambridge University Press: Cambridge, New York, Melbourne.

Balint, R. 2005, *Troubled Waters: Borders, Boundaries and Possession in the Timor Sea*, Allen & Unwin: Crows Nest.

Bartlett, A. 2001, *Debates*, Senate, 20 September, 27481.

Bartrop, P. and Eisen, G. 1990, *The Dunera Affair: A Documentary Resource Book*, Swartz and Wilkinson: Melbourne.

Bashford, A. & Strange, C. 2002, 'Asylum-Seekers and National Histories of Detention', *Australian Journal of Politics and History*, 48(4), 509-528.

Bashford, A. and Nugent, M. 2003, 'Leprosy and Management of Race, Sexuality and Nation in Tropical Australia', in *Contagion: Epidemics, History and Culture from Smallpox to Anthrax*, eds. A. Bashford and C. Hooker, Routledge: London and New York.

Bashford, A. 2004, *Imperial Hygiene: A Critical History of Colonialism, Nationalism and Public Health*, Palgrave Macmillan: New York.

- Bauman, Z. 1989, *Modernity and the Holocaust*, Polity Press: Cambridge.
- Beazley, K. 2001, *Debates*, House of Representatives, 29 August, 30570.
- Behrooz v Secretary of the Department of Immigration 2004, 208 ALR 271.
- Bevege, M. 1993, *Behind Barbed Wire: Internment in Australia During World War II*, University of Queensland Press: St Lucia.
- Bolton, G. 1982, 'Aborigines in Social History: An Overview', in *Aboriginal Sites, Rights and Resource Development*, ed. R.M. Berndt, University of Western Australia Press: Perth.
- Border Protection (Validation and Enforcement Powers) Act 2001 (Cth)*
- Boucher, G. and Sharpe, M. 2008, *The Times Will Suit Them: Postmodern Conservatism in Australia*, Allen & Unwin: Crows Nest.
- Brennan, F. 2003, *Tampering with Asylum: A Universal Humanitarian Problem*, University of Queensland Press: St Lucia.
- Briskman, L., Latham, S. and Goddard, C. 2008, *Human Rights Overboard: Seeking Asylum in Australia*, Scribe: Carlton North.
- Brock, P. 1993, *Outback Ghettos: Aborigines, Institutionalisation and Survival*, Cambridge University Press: Cambridge, New York, Melbourne.
- Bruegel, I. and Natamba, E. 2001, *Maintaining Contact: What Happens After Detained Asylum Seekers Get Bail?* Faculty of Arts and Human Sciences, London South Bank University, <http://www1.lsbu.ac.uk/ahs/research/reports/irene/irene.shtml> [accessed 6.1.10].
- Burke, A. 2001, *In Fear of Security: Australia's Invasion Anxiety*, Pluto Press: Annandale.
- Burnside, J. 2003, *From Nothing to Zero: Letters from Refugees in Australia's Detention Centres*, Lonely Planet Publications: Melbourne.
- Burnside, J. 2007, *Watching Brief: Reflections on Human Rights, Law and Justice*, Scribe: Melbourne.

- Carrick, D. 2005, 'Compensation for Vivian Alvarez, Management Units, The East Timorese – Who Stays and Who Goes?', *The Law Report*, ABC Radio National, 17 May, <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1370005.htm> [accessed 10.1.10].
- Carrington, K. 2003, 'Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context', *Current Issues Brief No. 3 2003-4*, Information and Research Services: Department of the Parliamentary Library.
- Chesterman, J. and Galligan, B. 1997, *Citizens Without Rights: Aborigines and Australian Citizenship*, Cambridge University Press: Cambridge, New York, Melbourne.
- Chu Kheng Lim v Minister for Immigration, Local Government, and Ethnic Affairs* 1992, 176 CLR 1.
- Clyne, M. 2005, 'The Use of Exclusionary Language to Manipulate Opinion: John Howard, Asylum Seekers, and the Emergence of Political Incorrectness in Australia', *Journal of Language and Politics*, 4(2), 173-196.
- Clyne, M. 2007, 'Words Excusing Exclusion of Asylum Seekers', *Yearning to Breathe Free: Seeking Asylum in Australia*, eds. D. Lusher and N. Haslam, The Federation Press: Annandale, 198-207.
- Cohen, S. 2002 (1972), *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, Routledge: London and New York.
- Commonwealth and Immigration Ombudsman, 2009, *Report for Tabling in Parliament by the Commonwealth and Immigration Ombudsman*, 516/09, http://www.ombudsman.gov.au/files/immi_report_516_09.pdf [accessed 10.1.10].
- Comrie, N. 2005, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report 3, Commonwealth Ombudsman: Canberra.
- Corlett, D. 2005, *Following Them Home: The Fate of the Returned Asylum Seekers*, Black Inc.: Melbourne.

