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Australian Institute of Administrative Law
PO Box 3149
BMDC ACT 2617
Ph: (02) 6251 6060
Fax: (02) 6251 6324
www.aial.asn.au
email: aialsecretariat@aial.asn.au

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FREEDOM OF INFORMATION

*Ron McLeod**

Edited text of an address to an AIAL seminar entitled "Freedom of Information - A Current Perspective", held in Canberra on 21 February 2000

Thinking about today's address and freedom of information ('FOI') bought home to me some curious contradictions in my personal career.

I was the Secretary of the Public Service Board for a time in the late 1970's when the FOI legislation was being prepared in the Attorney-General's Department. The three members who made up the Public Service Board at the time, and to whom I reported, were very conservative people. Like most of their peers then at the top of the Public Service they were not great supporters of FOI, which they saw as being championed by radical young academics and activists.

Many senior public servants at the time hated the thought of FOI legislation. It promised to cramp their style as it was common practice for senior staff to write the most vituperative and often slanderous marginal comments on files. As a consequence historians will find many of the pre-FOI files much more juicy to read than those created more recently.

The Public Service Board's interest was essentially associated with the anticipated impact of the legislation on the administrative process. It was particularly concerned that the candour and frankness of the relationship between senior public servants and Ministers was not weakened by the opening up of government records to public scrutiny. It was also concerned about the costs to government of meeting the anticipated demand for access to records.

As Secretary to the Board, I participated in an Interdepartmental Committee chaired by Lindsay Curtis which advised the Attorney-General, and my brief was to keep injecting these types of considerations into the debate in an attempt to try to head off some of the more extravagant measures which some proponents of the scheme were pushing for. In retrospect, it is fortunate that I was singularly unsuccessful in my endeavours.

Later I spent 10 years as a member of the Advisory Council of the Australian Archives, and while the Archives Act and the FOI Act are complementary, in a sense their purposes seem at odds with each other. FOI is about openness and disclosure of the workings of government. The Archives Act is very much about creating a logical and sustainable regime to guide the destruction of the great bulk of records created over time by governments, ensuring, of course, that those records which are of lasting value are preserved.

Now an Ombudsman, I am the holder of an important office which is one of the lynch pins of the Commonwealth system of administrative law created in the 1970's. I share with the FOI Act and other important pieces of legislation, the principles and values of openness and accountability, fairness and equity, which are now embedded features of the Australian approach to democratic government. So I've come a long way since those early discussions around the table with Lindsay Curtis.

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* *Ron McLeod is the Commonwealth Ombudsman*

However, we live in changing times. While many fundamentals are taken for granted, we do need to be constantly alert to the fact that ultimately it is up to our nation's leaders and the community itself, what sort of society we want in the future and what should be the nature of the continuing relationship between the electors and the elected.

Freedom of information is, in my view, one of the fundamentals which should continue to be regarded as a given. It is hard to overstate its importance and its continuing relevance as the statutory embodiment of the principle of openness in government. While one might question some of the technical details of the legislation, the philosophical thrust of the legislation is as relevant today as it was in the 1970's when it was being debated.

Former Prime Minister, the Right Honourable Malcolm Fraser, captured the essence of the freedom of information legislation in an address to mark the 50th anniversary of the *Canberra Times* on 22 September 1976. He said:

> If the Australian electorate is to be able to make valid judgments on government policy it should have the greatest access to information possible.
>
> How can any community progress without continuing and informed and intelligent debate?
>
> How can there be debate without information?

The FOI Act was passed by Federal Parliament in 1982. The essential purpose of the Act was to make government more open and accountable by providing to citizens a right of access to information in the possession of the government. These rights now form an important part of our democratic tradition.

Seventeen years later, at a time when governments are more concerned with the cost of government and balancing budgets, it is worth reflecting on whether the ideals espoused by Malcolm Fraser, and later reflected in the FOI legislation, have in fact been fully realised.

As Commonwealth Ombudsman, my Office receives complaints from citizens about the way government agencies handle FOI requests. My Office also has a wider role in monitoring administration within government agencies, including administration of FOI. As a result, my Office is well placed to make some judgments about how well FOI is being administered.

We receive a steady stream of FOI related complaints each year, generally associated with delay, with use of the exemption provisions or with the level of charges being sought.

Last year, because of increasing evidence that the aims of the FOI Act were not being fully met, my Office conducted an 'own motion' review of FOI administration across a selection of government agencies.

In June 1999, I released a report of our review, entitled 'Needs to Know'. A mixture of good and bad outcomes emerged. On the positive side, we found that most agencies appeared to be approaching FOI in a reasonably responsive manner and it had become an accepted part of public administration. The staff who had the role of being agency FOI coordinators, in particular, seemed to be advocates of 'open government' and were reasonably well informed about access requirements within their organisations.

We also found that there had been a gradual but sustained upward trend in the disclosure of information over the years although this growth was largely achieved by those agencies which dealt predominantly with requests for personal information.

On the negative side, however, we identified a number of areas of concern. Few agencies had mechanisms in place which encouraged or promoted the disclosure of information without recourse to the FOI Act. There were also signs in some agencies that some FOI decision makers continue to experience difficulty with the aim of the Act and have at times

adopted a minimalist approach to disclosure.

We found widespread problems with the recording of FOI decisions and the probable misuse of exemptions in some cases. This was more evident in agencies which receive FOI requests relating to government policy than in those which typically deal with requests for personal information. In one agency we found that a senior officer had applied an exemption on a departmental document on the basis of 'commercial interest'. The officer did not provide any reasons for the decision and internal review was sought. The document was subsequently released after review. However, what was not disclosed to the applicant was that the document had been listed all along in the Department's s.9 notice as one which was publicly available for inspection or purchase, without recourse to FOI.

In a considerable number of other cases, we observed exemptions had been claimed without any reasons being recorded or advised to applicants. There appeared to be a widespread misunderstanding of the decision recording requirements of s.26 of the Act.

There were also signs that some agencies had been advising FOI applicants of unreasonably high charges to process an FOI request as a means of deterring the applicant from proceeding with the request.

These shortcomings suggest that some of the principles of the legislation have been forgotten, or are not fully understood or embraced by some of the current managers on Commonwealth Government agencies.

Other bodies, such as the Australian Law Reform Commission (ALRC) and Administrative Review Council (ARC) also share concern over the declining importance accorded to FOI by government agencies.

In 1995, the ALRC and ARC issued a joint report 'Open government: a review of the federal *Freedom of Information Act 1982*'. This review identified a number of deficiencies, the most important being:

- there is no person or organisation responsible for overseeing the administration of the Act;
- the culture of some agencies is not as supportive of the philosophy of open government and FOI as it was felt it should be;
- the conflict between the old 'secrecy regime' and the new culture of openness represented by the FOI Act has not been resolved;
- the cost of using the Act can be prohibitive for some applicants; and
- the exemption provisions are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act.

Significantly, four years later, similar deficiencies were identified during my Office's review of FOI administration.

The ALRC/ARC report to the government made a number of recommendations for legislative amendment, one of the most significant being the appointment of an FOI Commissioner to monitor and promote the FOI Act. I agree there is a need for such a body or authority to have oversight of administration of the Act. It was envisaged that the FOI Commissioner would conduct regular audits, and monitor agencies' compliance with, and administration of, the Act.

Importantly, the FOI Commissioner would also be responsible for the issuing of FOI guidelines to assist agencies in interpreting and applying the Act.

The Attorney-General's Department had a monitoring and educative role, but since 1995 it has progressively withdrawn from the publication of FOI guidelines, the conduct of FOI practitioner training and the issue of FOI Memoranda and Decision

Summaries. This has led to a growing void in the availability of current FOI information to help agencies in their administration of the legislation. This is clearly an undesirable situation given the complexity which can be associated with the application of the FOI legislation.

The need for applicants to resort to the formal processes available under the FOI legislation is lessened if government agencies simply make as much information as possible publicly available. Parliament saw a need to promote this important principle of open government by its inclusion as one of the aims of the FOI legislation. Unfortunately, available material suggests that this aim of the Act has not been widely reflected in agency practices. Members of the community appear often to be forced to resort to exercising their statutory right to information rather than being able to rely on Parliament's intention for government agencies to make most of the information they hold freely available without relying on formal access provisions.

Our investigation showed some signs of a culture of passive resistance to the disclosure of information emerging in parts of the bureaucracy. If this culture is allowed to flourish, then the aims of the FOI Act will continue to recede, to the detriment of open government and society.

The Archives Act complements FOI in important ways. It regulates public access to documents created prior to the commencement of the FOI Act, and establishes regimes governing their destruction and retention of government records on a continuing basis. The Australian Archives organisation unfortunately does not currently have the legislative 'teeth' to enforce minimum standards of record keeping and, as a consequence, information management practices across government leave considerable room for improvement. The challenge of management of electronic records also needs to be resolved.

Significant issues for accountability are associated with poor record keeping practices. The Auditor-General, the Law Reform Commission and my Office have all recently drawn attention to deficiencies in this area. Obviously an FOI Act is of little value if poor record keeping practices result in lost records, or an inability of agencies to find them when required.

We have heard a lot about accountability in recent years, but it has generally been about redefining and strengthening the accountability obligations of public officials and institutions, in a changing public administration environment. Recent public sector reforms have sought to improve the focus on outcomes and the measurement of performance against pre-determined targets or objectives. Improving efficiency by striving for more value for money has been an all pervasive goal.