- Council of Australian Governments (COAG) 2009, *Special Council of Australian Government's Meeting: Nation Building and Jobs Plan*, 5 February, http://www.coag.gov.au/coag_meeting_outcomes/2009-02-05/index.cfm [accessed 10.1.10].
- Crock, M. 1992, *Administrative Law and Immigration Control in Australia: Actions and Reactions*, PhD Thesis: The University of Melbourne.
- Crock, M. 1998, *Immigration and Refugee Law in Australia*, The Federation Press: Annandale.
- Crock, M. 2003, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows', *Pacific Rim Law and Policy Journal*, 12, 49-96.
- Crock, M. 2004, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law', *Sydney Law Review*, 4.
- Crock, M. and Saul, B. 2002, *Future Seekers: Refugees and the Law in Australia*, The Federation Press: Annandale.
- Crock, M., Saul, B. and Dastyari, A. 2006, *Future Seekers II: Refugees and Irregular Migration in Australia*, The Federation Press: Annandale.
- Cronin, K. 1993, 'A Culture of Control: An Overview of Immigration Policy-Making', in *The Politics of Australian Immigration*, eds. J. Jupp and M. Kabala, Australian Government Publishing Service: Canberra.
- Cumpston, J.H.L. 1989, *Health and Disease in Australia: A History*, ed. M.J. Lewis, Australian Government Publishing Service: Canberra.
- Curthoys, A. 2003, 'Liberalism and Exclusionism: A Prehistory of the White Australia Policy', in *Legacies of White Australia: Race, Culture and Nation*, eds. L. Jayasuriya, D. Walker, and J. Gothard, University of Western Australia Press: Crawley.
- Dauvergne, C. 1999, 'Confronting Chaos: Migration Law Responds To Images of Disorder', *Res Publica*, 5(1), 23-45.

- Davidson, A. 1997, *From Subject to Citizen: Australian Citizenship in the Twentieth Century*, Cambridge University Press: Cambridge, New York, Melbourne.
- Davies, E. 2007, *Mandatory Detention for Asylum Seekers in Australia: An Evaluation of Liberal Criticism*, MA Thesis: The University of Western Australia.
- Debates* 1907a, House of Representatives, 16 July, 504-559.
- Debates* 1907b, Senate, 30 October, 5285-5326.
- Debelle, P. 2002, 'Ruddock Shows Off "Humane" Centre and its 9000-volt fence', *Sydney Morning Herald*, 11 July.
- Debelle, P. 2005, 'Suicidal and Without Hope', *The Sunday Age*, 12 June.
- Dechian, S., Millar, H. and Sallis, E. 2004, *Dark Dreams: Australian Refugee Stories By Young Writers Aged 11-20 Years*, Wakefield Press: Kent Town.
- Devetak, R. 2004, 'In Fear of Refugees: The Politics of Border Protection in Australia', *International Journal of Human Rights*, 8(1), 101-109.
- Dias, E. 2004, 'Punishment by Another Name? Detention of Non-Citizens and the Separation of Powers', *Public Law Review*, 15, 17-35.
- Diken, B. 2004, 'From Refugee Camps to Gated Communities: Biopolitics and the End of the City', *Citizenship Studies*, 8(1), 83-106.
- Dikeos, T. 2008, 'Drugs Inside Villawood', *The 7.30 Report*, ABC, 30 July, <http://www.abc.net.au/7.30/content/2008/s2319489.htm> [accessed 4.1.10].
- Dimasi, M. 2008, 'The Coalition's Expensive Christmas Island Legacy', *Australian Policy Online*, 20 May.
- Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) 2001, *Annual Report 2000-2001: Output 1.3.5*, <http://www.immi.gov.au/about/reports/annual/2000-01/report19.htm> [accessed 10.1.10]
- Department of Immigration and Multicultural Affairs (DIMA) 2005, *Annual Report 2004-05*, <http://www.immi.gov.au/about/reports/annual/2004-05/pdf.htm> [accessed 4.7.06].

Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) 2005, *Management Improvements and Cultural Change in DIMIA*, Media Release, 21 September, http://www.newsroom.immi.gov.au/media_releases/134 [accessed 17.12.09]

Department of Immigration and Citizenship (DIAC) 2007, *Detention Health Advisory Group: Report Against 2006-2007 Work Programme*, http://www.immi.gov.au/managing-australias-borders/detention/_pdf/dehag.pdf [accessed 27.6.09].

Department of Immigration and Citizenship (DIAC) 2009a, *Annual Report 2008-09, Outcome One*, <http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-5.htm> [accessed 11.1.10].

Department of Immigration and Citizenship (DIAC) 2009b, 'Increased Capacity on Christmas Island', *Media Release*, 1 December, http://www.newsroom.immi.gov.au/media_releases/769 [accessed 4.12.09].

Department of Immigration and Citizenship (DIAC) 2009c, *Fact Sheet 60 – Australia's Refugee and Humanitarian Program*, <http://www.immi.gov.au/media/fact-sheets/60refugee.htm> [accessed 14.12.09].

Department of Immigration and Citizenship (DIAC) 2010, *Fact Sheet 82 – Immigration Detention*, <http://www.immi.gov.au/media/fact-sheets/82detention.htm> [accessed 10.1.10].

Douglas, M. 1966, *Purity and Danger: An Analysis of the Concept of Pollution and Taboo*, Routledge: London and New York.

Duff, A. 2003, *Punishment, Communication and Community*, Oxford University Press: Oxford, New York.

Duncombe, K. 2004, *Bruny Island's Quarantine Station: In War and Peace*, Bruny Island, Tasmania.

Dunn, K. and Howard, J. 2003, 'Reaching Behind Iron Bars: Challenges to the Detention of Asylum Seekers', *Australian Review of Public Affairs*, 4(1), 45-64.