Most modern day public servants, I suspect, if asked to speak of accountability, would do so by reference to these resource management and service delivery issues. However, accountability is as much about transparency and openness. Holding officials responsible for their actions and maintaining, and disclosing when required, a reliable record of the workings of government promote these aspects of accountability and are fundamental to good governance in a modern open society.

The significant extent of contracting out, which has occurred in government within a relatively short period of time, has raised issues about the community's continued access to information related to the delivery of government services. The Government has introduced a bill to amend the *Privacy Act 1988*,[1] and has proposed amendments to the FOI Act.

The effect of these amendments, if enacted, would be to ensure that the rights of those dealing with government contractors will, for most purposes, be the same as the rights of people dealing directly with government agencies. One exception, which the Government has not yet addressed, is the need for the FOI Act

to be amended to make the Ombudsman's jurisdiction in relation to the actions of government contractors clear, consistent and certain.

The commercial-in-confidence exemption will continue to be available in relation to documents concerning government dealings with contractors. In my view, that exemption has been overclaimed in the past - it is not unknown for officials to refuse disclosure of documents because of the possible adverse effect on a commercial body, when the commercial body itself has no great fear of disclosure. The commercial-in-confidence exemption has also been claimed at times to avoid disclosure of the nature of government dealings with business. The growing reliance on this exemption in relation to a wide range of documents, seems to disregard the terms of s.43 of the FOI Act - which I recall requires that there be 'a reasonable expectation of damage', rather than a mere possibility.

In the early days of contracting out, sitting in Estimates Committees, I was amazed at how Senators allowed refusals by public servants to answer a wide range of questions on the grounds of commercial-in-confidence, without any kind of probing or questioning. However, the parliamentary committees have adopted a more robust approach recently. For example, the Senate in 1998 resolved that 'there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from Parliament or its committees unless the Parliament has expressly provided otherwise'. The Senate Finance and Public Administration References Committee - dealing with contracting out - referred to a need to explain the reason for any claims, to the limits on reasonable claims and to their limited lifespan. With that said, Committees can agree to accept sensitive information in camera, an option that is clearly not available under FOI.

While by international standards we have a healthy democracy in Australia, the quality of our democratic processes would be improved if there was a more complete embrace of the cultural change the FOI legislation was designed to achieve. This is especially so of the bureaucratic level of Government which does not get exposed, to the same degree as Ministers, to the pressures for disclosure emanating from the Parliament and from an inquisitive media.

Cultural values need to be constantly reinforced if they are to be maintained. Governments and agency heads, through their actions, have an important continuing responsibility to reaffirm their commitment to openness, accountability and compliance with the spirit and practice of FOI legislation.

I hope that the Government gives early consideration to the matters contained in the reports by the ALRC and my Office and, in particular, the recommendation that a body or authority be given legislative responsibility for effective oversight of administration of the FOI Act.

Resolution of these matters would be a positive step in reinforcing the continued commitment to, and relevance of, the important objectives of the FOI legislation.

Endnote

1 The Privacy Amendment (Private Sector) Bill 2000 was introduced by the Attorney-General into the House of Representatives on 12 April 2000.

FREEDOM OF INFORMATION

*Stephen Brown**

Edited text of an address to an AIAL seminar entitled "Freedom of Information - A Current Perspective" held in Canberra on 21 February 2000

My perspective today is that of someone who for more than 10 years had management oversight of the freedom of information ("FOI") function in a major Commonwealth agency, the Department of Defence. In these comments, I will mention particular features of FOI management in Defence, refer to a few problems encountered over the years, and comment on some challenges for FOI in the future.

FOI has become widely accepted in democratic societies. Even the United Kingdom, one of the bastions of secrecy, now has legislation in hand, though it does seem that Sir Arnold (if not Sir Humphrey) may have played a part in its development. The UK did, of course, have an administrative scheme for 'Open Government', announced in March 1994. To implement this policy, the UK Ministry of Defence on 8 April 1994 issued a Defence Council Instruction entitled 'Open Government'. This bore the standard caveat: 'Not to be communicated to anyone outside HM Service without authority'.

I can't claim that the Australian Defence Organisation ever managed anything quite so incongruous. While FOI was accepted with varying degrees of enthusiasm, it was accepted and its administration commenced.

As in most agencies, substantial resources were provided in Defence for the FOI function on the commencement of the Act. Defence received an initial staffing allocation of 32 positions - to cover, of course, the set-up requirements of developing an administrative structure and writing instructions, as well as the ongoing management of requests. It was soon evident that nothing like the predicted volume of requests would occur, though individual requests could be much more complex than had been thought. The staffing cover for FOI reduced fairly rapidly, aided by general pressures on administrative expenditure through the 1980s and 1990s. Indeed, at one point the existence of two simultaneous staffing reviews briefly reduced the FOI staff allocation to the figure of minus one. The FOI section now has 6 staff, and is located in the Defence Legal Office. In 1998/99, Defence had 185 formal requests (and 11 document amendment requests) plus 456 purported requests which were handled outside the Act.

In Defence, the FOI section provides central management of FOI requests, including formal communications and advice to applicants, decisions on fees and charges, and the provision of advice on FOI matters to decision-makers. However, the responsibility for decisions on requests rests with the relevant functional area. Authority to release documents under the FOI Act was initially given to Class 11 public servants and Defence Force equivalents, while authority to deny was given to Senior Executive Service Level 1 officers or Defence Force 1-star officers. These levels now have been lowered so that SOG-B or Colonel-equivalent can both release and refuse.

* *Stephen Brown is formerly Assistant Secretary, Legal Services Branch, Department of Defence*

The FOI section provides active support to decision-makers, including advice on the scope of exemptions, relevant interpretations of the Act and help in the assessment of documents. The section can also assist decision-makers in bringing their occasionally nebulous reasons into a form compliant with the Act and suitable for advice to applicants.

As I have said, responsibility for actual decisions on requests rests with the relevant functional area. In this respect, I disagree with the recommendation in the Ombudsman's 1999 Report that decision-making be centralised in agencies. For an organisation the size and complexity of Defence, it would be impossible for a central decision-maker to even understand all requests, let alone be familiar with the considerations relevant to release.

Consistently with the arrangements for decision-making, Defence has also devolved responsibility for internal review. Authorisation was initially given to Deputy Secretaries and Service Deputy Chiefs, but now extends to all Senior Executive Service and Defence Force star rank officers. An internal review is normally undertaken by an officer in the chain of command or management above the initial decision-maker. Here, also, specialist advice is available from the FOI section.

One practice adopted by Defence has proved useful. When a potentially sensitive FOI request is received, a brief advice is circulated to relevant higher executives, the Public Information Branch and, usually, the Minister's Offices. This practice minimises nasty surprises - eg, when released documents appear in the press.

None of these features of FOI administration is particularly novel, but they have enabled effective management of FOI in a very large and diverse organisation. The crucial element has been the existence of a central, experienced and highly competent FOI section.

I now turn to discuss a few problems encountered in Defence in managing FOI.

While I do not think that there is now any general cultural problem in Defence with the idea of FOI, there can be particular instances where a decision-maker is unwilling to agree to the release of documents in response to a request which has been clearly made out. Sometimes this may reflect lack of familiarity with FOI - eg, because the decision-maker is newly posted to Canberra. Other times the requester may be seen as hostile, eliciting a response of 'Why should we give ammunition to our enemies?'. Dialogue with the FOI staff usually resolves these situations. A hint that the decision-maker may have to justify a refusal before the Administrative Appeals Tribunal can also be helpful.

Compliance with deadlines has always been a problem, and Defence does not have a particularly good record in meeting the statutory time limits. This is due largely to the complexity of individual requests and the difficulties in locating documents in a very large and diverse organisation. The 1995 Report of a review of the FOI Act by the Australian Law Reform Commission and the Administrative Review Council recommended a reduction from 30 to 14 days in the statutory time limit for responding to FOI requests. In my view, this is an entirely unreal suggestion. Apart from the factors I have mentioned, what the Ombudsman's Report delicately describes as 'a work environment of often conflicting priorities' will nearly always be a major, indeed nearly insuperable, barrier to meeting shorter time limits.

I have already mentioned that immediately following the enactment of the FOI Act, the number of FOI requests was lower than had been expected, but that individual requests often turned out to be far more complex than anyone would have thought. Naturally, it is always open to an agency to refuse a request on workload grounds, but even making that judgment can require a substantial exercise of locating and assessing the scope of the records involved.

The reality of this issue should not be dismissed. While probably not alone in this, Defence has had experience of requests which occupied hundreds of staff hours in locating, reviewing and assessing documents. There can be further large demands on staff time when appeals are made against refusals to release documents - and the workload ground, of course, has no application here.

Perhaps the most extreme example of a large and complex request was one which related to a commercial dispute. The estimated cost of meeting this request was $27 million - quite apart from the fact that the relevant area of the Department would have largely ceased normal business while processing it. The request was refused on workload grounds. However, when litigation ensued, a discovery order was sought in virtually the same terms as the request. Although the Commonwealth demonstrated the cost and burden of compliance, the order was granted, with the judge merely commenting: "The Commonwealth has deep pockets". Happily for the taxpayer's pockets, the litigation went into suspension and was eventually discontinued.