- Dunn, K.M., Forrest, J., Burnley, I. and McDonald, A. 2004, 'Constructing Racism in Australia', *Australian Journal of Social Issues*, 39(4), 409-430.
- Durkheim, E. 1938, *The Rules of Sociological Method*, The Free Press: New York.
- Edwards, M. 2007, 'Concern over Deportations', *PM*, ABC Radio National, 1 May [accessed 24.2.09].
- Elder, B. 2003, *Blood on the Wattle: Massacres and Maltreatment of Aboriginal Australians Since 1788*, 3rd edn, New Holland Publishers: Sydney.
- Evans, C. 2008, *Address to the 2008 National Members' Conference of the Migration Review Tribunal and the Refugee Review Tribunal*, 29 February, <http://www.minister.immi.gov.au/media/speeches/2008/ce08-29022008.htm> [accessed 9.5.09].
- Evans, C. 2009, 'Detention Debt Regime to be Scrapped', *Media Release*, 18 March, <http://www.minister.immi.gov.au/media/media-releases/2009/ce09031.htm> [accessed 22.1.10].
- Evans, R. 2000, "'Tempest Tossed"; Political Deportations from Australia and World War I', in *Alien Justice: Wartime Internment in Australia and North America*, eds. K. Saunders and R. Daniel, University of Queensland Press: St Lucia, 28-46.
- Everett, J. 2008, *The Bitter Shore*, MacMillan: Sydney.
- Fairburn, M. 1999, *Social History: Problems, Strategies and Methods*, Macmillan: Hampshire and London.
- Feeley, M.M. and Simon, J. 1992, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications', *Criminology*, 30(4), 449-474.
- Ferguson, L. 1998, *Debates*, House of Representatives, 2 December, 1241.
- Finnane, M. & McGuire, J. 2001, 'The Uses of Exile and Punishment: Aborigines in Colonial Australia', *Punishment and Society*, 3(2), 279-298.
- Fischer, G. 1989, *Enemy Aliens: Internment and the Homefront Experience in Australia 1914 – 1920*, University of Queensland Press: St Lucia.

Fischer, G. 1993, 'Fighting the War at Home: The Campaign Against Enemy Aliens in Australia During the First World War', in *Minorities in Wartime: National and Racial Groupings in Europe, North America and Australia During the Two World Wars*, ed. P. Panayi, Berg: Oxford, Providence.

Fisberies Management Act 1991 (Cth)

Foley, J.D. 1995, *In Quarantine: A History of Sydney's Quarantine Station 1828-1984*, Kangaroo Press: Kenthurst NSW.

Foucault, M. 1967, *Madness and Civilization: A History of Insanity in the Age of Reason*, Routledge: London and New York.

Foucault, M. 1977, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan, Vintage Books: New York.

Foucault, M. 1978, 'Right of Death and Power over Life', in *The History of Sexuality, Vol 1: An Introduction*, Vintage Books.

Gardiner-Garden, J. 2000, 'The Definition of Aboriginality', *Research Note 18*, Parliamentary Library, <http://www.aph.gov.au/library/pubs/rn/2000-01/01RN18.htm> [accessed 28 August 2007].

Garland, D. 1990, *Punishment and Modern Society: A Study in Social Theory*, The University of Chicago Press: Chicago.

Garland, D. 2001a, 'Introduction: The Meaning of Mass Imprisonment', *Punishment and Society*, 3(1), 5-7.

Garland, D. 2001b, *The Culture of Control: Crime and Social Order in Contemporary Society*, University of Chicago Press: Chicago and Oxford.

Gauthier, K. 2007, *A Price Too High: The Cost of Australia's Approach to Asylum Seekers*, A Just Australia, <http://www.ajustaustralia.com/resource.php?act=attache&id=213> [accessed 22.1.10].

Gelber, K. 2004, 'High Court Review 2003: The Centenary Year', *Australian Journal of Political Science*, 39(2), 331-347.

- Gelber, K. 2005, 'High Court Review 2004: Limits on the Judicial Protection of Rights', *Australian Journal of Political Science*, 40(2), 307-322.
- Gillard, J. 2009, 'Budget 2009-10: \$1 Billion to Address Indigenous Disadvantage', *Media Release*, 12 May, Department of Employment, Education and Training, http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/Article_090512_182846.aspx [accessed 10.1.10].
- Gleitzman, M. 2002, *Boy Overboard*, Puffin Books: Camberwell.
- Gleitzman, M. 2004, *Girl Underground*, Puffin Books: Camberwell.
- Glendinning, L. 2005, 'Woomera Traumatized Boy, Court Told', *Sydney Morning Herald*, 30 August.
- Goffman, E. 1961, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, Anchor Books: New York.
- Gordon, M. 2005, *Freeing Ali: The Human Face of the Pacific Solution*, University of New South Wales Press: Sydney.
- Grattan, M. and Murdoch, L. 2009, 'Murky Waters', *The Age*, 24 October.
- Hage, G. 1998, *White Nation: Fantasies of White Supremacy in a Multicultural Society*, Pluto Press: Annandale.
- Hage, G. 2003, *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society*, Pluto Press: Annandale.
- Hammill, J.M. 1999, *Culture of Chaos: Indigenous Women and Vulnerability in an Australian Rural Reserve*, PhD Thesis: The University of Queensland.
- Hand, G.L. 1992, *Debates*, House of Representatives, 2370.
- Hanson, P. 1996, *Maiden Speech*, <http://www.paulinehanson.com.au/pauline-aiden-speech.pdf> [accessed 16.4.07].
- Hart, C. 2006, 'Detainee "Raped in Front of her Toddler"', *Australian*, 10 June.
- Hart, C. 2007, 'Returning Asylum Seekers "Scandalous"', *Australian*, 27 September.