Such applicants often fall in the broader category of the vexatious requester - the person who pursues an obsessive quest over a period of years, sometimes decades, and for whom satisfaction is never reached. Most agencies have experiences of such people. I dare say many of them also contact the Ombudsman's Office. But when the public service is urged to benchmark itself against private sector best practice, it is salutary to consider that the private sector is not subject to such processes as FOI. A private sector manager with profit targets would not contemplate for a moment the diversion of resources which is involved in dealing with the vexatious requesters handled as a matter of course by public service agencies. This perhaps, is one of the downsides of public sector accountability and responsiveness.

And so to some challenges for the future.

These are not necessarily FOI-specific, but it seems to me that they will have considerable impact on its effectiveness.

The first challenge relates to records management. In making these comments, I do so in strong support of the observations in the Ombudsman's Report.

By records management, I mean three things (and these apply to records in physical or electronic form):

- actually recording policy and administrative processes, actions and decisions;
- maintaining such records and related correspondence in a coherent and identifiable form;
- being able to locate and access all relevant records as required and with minimal effort.

Satisfactory achievement in each of these areas is essential if the FOI system is to be capable of operating and thereby to serve its objectives of openness and accountability. Self-evidently, too, satisfactory achievement in these areas is necessary if an agency is to manage its business and be able for its own purposes to identify and retrieve the knowledge it holds.

The Ombudsman's Report suggests, and it is certainly my belief, that there are shortcomings in these areas in a number of agencies - and I certainly would not exclude Defence from this assessment. There is a classic case study of the problems in Professor Pearce's report on the pay television matter. The Canberra Hospital demolition is another example. Significant elements of that undertaking were not properly recorded, and some of the records which were made then proved difficult to find when needed.

It is a core responsibility of agencies to conduct records management at a high level of efficiency. If this is done, FOI

performance will run at an equally high level.

There is a collection of challenges emerging from outsourcing and from contracting generally. One example is the issue of access to information held by contracted service providers. Legislative amendments are proposed to deal with FOI and privacy issues, though these amendments do seem to be taking an awfully long time to put in place. There are, I know, some practical problems in extending these legislative regimes to contractors, but I doubt that there is any real issue of principle in doing so.

However, another aspect of Commonwealth contracting presents more difficulty in the FOI context. This is the concept of 'commercial in confidence'. There appears to be a belief in some quarters that this is a complete and automatic barrier to the disclosure of documents which are so described. Plainly this is not correct.

Parties cannot, for example, contract out of FOI simply by agreeing that their contractual documents will not be released. If an FOI request is made, it must be addressed against the statutory criteria and if non-disclosure is proposed then the case has to be made - eg, because disclosure would damage the financial interests of the Commonwealth, or would harm the commercial interests of the contractor. Many documents claimed to be commercial-in-confidence could not possibly meet these tests, and continued vigilance will be needed to ensure that disclosure entitlements are not undermined.

There is a particular challenge to ensure that the FOI system itself is administered consistently and competently across the entire range of Commonwealth agencies, large and small. The Ombudsman's Report identified wide variations among agencies in FOI training, administration and guidance. It is therefore particularly regrettable that the Attorney-General's Department - the Department which has responsibility for the FOI Act under the Administrative Arrangements Order - ceased to distribute FOI Memoranda and Decision Summaries. No other mechanism has been created for keeping FOI practitioners abreast of developments affecting the Act, for providing policy guidelines on its operation or for ensuring consistency in administration across the spectrum of agencies.

I would have thought that these were inescapable responsibilities of the Department which administers the Act. If the Attorney-General's Department cannot meet them, the Act should be assigned to a Department which can.

The FOI Commissioner recommended by the ALRC/ARC Report might perhaps have assumed these functions, but it appears unlikely that the Government will agree to establish that office. If that proves to be the case, perhaps we may hope that the Government will alternatively allocate some modest resources to this activity, consistent with its commitments to open government, enhanced accountability and best practice administration.

In conclusion, it will probably have been evident from these remarks that I am a believer in openness of government, and in FOI as a means for achieving that end.

Bureaucrats have tended to be rather negative about openness, fearing that its most likely outcome will be to allow the gathering of material for purposes of criticism, often in a glare of unwelcome publicity. I think that this is unnecessarily defensive. Openness can also be used to demonstrate competence, professionalism and achievement. No doubt these are attributes which are less likely to feature on 4 Corners, but demonstrating them is part of the obligation of accountability. Openness can also help to convince the community of the undoubted fact that government administration does exist to serve them. After all, that is something they have a right to know.

PUTTING THE "O" BACK INTO FOI

*Mick Batskos**

Edited version of an address to an AIAL twilight seminar held in Melbourne on 15 February 2000

Introduction

The *Freedom of Information (Miscellaneous Amendments) Act* 1999 (Vic) ("Amendment Act") was assented to on 21 December 1999 and commenced on 1 January 2000. As the Attorney-General stated during debate on the Bill for the Amendment Act, the Government enacted the Amendment Act as part of its freedom of information policy and to put the "O" back into FOI. It is from that statement that this seminar is named.

This paper elaborates on the changes made by the Amendment Act to the exemptions in the Victorian *Freedom of Information Act* 1982 ("FOI Act"), in particular the changes that were made to:

(a) Section 28(1)(b) in relation to Cabinet documents;

(b) Section 33 in relation to unreasonable disclosure of information relating to the personal affairs of any person; and

(c) Section 34 in relation to what has generally become known as the 'commercial in confidence exemption'.

This paper examines some of the legal issues and some practical matters arising out of the amendments to exemptions in the FOI Act.

* *Mick Batskos is Executive Director, FOI Solutions*

Section 28(1)(b): cabinet documents

Before the Amendment Act, there were two possible types of exempt documents under section 28(1)(b) (ignoring for present purposes all of the other types of cabinet documents under the remaining paragraphs of section 28(1)). First, a cabinet submission prepared by (or for) a Minister or by an agency for submission to Cabinet was exempt. Secondly, a document considered by Cabinet relating to issues presently or previously before the Cabinet was also exempt.[1]

The Government was concerned that s28(1)(b) as it was before the Amendment Act was, in relation to the second type of exempt Cabinet document, broad enough to cover any document that may have been considered by Cabinet without actually being part of a Cabinet submission. This was because there was no need to assess the purpose for which it was prepared for the exemption to be made out. It was enough that it related to issues that were or had been before the Cabinet. It was theoretically possible for a whole bundle of documents relating to an issue to be put before Cabinet, thereby attracting the exemption under the second limb of section 28(1)(b). The Amendment Act removed this second type of document from the exemption in section 28(1)(b).

Section 28(1)(b) of the FOI Act now provides that a document is an exempt document if it is "a document that has been prepared by a Minister or on his behalf or by an agency for the purpose of submission for consideration by the Cabinet."

This means that a document will no longer fall within the Cabinet document exemption merely because it was considered by Cabinet and is related to issues that are, or have been, before

Cabinet. It must, in effect, have been prepared as a formal Cabinet submission. This may raise some difficult issues in relation to attachments to Cabinet submissions. I believe that it would be reasonable for attachments to be treated as part of the submission where they are directly relevant to the submission and not merely attached in order to attract exemption. It is expected that there will be some guidance shortly from the Cabinet office about what constitutes a formal Cabinet submission for the purposes of section 28(1)(b) of the FOI Act.

It should be noted that the change to this paragraph has not affected the application of this exemption where a document has been prepared for the purpose of submission for consideration by Cabinet and it does not actually come before Cabinet.[2]

Section 33: Personal affairs information

The Amendment Act made significant amendments to the treatment of personal information. Before the most recent amendments, Part IIIA was inserted into the FOI Act to deal with "personal information". "Personal information" was defined as meaning any information:

(a) that identifies any person or discloses their address or location; or

(b) from which any person's identity, address or location can reasonably be determined.

Except in certain circumstances, disclosure of personal information was prohibited. If a person wanted to get access to it, it was necessary to apply to the Victorian Civil and Administrative Tribunal ("VCAT") for an order granting access to the whole document.

The Amendment Act repealed Part IIIA and made it clear that personal information, as previously defined, must now be dealt with under s33 of the FOI Act. Section 33 provides that a document is exempt if it would disclose information relating to the affairs of any person (including a deceased person) and disclosure would be unreasonable.

There were two important changes to s33. First, s33(9) of the FOI Act has been amended so that the phrase "information relating to the affairs of any person" now expressly includes what was defined as "personal information" under the now repealed Part IIIA. That is, information:

(a) that identifies any person or discloses his or her address or location; or

(b) from which any person's identity, address or location can reasonably be determined.

There had been a number of inconsistent decisions emanating from the VCAT, and its predecessor, the AAT, as to whether the names, addresses and other identifying information about public servants related to their 'personal affairs' for the purposes of s33 of the FOI Act. The amendment to s33(9) makes it clear once and for all that such identifying details in relation to any natural person, whether public servant or otherwise, qualify as information relating to the personal affairs of any person. The main issue will therefore be whether disclosure is unreasonable in all the circumstances. The onus is, of course, on the agency to establish the exemption.

So, for example, if the *Frankston Hospital case* were to occur today, there would be no doubt that the nurses' names on the rosters would be information 'relating to their personal affairs' under s33 of the FOI Act. The only issue that would have to be determined would be whether disclosure would be unreasonable in all the circumstances.