- Harvey, C. 2009, 'Asylum-Seekers Arrive by Plane, Not Boat', *The Sunday Telegraph*, 25 October.
- Hasluck, P. 1965, *The Government and the People, 1939-1941*, Volume 1, Australian War Memorial, <http://www.awm.gov.au/histories/chapter.asp?volume=30> [accessed 1.10.07].
- Haynes, R.D. 1998, *Seeking the Centre: The Australian Desert in Literature, Art and Film*, Cambridge University Press: Cambridge, Melbourne.
- Holt, A. 2001, *Forcibly Removed*, Magabala Books: Broome.
- Holt, M. 2003, 'Biopolitics and the "Problem of the Refugee"', in *Critical Perspectives on Refugee Policy in Australia*, eds. M. Leach and F. Mansouri, Deakin University: Burwood.
- Hoskin, J. 2002, 'Treatment of Detainees', *Australian Jewish News*, 17 July.
- Howard, J. 2001a, *Debates*, House of Representatives, 29 August, 30570.
- Howard, J. 2001b, *Transcript of the Prime Minister the Hon John Howard MP Interview with Jon Faine*, 4 September 2001, 3LO
<http://www.pm.gov.au/news/interviews/2001/interview1213.htm> [accessed 12.7.07].
- Howard, J. 2002, *Doorstop Interview*, 16 April,
<http://www.pm.gov.au/news/interviews/2002/interview1597.htm> [accessed 10.1.10].
- Howard, J. 2005, *Lateline*, ABC Television, 19 September,
<http://www.abc.net.au/lateline/content/2005/s1463823.htm> [accessed 2.10.09].
- Human Rights and Equal Opportunities Commission (HREOC) 1997, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Commonwealth of Australia: Sydney.
- Human Rights and Equal Opportunity Commission (HREOC) 2000, *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights in an Immigration Detention Centre*, Report No. 12.

Human Rights and Equal Opportunity Commission (HREOC) 2005, *Report of an Inquiry into Complaints by Immigration Detainees Concerning their Detention at the Curtin Immigration Reception and Processing Centre*, Report No 28.

Human Rights and Equal Opportunity Commission (HREOC) 1998, *For Those Who've Come Across the Sea: Detention of Unauthorised Arrivals*, Commonwealth of Australia: Sydney.

Human Rights and Equal Opportunity Commission (HREOC) 2002a, *Report of an Inquiry into a Complaint by Mr Mohammed Badraie on Behalf of his Son Shayan Regarding Acts or Practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)*, Report No. 25.

Human Rights and Equal Opportunity Commission (HREOC) 2002b, *Report of an Inquiry Into Complaints by Five Asylum Seekers Concerning Their Detention in the Separation and Management Block at the Port Hedland Immigration Reception and Processing Centre*, Report No. 24.

Human Rights and Equal Opportunity Commission (HREOC) 2004a, *Report of an Inquiry into a Complaint by Ms KJ Concerning Events at Woomera Immigration Reception and Processing Centre Between 29-30 March 2002*, Report No. 27.

Human Rights and Equal Opportunities Commission (HREOC) 2004b, *A Last Resort? National Inquiry into Children in Detention*, Commonwealth of Australia: Sydney.

Hyslop, A. 1997, 'A Question of Identity: J.H.L. Cumpston and Spanish Influenza, 1918-1918', *Australian Cultural History*, 16, 60-76.

Ignatieff, M. 1978, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850*, Columbia University Press: New York.

Immigration Restriction Act 1901 (Cth).

Industrial and Reformatories Schools Act 1886 (Qld).

International Covenant on Civil and Political Rights (ICCPR) 1966.

Irving, H. 1999, *To Constitute a Nation; A Cultural History of Australia's Constitution*, Cambridge University Press: Cambridge, New York, Melbourne.

- Jaivan, L. 2006, *The Infernal Optimist*, HarperCollins: Sydney.
- Jayasuriya, L., Walker, D. and Gothard, J. 2003, 'Introduction', in *Legacies of White Australia: Race, Culture and Nation*, eds. L. Jayasuriya, D. Walker and J. Gothard, University of Western Australia Press: Crawley.
- Joint Standing Committee on Migration 1994, *Asylum, Border Controls and Detention*, Commonwealth of Australia: Canberra.
- Joint Standing Committee on Migration 2005, *Report of the Inspections of Baxter Immigration Detention Facility and Port Augusta Residential Housing Project*, Commonwealth of Australia: Canberra.
- Jupp, J. 2002, *From White Australia to Woomera: The Story of Australian Immigration*, Cambridge University Press: Cambridge.
- Kane, J. 1997, 'Racialism and Democracy: The Legacy of White Australia', in *The Politics of Identity in Australia*, ed. G. Stokes, Cambridge University Press: Cambridge, New York, Melbourne.
- Keneally, T. 2003, *The Tyrant's Novel*, Doubleday: Sydney.
- Keneally, T. & Scott, R., eds. 2004, *Another Country: Writers in Detention*, Halstead Press: Broadway.
- Keogh, J. 2003, *Reports and Reflections on Baxter Detention Centre Visits: Early 2003*, Refugee Action Committee: Canberra,
http://www.refugeeaction.org/inside/baxter_visit.htm [accessed 22.1.10].
- Kerr, J., Dodson, L. and Glendinning, L. 2005, 'Scandal Explodes to 200 Detainees', *Sydney Morning Herald*, 26 May.
- Kerr, D. 2006, 'Privative Clauses and the Courts: Why and How Australian Courts have Resisted Attempts to Remove the Citizen's Right to Judicial Review of Unlawful Executive Action', *Queensland University of Technology Law and Justice Journal*, 5(2), 195-215.
- Kidd, R. 1997, *The Way We Civilise*, University of Queensland Press: St Lucia.
- Kioa v West* 1985, 159 CLR 550.

- Klocker, N. and Dunn, K.M. 2003, 'Who's Driving the Asylum Debate? Newspaper and Government Representations of Asylum Seekers', *Media International Australia*, 109.
- Lawrence, C. 2006, *Fear and Politics*, Scribe: Carlton North.
- Leach, M. 2003, "'Disturbing Practices": Dehumanising Asylum Seekers in the Refugee "Crisis" in Australia, 2001-2002', *Refuge*, 21(3), 25-33.
- Leach, M. & Mansouri, F. 2004, *Lives in Limbo: Voices of Refugees under Temporary Protection*, University of New South Wales Press: Sydney.
- Legomsky, S.H. 1998, 'Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia', *Washington University Law Quarterly*, 76(1).
- Liddell, F. 1907, *Debates*, House of Representatives, 16 July, 504-559.
- MacCallum, M. 2002, *Girt By Sea: Australia, Refugees and the Politics of Fear*, Quarterly Essay 5, Black Inc.: Melbourne.
- MacKellar, M. 1992, *Debates*, House of Representatives, 5 May, 2383.
- Maglen, K. 2005, 'A World Apart: Geography, Australian Quarantine, and the Mother Country', *Journal of History of Medicine and Allied Sciences*, 60(2), 196-217.
- Maley, W. 2003, 'Asylum Seekers in Australia's International Relations', *Australian Journal of International Affairs*, 57(1), 187-202.
- Malkki, L.H. 1995a, *Purity and Exile: Violence, Memory and National Cosmology among Hutu Refugees in Tanzania*, The University of Chicago Press: Chicago & London.
- Malkki, L.H. 1995b, 'Refugees and Exile: From 'Refugee Studies' to the National Order of Things', *Annual Review of Anthropology*, 24(1), 495-523.
- Manne, R. 2001, *The Barren Years: John Howard and Australian Political Culture*, Text: Melbourne.
- Manne, R. 2004, *Sending Them Home: Refugees and the New Politics of Indifference*, Quarterly Essay 13, Black Inc.: Melbourne.

- Mares, P. 2002, *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa*, New South Wales Press: Sydney.
- Mares, P. 2009, 'The Permanent Shift to Temporary Migration', *Inside Story*, 17 June.
- Mares, S. & Jureidini, J. 2004, 'Psychiatric Assessment of Children and Families in Immigration Detention: Clinical, Administrative and Ethical Issues', *Australian and New Zealand Journal of Public Health*, 28(6), 520-526.
- Markus, A. 2001, *Race: John Howard and the Remaking of Australia*, Allen & Unwin: Crows Nest.
- Markus, A. 2003, 'Of Continuities and Discontinuities: Reflections on a Century of Australian Immigration Control', in *Legacies of White Australia: Race, Culture and Nation*, eds. L. Jayasura, D. Walker and J. Gothard, University of Western Australia Press: Crawley.
- Marr, D. and Wilkinson, M. 2003, *Dark Victory*, Allen & Unwin: Crows Nest.
- Martin, H. 1989, *Angels and Arrogant Gods*, AGPS Press: Canberra.
- Mazari, N. & Hillman, R. 2008, *The Rugmaker of Mazar-e-Sharif*, Insight Publications: Elsternwick.
- McCutcheon, S. 2003, *The Haha Man*, HarperCollins: Sydney.
- McDermott, Q. 2008, 'The Guard's Story', *Four Corners*, ABC Television, 15 September, <http://www.abc.net.au/4corners/content/2008/s2362098.htm> [accessed 10.1.10].
- McMaster, D. 2001, *Asylum Seekers: Australia's Response to Refugees*, Melbourne University Press: Carlton.
- Mcaster, D. 2002, 'White Australia to Detention: Restriction and Racism', *Mots Pluriels*, 21.
- McMillan, J. 2002a, 'Controlling Immigration Litigation – A Legislative Challenge', *People and Place*, 10(2), 16-29.