That then brings us to the second amendment to s33 of the FOI Act. A new provision, s33(2A), was inserted into the FOI Act by the Amendment Act. It deals specifically with one aspect of the question of when disclosure is unreasonable. It is now clear that agencies, in determining whether disclosure of a document falling within section 33 would be unreasonable,

must consider whether disclosure would, or would be reasonably likely to, endanger the life or physical safety of any person. This, of course, is in addition to any other matters an agency would otherwise consider in determining the issue of unreasonableness. An interesting question that arises is whether the phrase "endanger life or physical safety" will be interpreted by the VCAT as extending to situations where disclosure may cause emotional harm.

That phrase also appears in s31(1)(e) of the FOI Act. Cases interpreting it in that context will no doubt provide some guidance on the interpretation of s33(2A).

A further amendment of a procedural nature is also relevant to decisions refusing access under s33 of the FOI Act. The Amendment Act introduced a new s53A into the FOI Act. That section provides that where an agency refuses access to documents under s33 and the applicant applies for review to the VCAT, the agency now has certain additional procedural obligations. Once the agency is notified by the VCAT that an application for review has been lodged, it must, if practicable to do so, notify the persons to whom the information in the documents relates (ie the person concerned or the next of kin where the information is about a deceased person) of certain things.

The notice must be in writing and must inform the person to whom it is directed of the right to intervene in the review proceeding. It must also request that person to inform the VCAT within 21 days as to whether he or she intends to intervene. This procedural amendment will raise some difficult questions for the VCAT, namely, what comprises the "right to intervene"? Does it mean that the third person will be able to produce written or oral submissions? Can any involvement of that person be held in camera? If so, are there any natural justice issues that arise against the applicant? If one issue is the identity of the individual concerned, how can that individual's right to intervene be balanced against the applicant's right to a fair hearing, particularly where the applicant is not legally represented?

Section 34: Commercial in confidence

The main change introduced by the Amendment Act in the area of 'commercial in confidence' documents is the introduction of a requirement that there be an *unreasonable* disadvantage caused by disclosure of commercially sensitive documents of external businesses and agencies.

Until now, the most commonly used commercial exemption was s34(1)(a) of the FOI Act as it stood prior to the amendments. That section provided that a document was exempt if it contained information acquired by an agency from a business, commercial or financial undertaking *and* either of two further conditions were satisfied. These conditions were, first the information related to trade secrets, and secondly, the information related to other matters of a business, commercial or financial nature.

As that second condition was comparatively easy to satisfy, agencies rarely used the first limb of s34(1)(a) dealing with trade secrets. It also meant that because of the ease of satisfying the second condition of s34(1)(a), the old s34(1)(b) was not relied on very often. As you would recall the old s34(1)(b) provided that a document was exempt if it:

(a) contained information acquired from a business, commercial or financial undertaking; and

(b) the disclosure of it would have been likely to expose the undertaking to disadvantage.

The amendments have had two effects on s34(1) of the FOI Act. First, where there is information of a business, commercial or financial nature acquired by an agency from an external business, it will only be exempt if *in addition* disclosure would be likely to expose the business *unreasonably* to disadvantage.[3] This means that it is no longer enough if the

information is merely business, commercial or financial information. Its disclosure must in addition be likely to expose the undertaking unreasonably to disadvantage. This means that it is not enough if there is a *mere possibility* of disadvantage. It must be *likely* to occur. This suggests a test of being more probable than not in all of the circumstances that the relevant kind of disadvantage will occur.

It also means that it is not enough if it is likely there will be *some* disadvantage arising from the disclosure. That disadvantage must be *unreasonable*. This raises the question of how do you determine whether an undertaking would be unreasonably disadvantaged by the disclosure? The FOI Act itself gives some guidance. Section 34(2) of the FOI Act has been amended to specify that in deciding whether disclosure would expose an undertaking unreasonably to disadvantage, certain factors may be taken into account. Those factors are set out in s34(2) and include:

(a) whether the information is generally available to competitors of the undertaking;

(b) whether the information would be exempt matter if it were generated by an agency;

(c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and

(d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking - for example, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls.

Section 34(2) goes on to state that an agency may also take into account any other considerations that in its opinion are relevant. This, in conjunction with the reference to "unreasonable disadvantage", suggests that all of the circumstances may be taken into account and that there should be a balancing or weighing up of all factors for and against disclosure; similar to the reference to "unreasonable disclosure" in the exemption dealing with personal privacy. It will be interesting to see if the VCAT will interpret the reference to "unreasonably" in s34 as justifying consideration of the purpose for which the information is sought.

It is very important to note that the exemption in s34(1)(b) *cannot* be relied upon unless the agency first notifies the undertaking which supplied the relevant document that the agency has received a request for access to the document[4]. That notification must take place before any reliance is placed upon s34(1)(b). The notice must seek the business undertaking's views as to whether disclosure of the document in question should occur.

The second effect that the amendments have had on s34(1) is that the trade secrets aspect of section 34(1) has been separated from the concept of "other information of a business commercial or financial nature." Section 34(1)(a) of the FOI Act now provides that a document containing information acquired by an agency from an external business is exempt if the information relates to trade secrets. That is all. There is no need to show that there would be any unreasonable disadvantage.

But what is information relating to "trade secrets"? Some old Victorian FOI cases have determined that the term "trade secrets" in the previous version of s34(1)(a) was to be given its normal legal meaning and is not confined to production processes which may be secret.[5] That same meaning is likely to apply to "trade secrets" in the amended s34(1)(a). But how far will it extend? Only time will tell.

Some of the factors considered relevant in determining whether something is a "trade secret" include:

(a) whether the information is of a technical character (although subsequent cases have suggested that it can be non-technical business information as well)[6];

(b) the extent to which the information is known outside the business of the owner of the information;

(c) the extent to which the information is known by persons engaged in the owner's business;

(d) measures taken by the owner to guard the secrecy of the information;

(e) the value of the information to the owner and to his competitors;

(f) the effort and money spent by the owner in developing the information; and

(g) the ease or difficulty with which others might acquire or duplicate the secret.'

In the author's view, the scope of what is meant by the term 'trade secret' will probably come into consideration sooner rather than later, given that there is no additional requirement to consult with businesses before that exemption is claimed, and the fact that the concept of "trade secret" at common law is a flexible notion.

The Amendment Act also amended s.34(4) of the FOI Act Now, where the documents in question contain trade secrets of an agency,[8] or the agency is engaged in trade or commerce and the documents contain information of a business commercial or financial nature, it is necessary to also show that disclosure would be likely to expose the agency *unreasonably* to disadvantage before the documents are exempt under section 34(4). The same considerations of unreasonableness I already discussed would appear to be equally applicable here.

One interesting feature of s34(4) is that, unlike the exemption relating to information acquired by agencies from businesses (where if there is a trade secret there is no need to show any unreasonable disadvantage caused by disclosure), where a trade secret of an agency is involved, there is nevertheless an additional requirement for disclosure of it to unreasonably disadvantage the agency before the exemption is made out.

Conclusion

In the author's view, the amendments introduced by the Amendment Act will indeed have the practical effect of narrowing the three exemptions discussed here. This will in turn result in greater access to documents. However, it is equally clear that the FOI Act as amended will probably give rise to some legal issues that will in the not too distant future require clarification by the VCAT and possibly the Supreme Court.

Endnotes

1 This second category of documents was inserted into the FOI Act in 1993.
2 *Re Birnbauer and Department of Industry, Technology and Resources* (1986) 1 VAR 279.
3 Section 34(1)(b).
4 Section 34(3).
5 *Re Gill and Department of Industry, Technology & Resources* (1985) 1 VAR 97, 106. See also *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, 49; *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167, 193.
6 *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163.
7 *Re Bankers Trust Australia Ltd and Ministry of Transport* (1989) 3 VAR 33, 38-9 referring to *Organon (Aust) Pty Ltd v Department of Community Services and Health* (1987) 13 ALD 588, 593-4 (Fed Crt).
8 There would not appear to be a requirement that the agency be engaged in trade or commerce before it can have a trade secret.

NON-REFOULEMENT AND TORTURE: THE ADEQUACY OF AUSTRALIA'S LAWS AND PRACTICES IN SAFEGUARDING FUGITIVES FROM TORTURE AND TRAUMA

*Joanne Kinslor**

Introduction

As part of its inquiry into immigration law,[1] the Senate recently investigated Australia's non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture). The importance of such an investigation was emphasised in May 1999 when the United Nations Committee Against Torture (UNCAT) handed down its first decision against Australia: *Sadiq Shek Elmi v Australia* (hereafter *SE*).[2] In this case, UNCAT found that Australia would be in breach of its obligations under Article 3 of the Convention against Torture if it continued in its decided course of forcibly returning a Somali national to Somalia, where he would be in danger of suffering torture.[3] This article examines the issues raised in the *SE* case and looks at the implications that these issues have for immigration law in Australia. The nature of the Convention against Torture and the way in which Australia has sought to comply with the obligations it assumed upon signing and ratifying the Convention are examined.[4]

It is disturbing for Australia, a country that takes pride in its human rights record, to be informed by an international human rights committee that it is pursuing a course of action in violation of a convention which seeks to protect people from one of the most extreme of human rights abuses. In defence of Australia's reputation, it may be postulated that SE's case is an anomaly; that it was the unfortunate result of misguided decision makers dealing with a difficult factual situation or with a poorly presented case. This may be suggested even though the likelihood of an aberrant decision should be minimised by the fact that cases are only admitted for hearing before the UNCAT once domestic remedies have been exhausted.[5]

This article attempts to demonstrate that, seen in the context of Australia's immigration law and practice, the decision against Australia in SE's case is actually the foreseeable and likely result of Australia's failure to provide adequately for its "non-refoulement" obligations under Article 3 of the Convention against Torture. The gravity of this failure and hopefully the motivation for its remedy may be realised by recognising the nature of the Convention against Torture and the subject matter that it deals with.