- McMillan, J. 2002b, 'Judicial Restraint and Activism in Administrative Law', *Federal Law Review*, 30, 335-371.
- McMillan, J. 2003, 'Judicial Review of the Work of Administrative Tribunals – How Much is Too Much?' *ALAL Forum*, 39, 26-31.
- McMillan, J. 2006, *Administration of S 501 of the Migration Act 1958 as it Applies to Long-Term Residents*, Report No 1/2006, Commonwealth Ombudsman: Canberra.
- McNevin, A. 2007 'The Liberal Paradox and the Politics of Asylum in Australia', *Australian Journal of Political Science*, 42(4), 611-630.
- Merrylees, C. 2006, *Haywire: The War-Time Camps at Hay*, Hay Historical Society: Griffith.
- Migration Act 1958 (Cth)*
- Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth)*
- Migration Amendment (Excision from Migration Zone (Consequential Provisions) Bill 2001 (Cth)*
- Migration Legislation Amendment Bill (No 1) 2001 (Cth)*
- Migration Legislation Amendment Bill (No 5) 2001 (Cth)*
- Migration Legislation Amendment Bill (No 6) 2001 (Cth)*
- Migration Legislation Amendment (Judicial Review) Bill 1998 [2001] (Cth)*
- Migration Reform Act 1992 (Cth)*
- Miller, N. 2008, 'New Mental Illness Hits Refugees', *Age*, 28 May.
- Morton, T. 2002, 'Worse than Prisons? Managing Detention Centres', *Background Briefing*, ABC Radio National, 6 October,
<http://www.abc.net.au/rn/talks/bbing/stories/s697195.htm> [accessed 24.7.08].
- Nagata, Y. 1996, *Unwanted Aliens: Japanese Internment in Australia*, University of Queensland Press: St Lucia.

NAMU v Secretary, Department of Immigration, Indigenous and Multicultural Affairs 2002, FCA 907.

Narushima, Y. 2009, 'Crammed Christmas Island Centre to Cost Extra \$45m', *Sydney Morning Herald*, 3 December.

Neumann, K. 2004, *Refuge Australia: Australia's Humanitarian Record*, University of New South Wales Press: Sydney.

Neumann, K. 2006, *In the Interest of National Security: Civilian Internment in Australian During World War II*, National Archives of Australia: Canberra

Newburn, T. 2007, *Criminology*, Willan Publishing: Cullompton Devon and Portland Oregon.

New South Wales (NSW) Anti-Discrimination Board, n.d., *Race for the Headlines*, [http://www.lawlink.nsw.gov.au/LAWLINK/ADB/LL_ADB.NSF/3c435965abde29044a256d66000a361c/0212cadbceec00187ca257043000cdd48/\\$FILE/Race%20for%20the%20Headlines%20-%20Executive%20Summary.pdf](http://www.lawlink.nsw.gov.au/LAWLINK/ADB/LL_ADB.NSF/3c435965abde29044a256d66000a361c/0212cadbceec00187ca257043000cdd48/$FILE/Race%20for%20the%20Headlines%20-%20Executive%20Summary.pdf) [accessed 10.1.10].

Nicholls, G. 2007, *Deported: A History of Forced Departures from Australia*, University of New South Wales Press: Sydney.

Nicholls, G. 2008, 'Immigration's Culture War', *Inside Story*, 2 November.

O'Neill, M. 2008, *Blind Conscience*, New South Wales Press: Sydney.

O'Regan, M. 2002, 'Media Freedom and Woomera', *The Media Report*, ABC Radio National, <http://www.abc.net.au/rn/mediareport/stories/2002/475505.htm> [10.1.10]

Pacific Islander Labourers Act 1901 (Cth)

Palmer, M. 2005, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Commonwealth of Australia: Canberra.

Papastergiadis, N. 2004, 'The Invasion Complex in Australian Political Culture', *Thesis Eleven*, 78, 8-27.

Pearl Shelling Act 1912 (Cth)

- Pearce, G.F. 1914, *Debates*, Senate, 28 October, 341-347.
- Pederson, A., Clarke, S., Dudgeon, P. and Griffiths, B. 2005, 'Attitudes Towards Indigenous Australians and Asylum Seekers: The Role of False Beliefs and Other Social-Psychological Variables', *Australian Psychologist*, 40(3), 170-178.
- Perera, S. 2002, 'What is a Camp...?' *Borderlands*, 1(1).
- Perera, S. & Pugliese, J. 1997, "'Racial Suicide": The Re-Licensing of Racism in Australia', *Race and Class*, 39(2), 1-19.
- Peterson, N. and Sanders, W., eds. 1998, *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*, Cambridge University Press: Cambridge, New York, Melbourne.
- Pickering, S. 2001, 'Common Sense and Original Deviancy: News Discourses and Asylum Seekers in Australia', *Journal of Refugee Studies*, 14(2), 169-186.
- Pickering, S. 2004, 'Border Terror: Policing, Forced Migration and Terrorism', *Global Change, Peace and Security*, 16(3), 211-226.
- Pickering, S. 2005, *Refugees and State Crime*, The Federation Press: Annandale.
- Pitty, R. & Leach, M. 2004, 'Australian Nationalism and Internationalism', in *The Politics of Australian Society: Political Issues for the New Century*, eds. P. Boreham, G. Stokes and R. Hall, 2nd edn., Pearson Education: Frenchs Forest, 93-108.
- Plaintiff S157/2002 v Commonwealth 2003, 195 ALR 24.
- Poynder, N. 1997, 'The Incommunicado Detention of Boat People: A Recent Development in Australia's Refugee Policy', *Australian Journal of Human Rights*, 3(2).
- Price, R. 2003, 'Who Has Jurisdiction Over the Mind? An Individual Rights Approach to Forced Medication in Australia', *Australian Journal of Human Rights*, 10(2).
- Pringle, H. and Thompson, E. 2002, 'The Tampa Affair and the Role of the Australian Parliament', *Australian Journal of Administrative Law*, 13, 128-142.

Proust, E. 2008, *Evaluation of the Palmer and Comrie Reform Agenda – Including Related Ombudsman Reports*, Commonwealth of Australia: Canberra.

Quarantine Act 1908 (Cth)

Rajaram, P.K. & Grundy-Warr, C. 2004, 'The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia and Thailand', *International Migration*, 42(1), 33-64.

Read, P. 2003, 'How Many Separated Aboriginal Children?', *Australian Journal of Politics and History*, 49(2), 155-163.

Reith, P. 2001, *Radio Interview with Derryn Hinch – 3AK*, Australian Government Department of Defence, 13 September 2001, <http://www.minister.defence.gov.au/ReithSpeechTpl.cfm?CurrentId=999> [accessed 13.12.09].

Reynolds, H. 1989, *Dispossession: Black Australians and White Invaders*, Allen & Unwin: Sydney, Wellington, London, Boston.

Reynolds, H. and Lake, M. 2009, *Drawing the Global Colour Line: White Men's Countries and the International Challenge of Racial Equality*, Melbourne University Publishing: Parkville.

Rodd, C.P. 2006, *Universal Inhumanity? Australia's Reaction to Refugees Who Arrived by Boat During the Election Years of 1977 and 2001*, Masters Thesis: The University of Melbourne.

Rothman, D.J. 1971, [1990] *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, Aldine Transaction: New Brunswick USA and London UK.

Rowley, C.D. 1970, *The Destruction of Aboriginal Society: Aboriginal Policy and Practice*, Volume I, Australian National University Press: Canberra.

Rowley, C.D. 1971a, *Outcasts in White Australia: Aboriginal Policy and Practice*, Volume II, Australian National University Press: Canberra.

Rowley, C.D. 1971b, *The Remote Aborigines: Aboriginal Policy and Practice*, Volume III, Australian National University Press: Canberra.

- Rowley, C.D. 1981, *A Matter of Justice*, Australian National University Press: Canberra.
- Ruddock, P. 1998, *Debates*, House of Representatives, 2 December, 1243.
- Ruddock, P. 1999, 'Government Struggles to Stop Flow of Illegals', *PM*, ABC Radio National, 15 November, <http://www.abc.net.au/pm/stories/s66365.htm> [accessed 28.3.07].
- Sackville, R. 2004, 'Refugee Law: The Shifting Balance', *Sydney Law Review*, 3.
- Sallis, E. 2005, *The Marsh Birds*, Allen & Unwin: Crows Nest.
- Saunders, K. 1993, "'Inspired By Patriotic Hysteria?" Internment Policy Towards Enemy Aliens in Australia during the Second World War', in *Minorities in Wartime: National and Racial Groupings in Europe, North America and Australia During the Two World Wars*, ed. P. Panayi, Berg: Oxford, Providence.
- Saunders, K. 2000a, 'A Difficult Reconciliation: Civil Liberties and Internment Policy in Australia During World War Two', in *Alien Justice: Wartime Internment in Australia and North America*, eds. K. Saunders and R. Daniels, University of Queensland Press: St Lucia, 114-137.
- Saunders, K. 2000b, "'Taken Away to be Shot?" The Process of Incarceration in Australia in World War II', in *Alien Justice: Wartime Internment in Australia and North America*, eds. K. Saunders and R. Daniels, University of Queensland Press: St Lucia, 152-167.
- Scott, E. 1941, *Official History of Australia in the War of 1914-1918, Volume XI: Australia During the War*, 7th edn., ed. C.E.W. Bean, Australian War Memorial <http://www.awm.gov.au/histories/chapter.asp?volume=12> [accessed 16.7.09].
- Senate, 2006, *Legal and Constitutional Legislation Committee, Question No. 120*, 25 May, http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/bud_0607/ag/qon_120.pdf [accessed 10.1.10].
- Serco, 2009, 'Serco Signs AUS\$370m Contract with Australian Government to Transform Immigration Centres', *Media Release*, 29 June, <http://www.serco.com/media/internationalnews/daic.asp> [accessed 10.1.10].

- Solzhenitsyn, A. 1973, *The Gulag Archipelago 1918-1956*, trans. T.P. Whitney, Collins/Fontana: Melbourne.
- Sparrow, P. 2005, *From Under a Leaky Roof: Afghan Refugees in Australia*, Fremantle Arts Centre Press: Fremantle.
- Spierenburg, P. 2004, 'Punishment, Power, and History: Foucault and Elias', *Social Science History*, 28(4), 607-36.
- Standard Guidelines for Corrections in Australia* 2004, http://www.justice.tas.gov.au/data/assets/pdf_file/0010/46693/GUIDEL~1.pdf [accessed 10.1.10].
- Steel, Z. & Silove, D.M. 2001, 'The Mental Health Implications of Detaining Asylum Seekers', *Medical Journal of Australia*, 175, 596-99.
- Steel, Z., Momartin, S., Bateman, C., Hafshejani, A., Silove, D.M., Everson, N., Roy, K., Dudley, M., Newman, L., Blick, B. and Mares, S. 2004, 'Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia', *Australian and New Zealand Journal of Public Health*, 28(6), 527-536.
- Steketee, M. 1996, 'Ruddock Flags Tougher Line on Refugee Bids', *Australian*, 26 December.
- Stokes, G. 2000, 'One Nation and Australian Populism', in *The Rise and Fall of One Nation*, eds. M. Leach, G.Stokes and I. Ward, University of Queensland Press: St Lucia, 23-41.
- Sultan, A. and O'Sullivan, K. 2001, 'Psychological Disturbances in Asylum Seekers Held in a Long Term Detention: A Participant-Observer Account', *Medical Journal of Australia*, 175(11), 596-599.
- Sutton, M.J. 2003, 'Re-Examining Total Institutions: A Case Study From Queensland', *Archaeology Oceania*, 38(2), 78-88.
- Sydney Morning Herald* 2003, 'Detention Camp Guards on Drug Dealing Charges', 13 August.