The Case of *SE v Australia*[6]

SE came to Australia in October 1997. He asserts that his life is in danger in Somalia because he is a member of the Shikal clan, whose members are easily identified by their lighter coloured skin and distinct accent. Members of the Shikal clan, he claims, are the target of other clans because of their wealth and because they refused to join or financially support the dominant Hawiye clan. His father, an elder of the Shikal clan, was shot by the Hawiye militia when he refused to "give over" one of his sons to them or to otherwise support the militia. SE's brother was killed when

* *BA, Student-at-Law, University of Sydney.*

the militia detonated a bomb in his home and his sister committed suicide after being raped three times by members of the Hawiye militia.

Following the refusal of the Department of Immigration and Multicultural Affairs (DIMA) to grant SE a protection visa in March 1998, SE sought review by the Refugee Review Tribunal (RRT). The RRT rejected his claim in May 1998. SE then made a request to the Minister for Immigration to use his discretion[7] to overturn this decision, but in July 1998 the Minister declined to consider exercising his discretion. In October 1998 SE was told that he would be deported to Mogadishu.

This decided course of deportation was not reversed despite a request by Amnesty International that the Minister intervene. SE was not permitted by the Minister to lodge a second application for a protection visa, although it was readily determined that he had received inadequate representation for his original application and RRT appeal. In due course, the High Court refused to issue an injunction against his deportation on the grounds that there was not a "serious question" of law to be tried.[8]

However, SE's deportation was delayed, through a series of exceptional events. In summary, the captain of the aircraft designated to fly SE from Melbourne on 29 October 1999 refused to have SE on board after he witnessed his distress. An Urgent Action was issued by Amnesty International on 18 November 1998[9], followed by a protest by the Trades and Labour Council at Perth airport when the DIMA attempted to deport SE on 19 November 1998. DIMA finally agreed to suspend his deportation after the UNCAT requested that they do so while they heard SE's case.

On 20 May 1999 the UNCAT decided against Australia. It stated that SE's deportation would be in breach of Article 3 of the Convention against Torture, which obliges states not to *refoule* individuals to a country where they are likely to suffer torture. What makes this case disturbing is that there was (and is) no provision in Australian domestic law requiring SE's case to be assessed in accordance with the provisions of the Convention, even though Australia has signed and ratified it. Since the circumstances of most asylum seekers do not allow them the opportunity to have their cases heard before the UNCAT, the case demonstrates the need for changes within Australia's immigration laws so as to ensure that Australia's treatment of asylum seekers does not offend against our obligations under the Convention. An appropriate change would be to introduce a humanitarian visa class based upon Article 3, together with a mechanism for reviewing removal decisions so as to ensure compliance with Article 3.

The Nature of the Convention against Torture

As noted above, the Convention against Torture seeks to protect people from one of the most extreme of human rights abuses. The World Conference on Human Rights in June 1993 described torture as "one of the most atrocious violations against human dignity".[10] The status of the right to be protected from torture as one of the most basic of human rights is evidenced by its presence in all general human rights treaties, such as the United Nations Declaration of Human Rights (Article 5) and the International Convenant on Civil and Political Rights (Article 7)[11], and its universal condemnation has allowed it to secure "the rare status of *jus cogens*".[12]

The Convention against Torture not only prohibits torture, but aims for the global elimination of torture.[13] Its non-refoulement provision (Article 3), focuses on the existence of serious harm which will be suffered if a person is returned to a country where he is likely to suffer torture, regardless of the character of the person who will suffer the harm or the connection of the harm with a specific ground. Article 3 of the Convention against Torture states:

> No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture.

The abuse which torture constitutes is recognised here to be so extreme that the existence of a possibility of torture is the sole determiner of whether an individual should be afforded protection. This reinforces a view of torture as one of the most serious of human rights abuses as well as recognising that the elimination of torture globally demands that states not only eliminate it within their borders but also recognise that they act as a member of a global community and have global responsibilities towards foreign nationals. Understanding the nature and aims of the Convention against Torture and the place of Article 3 within it is critical for deciding upon an appropriate domestic response to it.

Australia's Response to the Convention against Torture

Australia became a party to the Convention against Torture in 1987[14] and gave effect to several of its provisions in domestic law through the *Crimes (Torture) Act 1988* (Cth). However, the terms of Article 3 were not given domestic legislative force by this legislation. In contrast, Article 3 shapes the *Extradition Act 1988* (Cth) which only allows a person to be extradited once the Attorney-General is content that persons will not be tortured in the country to which they are extradited.[15] Asylum seekers are not protected by this provision because extradition is a mechanism designed to return foreign nationals wanted in relation to alleged criminal offences by another country with which Australia has reached an agreement.

In *SE v Australia*[16] Australia implied that it has provided for its "non-refoulement" obligations under the Convention against Torture. One of the principal grounds on which the argument that SE's claim for Article 3 protection was without merit rested, was that he had failed to gain a visa in Australia, despite exhausting domestic remedies. This argument shows that Australia had not changed its position since its first report to the UNCAT,[17] in which it claimed to have provided for its Article 3 obligations through granting visas to refugees and permitting the Minister to grant visas on humanitarian grounds at his/her discretion.[18]

However, it was not the facts of SE's case, but the provisions of Australian immigration law, which did not meet the requirements of Article 3 of the Convention against Torture. Even though protection visas and humanitarian visas can be issued by DIMA and the Minister, this does not guarantee that those eligible for protection in Australia under Article 3 will receive it. This may be demonstrated by comparing the availability of and criteria relating to protection visas and humanitarian visas with the terms of Article 3.

Protection visas

Individuals will gain a cl 866 protection visa[19] if they can satisfy the Minister for Immigration that they are a refugee.[20] The definition of "refugee" is taken from Article 1 of the Refugee Convention,[21] which defines a refugee as a person:

> who owing to a well-founded fear of being persecuted for reasons of 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 the country.[22]

The problem with using this definition as the basis of the main on-shore humanitarian visa in Australia is that it does not cover all individuals who are protected under Article 3 of the Convention against Torture.

The focus of Article 3 is the existence of serious harm which will be suffered, rather than its connection with a specific ground or the person making the claim, as is the case with the Refugee Convention.[23] Although both the Refugee Convention and the Convention against Torture seek

to protect people from being returned to a place where they will suffer human rights abuses, the elements which make up the relevant provisions differ. The extent of these differences emerges when we examine the character of the harm for which protection is granted under Article 3, the proof required, and who is protected from refoulement.[24]

The type of harm suffered

Article 3 only applies to acts of torture.[25] Torture is defined in article 1 as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

The European Court of Human Rights has distinguished torture from other inhuman treatment by on the basis of its severity and immoral purpose.[26] In *Ireland v United Kingdom*,[27] five interrogation techniques were deemed not to constitute torture, but instead inhuman and degrading treatment, because torture is constituted only by deliberately inhuman acts which cause extreme suffering.[28] The UNCAT may be influenced to define torture more broadly than the European Court because, unlike the European Convention against Torture, only torture activates Article 3. Nevertheless, the principle of hierarchical abuse will still be maintained with torture being at the top of a hierarchy of abuse.

Since other inhuman treatment constitutes "persecution", the scope of Article 3 is narrower than that of Article 33 (1) of the Refugee Convention with respect to the type of harm suffered.

To constitute "torture" within the Convention against Torture, the relevant act must be committed with the "consent or acquiescence of a public official or other person acting in an official capacity".[29] Here also the scope of the provision is narrower than Article 33(1) of the Refugee Convention.[30] Yet, there may be little practical difference between the scope of the two conventions in this respect.

The notion of torture was defined in this manner because it was expected that criminal acts by private persons would be dealt with through domestic legal systems.[31] The Convention against Torture is an instrument of international law and should not work in competition with domestic legal systems. It was not, however, intended to leave individuals without redress because the state where they suffer harm is incapable or disinclined to protect them.