- Sydney Morning Herald* 2009, 'Christmas Island Gets \$50million Boost', 15 December.
- Tavan, G. 2005, *The Long Slow Death of White Australia*, Scribe: Carlton North.
- Taylor, S. 2005, 'Sovereign Power at the Border', *Public Law Review*, 16, 55-77.
- Taylor, P, 2009, 'Six Sri Lankan Detainees Held in Christmas Island "Red Block"', *The Australian*, 9 November.
- Tazreiter, C. 2004, *Asylum Seekers and the State: The Politics of Protection in a Security Conscious World*, Ashgate.
- Thompson, E.P. 1963, *The Making of the English Working Class*, Pantheon Books: New York.
- Thorne, S. 2003, *Beyond The Razor Wire ... Is Australia, Where Everything's Free*, Sandy Thorne: Lightning Ridge.
- Topsfield, J. 2005, 'Hundreds In Detention Attempt Self-Harm', *Age*, 19 September.
- Topsfield, J. 2006, 'Baxter Centre Put in Mothballs', *Age*, 10 May.
- Trigger, D.S. 1992, *Whitefella Comin': Aboriginal Responses to Colonialism in Northern Australia*, Cambridge University Press: Cambridge, New York, Port Chester, Melbourne, Sydney.
- Tyler, H. 2003, *Asylum: Voices Behind the Razor Wire*, Lothian Books: South Melbourne.
- United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment 1988.*
- United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) 1984.*
- United Nations Convention on the Rights of the Child (CROC) 1989.*
- United Nations Convention Relating to the Status of Refugees (Refugee Convention) 1951.*

United Nations High Commission for Refugees (UNHCR) n.d., *International Protection (SCIP): Identity Documents for Refugees*, <http://www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOMandpage=homeandid=3ae68cc e4> [accessed 3/7/06].

United Nations High Commission for Refugees (UNHCR) 2001, *Yearbook 2001 Chapter IV: Asylum and Refugee Admission in Industrialised Countries*, <http://www.unhcr.org/home/STATISTICS/3dcb7e574.pdf> [accessed 10.1.10].

United Nations High Commission for Refugees (UNHCR) 2006, 'Numbers of Asylum Applications Halved Since 2001, Says UNHCR', *Media Release*, 17 March 2006. <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=441a7d714> [accessed 6.1.10].

United Nations High Commission for Refugees (UNHCR) 2009a, *Asylum Levels and Trends in Industrialised Countries 2008*, 24 March, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=49c796572&query=asylum%20levels%20and%20trends%20in%20industrialized%20countries%202008> [accessed 6.1.10].

United Nations High Commission for Refugees (UNHCR) 2009b, *Asylum Levels and Trends in Industrialized Countries First Half 2009*, 21 October, <http://www.unhcr.org/4adebca49.html> [accessed 6.1.10].

United Nations Protocol Relating to the Status of Refugees 1967.

Universal Declaration of Human Rights 1948.

Unlawful Associations Act 1916 (Cth).

Unlawful Associations Act 1917 (Cth).

Vienna Convention on the Law of Treaties 1969.

Vrachnas, J., Boyd, K., Bagaric, M. and Dimopoulos, P. 2008, *Migration and Refugee Law: Principles and Practice in Australia*, 2nd edn., Cambridge University Press: Cambridge, New York, Melbourne.

Waquant, L. 1999, "Suitable Enemies": Foreigners and Immigrants in the Prisons of Europe', *Punishment and Society*, 1(2), 215-222.

Wacquant, L. 2001, 'Deadly Symbiosis: When Ghetto and Prison Meet and Mesh', *Punishment and Society*, 3(1), 95-134.

War Book (The) 1939 (Cth).

War Precautions Act 1914 (Cth).

Welch, M. 2002, *Detained: Immigration Laws and the Expanding I.N.S. Jail Complex*, Temple University Press: Philadelphia.

Welch, M. and Schuster, L. 2005, 'Detention of Asylum Seekers in the UK and USA', *Punishment and Society*, 7(4), 397-417.

Whitmont, D. 2001, 'The Inside Story', *Four Corners*, ABC Television, 13 August, http://www.abc.net.au/4corners/archives/2001b_Monday13August2001.htm [accessed 10.1.10].

Whitmont, D. 2005, 'Anna's Story', *Four Corners*, ABC Television, 4 April, <http://www.abc.net.au/4corners/content/2005/s1338239.htm> [accessed 1.7.08].

Zifcak, S. 2003, *Mr Ruddock Goes to Geneva*, University of New South Wales Press: Sydney.