Individuals who find themselves in this position should be covered by the Convention by virtue of the phrase "with the consent or acquiescence of a public official." Governments will be taken to have acquiesced in torture if they do not act to prevent it. As an example of this, Rodley argues that acts done by paramilitary and other unofficial groups will be covered if public officials ignore those acts.[32] Furthermore, a report by the Special Rapporteur on Torture says that if a state does not intervene when quasi public groups such as tribes commit human rights abuses it will be considered to have consented or acquiesced in the act.[33] Further still, Copelon argues that a state may consent even to private acts of domestic violence when it fails to protect citizens from it.[34]

It is also consistent with the purpose of the public official requirement to interpret the phrase "those acting in an official capacity" as defacto governments, in circumstances where there is no official government. In *SE v Australia* Australia claimed that the applicant did not face torture as defined by Article 1 because those who threatened to harm him were members of "armed

Somali clans", not public officials or person acting in an official capacity.[35] The UNCAT held that, given Somalia was in a state of civil war and without an official government, the factions in question came within the definition because they had set up quasi-governmental institutions and exercised powers similar to those used by legitimate governments.[36]

Proving the existence of harm

Article 3 requires that *substantial* grounds exist for believing that a person *will* be in danger of being subjected to torture.[37] It uses a probability standard of proof and deals only with future risk, since its aim is to protect from harm rather than bring redress for past abuses.[38]

What constitutes substantial evidence will be dependent upon a particular factual situation.[39] *Balabou Mutombo v Switzerland* indicated that "substantial grounds" means that the risk of an individual being tortured is a "foreseeable and necessary consequence" of their return.[40] However, this is not a firm definition because it still requires an opinion as to what is foreseeable in the relevant circumstances and it has not been used as a test in later cases.

As indicated by paragraph 2 of Article 3, the general human rights situation in a country should be examined in determining whether an individual is threatened by torture. However, this is not taken as an absolute or an exhaustive proof,[41] but as a means by which a view may be "strengthened".[42] Following from this, although general human rights abuses exist in a country, Article 3 may not operate because the person in question is not at risk.[43] Moreover, it may be held that a person is in danger of torture although their country does not have a constant pattern of human rights abuses.[44]

In assessing the significance of inconsistencies and contradictions within an applicant's story, the UNCAT has repeatedly stated that "complete accuracy is seldom to be expected by victims of torture."[45] As well as considering the characteristics of torture victims, the UNCAT focuses upon the paramount aim of the article, which is to protect the security of individuals. Consequently, it has held that despite the existence of doubts regarding the facts of a case, the security of an individual must be ensured.[46]

Taylor observes that Article 3 does not consider the subjective fear of an applicant in the way Article 33(1) of the Refugee Convention does.[47] However, the practical significance of this distinction is minimal because, as Taylor notes, the subjective fear of a refugee must have an *objective foundation* by which a court is able to establish, under *Chan*, that there is a "real chance" they will be persecuted.[48]

Moreover, the standard or proof required under Australian law seems greater than that required by the UNCAT. The *Migration Act 1958* places the onus of proof upon applicants to ensure that the Minister "is satisfied" that they have a genuine fear based upon a real risk of persecution.[49] By contrast, under the Convention against Torture, the burden of proof, at least with regard to evidence of country conditions critical to an assessment under Article 3, is placed upon the state in which relief is sought.[50] In addition, the UNCAT is concerned that the paramount aim of Article 3, that persons be protected from torture, is met, despite doubts which may exist concerning the facts of a case.[51]

Who is protected from refoulement?

There are several significant differences with regard to the class of persons protected from refoulement under the Refugee Convention in comparison with the class protected by the Convention against Torture.

A refugee is someone who is part of a persecuted group. A refugee who is protected from refoulement is someone who is not protected or assisted by agencies other than the UNHCR (Refugee Convention, Article 1D); is not a national

of the country where he/she resides (Refugee Convention, Article 1E); has not committed a crime against peace, a war crime, or a crime against humanity (Refugee Convention, Article 1F (a)); has not committed a serious non-political crime (Refugee Convention, Article 1F (b)); has not committed acts "contrary to the purposes and principles of the United Nations" (Refugee Convention, Article 1F (c)); and is not a danger to the security or the community of the country where he/she seeks refuge (Refugee Convention, Article 33 (2)).

In contrast, a person is protected by Article 3 of the Convention against Torture regardless of characteristics such as those referred to in the Refugee Convention. "[T]here are no preclusions for those...considered to be criminals, national security risks, or even torturers."[52] In *D v the United Kingdom*[53] it was held that protection should be given to a drug dealer. In *Chahal v United Kingdom* the successful applicant was an alleged terrorist involved with planning terrorist attacks in the country where he sought asylum. While these are decisions of the European Court of Human Rights, and the jurisprudence of the UNCAT may develop differently on this issue, the reasoning of the ECHR is important. In *Chahal v United Kingdom* the ECHR explained that a claim for protection under the Convention against Torture should be decided without regard to the applicant's conduct or national security because it is fundamental to democratic society that individuals be protected from torture and the irreversible harm caused by it.[54] Such a broad approach is also consistent with the philosophy behind the Convention against Torture: that is, that all persons, regardless of their status, have a right to be protected from torture and that states have an interest in making the elimination of torture their highest priority within the decision making process.

Those concerned with national security should be mindful of the following issues. First, the Convention against Torture does not require Australia to do anything more than ensure that it does not return an individual to a country where they are at risk of torture. It does not impose upon Australia an obligation to grant a torture victim permanent residence or refugee status. Australia may send torture victims to any country where they are not under threat of torture.[55] This feature of the provision has been recognised by United States law. The United States offers asylum seekers under the Convention against Torture relief in two forms. Asylum seekers who do not meet the definition of a refugee but who meet the requirements of Article 3 are granted similar rights to refugees, including the right not to be deported and the right to work. Asylum seekers who meet the requirements of Article 3 and are prevented from gaining refugee status under article 1 (F) of the *Refugee Convention* because of crimes they have committed, are granted 'deferral from deportation'. Through this, the United States recognises that it is obliged not to *refoule* torture victims but it reserves the right to send them to a safe third country and the right not to give them permanent resident status.[56]

Secondly, the Convention against Torture does not prevent a state from subjecting a person to domestic jurisdiction.[57] Granting an individual protection does not mean that that person has been placed above the law. Furthermore, torture victims who have violated international law, such as war criminals or torturers, may be brought before the International Criminal Court or extradited to a country where they may be tried for their crimes.[58]

Thirdly, sensationalised claims should not be permitted to distort what is actually involved in implementing Article 3 of the Convention against Torture. Only a small number of people seek asylum under the Convention against Torture. As noted above, torture is an extreme form of abuse which is considerably narrower in form than "persecution" as defined by the Refugee Convention. Of the limited number of asylum seekers who are covered by the Convention against Torture, only a minority will have a criminal history. It is important not to compromise the principles and objectives of the

Convention against Torture in reaction against this small number of individuals. To do so would involve passing severe moral judgment upon an individual whose past actions have been inevitably influenced by a situation in which gross human rights abuses threatened them, and/or were perpetrated against them. Moreover, this severe moral judgment is coupled with abrogation of moral responsibility on our behalf if we are to place individuals at risk of being tortured. The question asked should not be, "Why should we implement laws which allow criminals to enter Australia?", but, "How can we retain laws which do not protect people from being tortured?".

Nevertheless, it would be possible to limit the application of Article 3 in a similar manner to that achieved through the exclusions found in Articles 1 and 33 of the Refugee Convention discussed above.

Another difference between those who are protected by the Convention against Torture and those protected by the Refugee Convention is that torture victims do not need to be part of a group towards which harm is directed. The "nexus" requirement of refugee asylum, which stipulates that claimants must be able to connect their suffering to discrimination against a group, is not present in the Convention against Torture because of the exceptional and often individually focused nature of torture. As was the case with SE, the "nexus" requirement of the Refugee Convention narrows the scope of the Torture Convention's protection so as to render it ineffective for some asylum seekers who have legitimate claims for protection based upon severe human rights abuse. Both DIMA and the RRT determined that SE did not satisfy the "nexus" requirement because he could not show that he would be persecuted for one of the reasons mentioned in Article 33 of the Refugee Convention. Yet, as the UNCAT found, he was at risk of facing torture. His case demonstrates that the elements which make up the relevant provisions of these Conventions are distinct and that claims must be assessed separately under each Convention.

The Minister's Discretion

From the discussion above it is evident that individuals under threat of torture may not be refugees because the harm they suffer is not harm suffered by a group, or because they do not meet the character requirements in the Refugee Convention. Australian law has allowed for such torture victims by giving the Minister of Immigration a discretionary power to grant humanitarian visas under s.417 of the *Migration Act 1958*. Unfortunately, torture victims such as SE are not adequately protected by this discretion, because it is a personal discretion exercised by a politician in accordance with the public interest and not subject to adequate review.

A Personal Discretion

The Minister has an unenviable task in being required to exercise this discretion justly in relation to the thousands of requests he receives each month. In fact, it is an impossible task for one person to complete, and it is unreasonable for us to expect one person to remedy all the problems caused by our inadequate visa provisions, considering the time and expertise required for such a task. The discretion requires the application of complex international law principles to numerous factual situations. In the context of the Refugee Convention, this process has required the regular guidance of the High Court.[59] It is arguable that it may be even more difficult to implement the Convention against Torture, which is a more recent Convention around which little jurisprudence has so far developed.

Only a decision not to consider whether to use the discretion can be delegated to DIMA[60] Yet, the problem of inadequate expertise is evident at this level as well. The case of *SE v Australia* indicates that staff may not be adequately trained to identify cases which are covered by the Convention against Torture.

Exercised by a Politician

Procedural fairness with respect to the Minister's discretion is compromised by the fact that the Minister is not an independent decision maker, in that he/she is not independent of immigration control and other government interests.[61] As a politician, the Minister may be reluctant to exercise this discretion because of the possible political implications that a decision may have, especially since s.417(4) requires that the decision be made public.[62]

Furthermore, there is evidence which suggests that the political leanings of the Minister may affect DIMA staff who have been delegated the task of deciding whether the Minister should consider exercising this discretion. In 1995 Cooney showed that MIRO officers were unwillingly to recommend that the Minister use his discretion under s351 (which is worded in similar terms to those of s 417) because they were concerned that they would be labelled critics of government policy.[63]

Exercised in Accordance with the Public Interest

This discretion must be exercised in the "public interest". The relevant "public interest" promoted or protected by a particular decision must be stated when a decision to exercise this discretion is tabled before Parliament in accordance with s.417(4). The problem here is that the focus on the "public interest" diverts attention away from, or even contradicts, the goal of protecting the basic human rights of an individual[64]- which is the focus of the Convention against Torture.

Inadequate Review

This discretion is non-compellable and the Minister's decision (or that of DIMA staff) not to use it cannot be questioned.[65] This means that applicants do not receive a hearing at all if a decision is made not to exercise the discretion.

When the Minister does exercise this discretion, an applicant does not receive procedural fairness because hearings are by written submissions only (which may be particularly difficult for non-English speaking asylum seekers and those who have traumatic stories to relate) and applicants do not have effective access to judicial review because the discretion is non-compellable.[66] Neither can unfavourable decisions be reviewed by the public because there is no requirement that they be tabled in Parliament or otherwise made public.

As mentioned above, only a favourable decision by the Minister receives a form of review. Under s.417(4) the Minister must table a favourable decision, with the reasons he/she made it, in Parliament. However, the quality of such a review is affected by the fact that Parliament "may lack the time, expertise and political will to properly review specific cases".[67]

SE v Australia demonstrates how flawed this discretion is as a safeguard for torture victims.[68] In its submission to the UNCAT, Australia argued that our domestic law had adequately assessed whether SE had a genuine claim to protection under Article 3. Australia relied in part on the fact that DIMA had assesed SE's case to determine whether it should be referred to the Minister, and that the Minister had declined to exercise his discretion when requested to do so. In light of the UNCAT's decision, the competence of the Minister and his department to identify those in need of Article 3 protection is open to question. This emphasises the need for judicial review of the exercise of the Minister's discretion, something which was unavailable to SE.[69]

Deportation

Under s198 of the Act, an unlawful non-citizen[70] must be removed from Australia.[71] That section states that an "officer *must* remove as soon as reasonably practicable" an unlawful non-citizen who is detained and who does not have a valid visa or visa application. In *SE v Minister*,[72] SE argued that this provision

must be read as not requiring the removal of individuals to a place where their human rights risked violation, because such an action would breach Australia's obligations under international treaties such as the Convention against Torture. It was held that the operation of this section was not limited in this way as a matter of statutory construction.[73]

In practice this means that the nature of the destination to which someone is to be removed and whether they will suffer human rights abuses at this destination are not considered during the deportation process. The justification is that such issues have already been sufficiently considered by those who examined the individual's visa application.[74] Thus, in *SE v Minister,* when an officer of DIMA was asked whether he had examined the conditions in Somalia (where the appellant was to be sent) before he exercised his statutory duty to remove the appellant from Australia he answered, "No, that had already been done". When asked, "By whom?", he replied, "...the RRT process".[75] The flaw within such reasoning is evident from the discussion above. Not all applicants to whom Australia has an obligation not the remove under Article 3 of the Convention against Torture will be able to obtain a visa under our current provisions.

Recommendations for change

Although the Convention against Torture is a relatively recent Convention which has yet to be widely implemented, Australia may look to the example of other countries, such as Germany and the United States, in assessing how it may provide for its Article 3 obligations within its immigration laws. Article 3 of the Convention against Torture is reflected in Germany's immigration law, both in its visa provisions and its mechanisms for deportation review. Under s53 of the *Aliens Act* of Germany, asylum seekers will not be deported if they are in "concrete danger" of being subjected to torture [s52(1)]. Under s53(6) of the same Act, deportation can be prevented if an asylum seeker's life, bodily integrity or freedom is under immediate and personal danger.[76]

The United States has gone further than Germany to guarantee asylum seekers relief based upon the Convention against Torture. Within United States law, although torture victims cannot seek redress under Article 22 of the Convention against Torture,[77] they have been able to apply directly for the protection of Article 3 since its ratification by the United States in 1994.[78] In 1998/1999, the United States implemented a new procedure which integrates determinations under the Convention against Torture into the asylum adjudication process. This procedure allows asylum seekers to apply for relief under the Convention against Torture at any stage during their proceedings. Moreover, Immigration & Naturalisation Service officials and immigration judges are trained to raise Convention against Torture claims themselves when they think that is appropriate. One of the most significant features of these provisions is that they recognise that humanitarian status is not discretionary, but *required* for individuals who qualify for protection under the Convention against Torture.[79]

Through its reluctance to give full effect to its obligations under Article 3, Australia is failing to play its part in eliminating torture. In view of this, Australia should follow the lead of the United States and create a separate ground of relief for asylum seekers modelled on the features of Article 3 of the Convention against Torture.

Conclusion

The case of *SE v Australia* draws attention to the fact that Australia has failed to provide adequate protection for asylum seekers who are at risk of torture. Although Australia has claimed otherwise, a close examination of our on-shore cl 866 protection visa and the Minister's discretion under s 417 to grant visas on humanitarian grounds shows that these mechanisms do not adequately protect individuals covered by Article 3 of the

Convention against Torture. In order to remedy this situation two changes should be made to the *Migration Act 1958.* Firstly, a visa class should be created which is based upon Article 3 of the Convention against Torture.[80] Secondly, deportation orders ought to be reviewable by reference to Article 3 of the Convention. Such measures will demonstrate that Australia is committed to the world-wide elimination of torture.

Endnotes

1 Inquiry into the Operation of Australia's Refugee and Humanitarian Program. The inquiry was being conducted by the Senate Legal and Constitutional References Committee pursuant to a notice of motion passed by the Senate on 13 May 1999. The Committee's report, *A Sanctuary Under Review - An Examination of Australia's Defence and Humanitarian Determination Processes* was tabled in the Senate on 28 June 2000.

2 Communication No. 120/1998. Date of communication: 17 November 1998.

3 Prior to *SE v Australia* two communications had been accepted by the Committee Against Torture: *H v Australia* Communication 102/1998 and *NP v Australia* Communication 106/1998. The first of these was discontinued when the complainant returned to her home country. The second was rejected by UNCAT on its merits. Subsequent to UNCAT's decision against Australia in *SE v Australia* there has been an increase in the number of complaints lodged, including CAT Communication 136/1999, CAT Communication 138/1999 and CAT Communication 139/1999. Refer: Attorney-General's Department, Submission to the Senate Legal and Constitutional References Committee: Operation of Australia's Refugee and Humanitarian Program, Submission No. 75, 1999.

4 Victims of torture are also protected under the International Convenant on Civil and Political Rights (ICCPR) (refer to Articles 6 and 7) which Australia ratified on 13 August 1980. For a discussion of the extent to which Australia upholds those provisions see S. Taylor, "Australia's Implementation of Its Non-Refoulement Obligations Under the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Convenant on Civil and Political Rights", (1994) 17(2) *UNSWLJ* 432.

5 See Article 22, paragraph 5 (b) of the Convention against Torture which precludes the UNCAT from considering a communication before all domestic remedies have been exhausted. Although the provision allows for communications to be heard in exceptional circumstances where domestic remedies are "unreasonably prolonged" or "unlikely to bring effective relief" (Article 22 (5) b), this requirement of admissibility has been interpreted quite strictly. In *M.A. v Canada*, Communication No. 22/1995, the applicant argued that his chance of success was almost non-existent because of binding jurisprudence and the review process. The Committee held that they could not accept this argument because they could not assess whether domestic remedies would be successful, but only if they were "proper remedies". The Committee explained that "special circumstances" were needed before this requirement could be wavered. *M.A. v Canada*, Communication No. 22/1995 U.N. Doc. A/50/44/ at 73 (1995).

6 The facts of SE's case are set out by the UNCAT in *SE v Australia* at paragraphs 2.1-2.7.

7 Under s417 *Migration Act 1958* the Minister has a discretion to grant a humanitarian visa to an asylum seeker if it is in the public interest to do so.

8 Hayne J refused SE an interim injunction on 16 November 1998. Special leave to appeal to the full bench of the High Court was subsequently denied.

9 This Urgent Action is only the third ever issued by Amnesty International against Australia, the last being in 1989. See Paul Whittaker, "The Alarming Case of Sadiq Shek Elmi", *Amnesty International Australia Newsletter*, January - February 1999. Vol. 17. No. 1.

10 United Nations Department of Public Information, New York, 1993, DPI/1394-393999 at 60 in P. Burns QC and O. Okafor, "The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or How it is Still Better to Light a Candle than to Curse the Darkness", (1998) 9(2) *Otago Law Review* 399.

11 See P.B. Sharvit, "The Definition of Torture in the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment", 23 *Israel Yearbook on Human Rights* 147, 148.

12 *In the Matter of Anwar Haddan* Exclusion Proceedings Board Immigration Appeals, File No. A22/751/813 (United States) at 28.

13 Fact Sheet No. 17, United Nations Human Rights Website, The Committee against Torture, http://www.unhcr.ch/html/menu6/2/fs17.htm, Introduction, at 1.

14 Taylor, (1994) above n 5 at 466-433.

15 Section 22(3). See ibid, at 450. Taylor questions the value of this safeguard since it is not exercised by an independent decision maker.

16 *SE v Australia* above n 3, paragraphs 4.10-4.16.

17 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment - Consideration of Reports Submitted By the States Parties Under Article 19 of the Convention: Australia*, 27 August 1999 at paragraphs 70 (p 12) and 73 (p 13).

18 Taylor raises the issue as to whether class 800 territorial asylum visas, not mentioned in the report, are an avenue through which Australia's non-refoulement obligations may be satisfied. She concludes that territorial asylum is not a real option for asylum seekers. Taylor, (1994) above n5., at 466-467.

19 Migration Regulations 1994 (Cth), Sch 2, cl 866.

20 M Crock, *Immigration and Refugee Law in Australia,* Federation Press, 1998, p 126.

21 *Migration Act 1958* (Cth), s 4(1).

22 Refugee Convention, Art 1A(2). The 1967 Protocol extends this definition to events occurring after 1951. See Art (A) (2).

23 D. Anker, *Law of Asylum in the United States.* Boston, Refugee Law Centre, 3rd ed, 1999, p 18.

24 Despite the use of the word "refoulement", it should be noted that the Article 3 is wider than Article 33 (1) of the Refugee Convention in that it is not limited to non-refoulement.

25 Anker, above n 24 at 480, 483.

26 The U.N Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975 states that torture "constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". Ibid, Anker, 482.

27 25 Eur Ct. H.R. (ser A) 167 (1968) in J H Burgers and H Danelius *The UN Convention against Torture: A Handbook on the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment,* Nijhoff Sold and Kluwer Academic Publishers, 1988 pp 115-117.

28 This hierarchical distinction was also used in *Tyer v United Kingdom* 26 Eur. Ct. H.R. (ser A) 29 (1978) in Anker, above n 24, 484.

29 Convention against Torture, Article 1. States are responsible for acts of torture by their public officials regardless of whether their conduct was approved by the state. Anker, above n 24., 504.

30 Taylor, above n 5., at 442-3.

31 Burgers and Danelius above n 28., at 120.

32 N.S. Rodley, "United Nations Non-Treaty Procedures for Dealing with Human Rights Violations", *Guide to International Human Rights Practice* 60, Hurst Hannum ed, 2d ed. 1992, 91 in Anker, above n 24., 503.

33 *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences,* U.N. ESCOR, Comm'n Hum Rts, 53rd Sess, 14, U.N. Doc E/CN.4/1997/47 (1997) in Anker, ibid., at 504.

34 R. Copelon, *Recognising the Egregious in the Everyday: Domestic Violence as Torture* 25 Colum. Hum Rts. L. Rev (1994) at 355-56, in Anker, ibid., 506-7. In extending torture to private acts the purpose requirement of the definition should not be forgotten. Sharvit notes that, while the purposes listed in Article 1 are not exhaustive, they all share a connection with the "interests or policies of the State and its organs": Sharvit, above., n 5 at 163-4. Yet torture can still be extended to domestic violence if the patriarchal interests of a state are recognised and its purpose is held to be discrimination according to sex. Such an interpretation is allowable by the fact that the list of purposes is not exhaustive and that "the 'purpose' element should be liberally construed or de-emphasised." N.S. Rodley, "United Nations Non-Treaty Procedures for Dealing with Human Rights Violations", in *Guide to International Human Rights Practice* 60, 70 (Hurst Hannum ed., 2d ed, 1992) and A. Clapman, *Human Rights in the Private Sphere* 200 (1993) in Anker, id., at 499.

35 *SE v Australia* above n 3., paragraph 4.4.

36 Id. paragraph 6.5.

37 Burgers and Danelius, above n 28., at 127.

38 Anker, above n 24, at 509.

39 *Balabou Mutomo v Switzerland* Communication No. 13/1993, Committee Against Torture. UN Doc UNCAT/C/12/D/13/1993 (27 April 1994) published in (1995) 7 (2) *IJRL* 330.

40 See *Balabou Mutomo v Switzerland* id., at 330.

41 Burgers and Danelius, above n 28., at 128.

42 See *Balabou Mutomo v Switzerland* above n 42., 331.

43 Ibid., at 330.

44 Id.

45 See *Ismail Alan v Switzerland* Committee against Torture, Communication No. 21/1995, published in (1996) 8 (3) *IJRL* 448; *Pauline Muzonzo Paku Kisoki v Sweden,* Committee against Torture, Communication No. 41/1996, published in (1996) 8 (4) *IJRL* 657; *Kaveh Yaragh Tala v Sweden* Committee against Torture, Communication No. 43/1996 at paragraph 10.3, U.N. Doc. UNCAT/C/17/D/43/1997 at http://www1.imn.edu/humanrts/cat/decisions/CATVWS43.htm.

46 *Balabou Mutomo v Switzerland* above n 42., at 330; *Tahir Hussain Khan v Canada* Committee against Torture, Communication No. 15/1994, paragraph 12.3, U.N. Doc.A/50/44 at 46 (1995) at http://www1.imn.edu/humanrts/cat/decisions/CATVWS43.htm.

47 Taylor, above n 22., at 443.

48 Ibid., 438. In *Chan* Mc Hugh J directly stated this point, saying that the subjective frame of the applicant "*must* be supported by an objective element." (emphasis added). See *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 C.L.R., 379.

49 See *Minister for Immigration v Wu Shan Liang* 70 ALR (1996) 568, 577.

50 Anker, above n 24., 511.

51 See references at footnote 45.

52 Anker, above n 24., p469.

53 The European Court of Human Rights, case number: 146/1996/767/964.
54 *Cahal v United Kingdom* 23 Eur. H.R. Rep. 82 (1996) (Eur. Ct. H.R.) in Anker, above n 24., at p 519.
55 Deborah L. Benedict, "A Survey of State Implementation of the Obligation of Non-Refoulement Embodied in Article 3 of the Convention against Torture in the Context of Refugee Protection", University of Michigan Law School, Externship Paper, Fall 1999, at 6.
56 Ibid., 13.
57 Anker, above n 24, at 519.
58 Benedict, above n 59, at 6.
59 See Law Council of Australia, Submission to Senate Legal and Constitutional References Committee: Operation of Australia's Refugee and Humanitarian Program, 1999 at 14. They pose as an example the case of *Applicants A and B v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 in which the High Court looked at the definition of a "particular social group" under the Refugee Convention and stated that such a group could not be defined as those who shared an experience of persecution.
60 Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs (1996) 141 ALR 322. Merkel J explained, at first instance, that there are three separate decisions which can be made under s 417. A decision to exercise the discretion; a decision not to exercise the discretion and a decision not to consider whether to consider exercising the discretion.
61 Taylor, above n 5 at 464.
62 Law Council of Australia, above n 63, at 15.
63 S. Cooney, *The Transformation of the Migration Act,* (1995), AGPS, 90 quoted in Law Council of Australia.
64 Law Council of Australia, above n 63, 16.
65 Section 475(1)(c) *Migration Act 1058.*
66 *Ozmanian v Minister for Immigration, Local government and Ethnic Affairs* (1996) 141 ALR 322.
67 Law Council of Australia, above n 63 at 16.
68 The inadequacy of the discretion would also be shown by unpublished cases in which the asylum seeker has not sought an exercise of the Minister's discretion because they are not aware of it or they do not have the monetary resources to continue review to that stage.
69 SE could not have his case reviewed because the Minister had decided not to consider using his discretion.
70 A non-citizen is unlawful if they do not have a valid visa. A valid visa may be a substantive visa or a bridging visa if they are awaiting a decision on a visa application or appeal.
71 Removal is the automatic end process of a failed visa application. The Minister has a limited, non-reviewable discretion to interfere in this process by substituting a negative decision from the IRT or the RRT (ss 345, 251, 391, 417 and 454 of the Act), granting a visa to an individual under an application bar who is facing removal under ss91C-91E of the Act (s 91F) or permitting a person to lodge a second visa application (ss 48A, 48B). Refer to M. Crock, above n 21, at 274.
72 *Re: Minister for Immigration and Multicultural Affairs & Amp; Anor; Ex Parte SE* [1998] HCA 72 (25 November 1998).
73 The wording of the provision does not allow for it to be interpreted in a manner consistent with Australia's international human rights responsibilities, under *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.
74 Presumably the justification behind deporting those who have not made an application for a protection visa is that are not in need of protection because they have not asked for it.
75 *Re: The Minister for Immigration and Multicultural Affairs and ANOR Ex parte SE* M99/1998 (9 November 1998) Transcript of proceedings before Hayne J on 4 November 1998, at 31. RRT refers to the Refugee Review Tribunal.
76 "Providing Protection- Asylum Determination in selected European countries: Germany, Austria, Hungary, Poland and Switzerland", Supplementary Report 4. 28.
77 Burns and Okafor, above n 11. at 420.
78 Anker, above n 24., at 466. For a discussion of why and how the Convention against Torture was directly applied in United States law see *In the Matter of Anwar Haddan* Exclusion Proceedings Board Immigration Appeals. File no. A22/751/813 (United States). This case identified the Convention against Torture as "Supreme Law" within the United States, by which judges were bound despite contrary state law. See Section III.
79 Benedict., above n 59 at 12-13.
80 Such a visa class may also incorporate articles 6 and 7 of the International Covenant on Civil and Political Rights.