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Prolonged Administrative Detention of Illegal Arrivals in Australia: The Untenable HIV/AIDS Justification

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PROLONGED ADMINISTRATIVE DETENTION OF ILLEGAL ARRIVALS IN AUSTRALIA: THE UNTENABLE HIV/AIDS JUSTIFICATION

CARLOS SCOTT LÓPEZ*

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I. INTRODUCTION AND RECENT EVENTS

The mandatory detention of illegal immigrants is one of the most contested issues in Australia today.¹ Australia's "zero tolerance" policy toward illegal immigrants has raised fundamental questions regarding actions the government may take to ensure the sanctity of its borders. Few would deny the right of a sovereign power to secure its frontier.² Debate rages, however, over the extent to which a sovereign country may risk breaching its international commitments to pursue the goal of securing its borders.

In the 1990s, a majority of the Australian electorate responded to the increasing numbers of asylum seekers in the seas around the Australian continent³ by reelecting the current Liberal administration.⁴ Many Australians, however, are defying the rules promulgated by this administration by harboring refugees, thereby risking imprisonment.⁵ Several fundamental issues are being confronted, including (a) who can be detained justifiably, (b) for what reasons can they be detained, (c) and for how long can they be detained. The government's solution is currently to

1. See Adrian Tame, *Refugees Split Nation*, SUNDAY HERALD SUN, July 21, 2002, at 39 (describing how the refugee controversy and management of detainees is "tearing away at something irreplaceable in the moral fabric of our nation," partly because of "the total absence of any common ground between . . . conflicting views"). See also Uli Schmetzer, *Asylum Seekers Stage Uprising in Australian Camps; Government Policy Tough on Refugees*, CHI. TRIB., Jan. 1, 2003, at 6 (discussing the current tough policies in Australia vis-à-vis immigration).

2. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (summarizing the principles of sovereignty by which nation-states abide today, including a nation's exclusive right to decide who can and cannot cross—and remain within—its borders).

3. Refugee Council of Australia, *Statistics*, at http://www.refugeecouncil.org.au/html/facts_and_stats/stats.html#stat6 (last visited Apr. 3, 2005) (summarizing the number of illegal arrivals in Australia from 1995 to 2000).

4. *Refugee Plight All Too True*, CANBERRA TIMES, Oct. 31, 2003, available at 2003 WLNR 4327263.

5. See Tame, *supra* note 1 (noting that Australians are "risking imprisonment for harbouring escapees from the detention centres").

detain illegal immigrants who arrive without visas until their removal is "effectuated."⁶ Although grounded in Parliamentary and High Court authority, this answer has failed to address the complex cases of stateless individuals and those whose removal cannot be effectuated. Moreover, the executive has intensified its insistence on the appropriateness and reasonableness of its approach of subjecting individuals to potentially indefinite imprisonment.⁷

Recent events have suggested that the government may be forced to resort to more desperate measures to keep its policy afloat. In August 2002, the Federal Court in *Al-Masri v. Minister of Immigration and Multicultural and Indigenous Affairs* ordered the release of Akram Ouda Mohammad Al-Masri, a Palestinian.⁸ The court determined that Al-Masri had been illegally detained because there was "no real likelihood or prospect of [his] removal in the reasonable [sic] foreseeable future."⁹ Human Rights activists rejoiced;¹⁰ government executives were frustrated.¹¹

One of the Australian government's immigration provisions struck down in *Al-Masri* included the government's attempt to require former detainees to pay for the government's costs imposed during the detainees mandatory detention. Following *Al-Masri*, former detainees began resisting these efforts by the government,¹² though the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) stated it would pursue the issue further in the courts.¹³ This comports with DIMIA's recent approach of employing whatever means necessary to

6. See Jim Dickins, *UN Slams Children Policy*, HERALD SUN, July 16, 2002, at 15.

7. *Id.* (noting how Australia's Department of Immigration, despite explicit criticism for subjecting children to mandatory immigration detention, "insist[ed] it is better than alternatives such as releasing children into the care of their communities").

8. *Al-Masri v. Minister of Immigration and Multicultural and Indigenous Affairs* (2002) F.C.A. 1009.

9. *Id.* See Andrew McGarry, *Judge Orders Release of Woomera Detainee*, THE AUSTRALIAN, Aug. 16, 2002, at 2.

10. See Lauren Ahwan, *Court Frees Refugee*, HERALD SUN, Aug. 16, 2002, at 12 (noting that Jeremy Moore, from the Woomera Lawyers Group, would use the case as a precedent for other detainees). The decision has prompted others to question the essence of Australia's policies and why they seem so cruel, at least in their implementation. See Fran Metcalf, *Don't Be Cruel*, COURIER MAIL, Nov. 9, 2002, at L06.

11. See Tony Harris, *Ignoring the Rule of Law*, AUSTL. FIN. REV., Sept. 10, 2002, at 62 (noting the "annoyance" of former Immigration Minister and current Attorney General Philip Ruddock at the release order).

12. See Steve Butcher, *Asylum Seeker Fights Detention Bill*, NEWCASTLE HERALD, Aug. 27, 2002, at 7 (discussing the court action initiated on August 26, 2002 by Shahid Kamran Qureshi, a Pakistani asylum seeker who was given a visa with the stipulation that he pay the government A\$26,460 for his time in mandatory detention despite the fact that he is not allowed to work).

13. *Id.*

implement its immigration policies. In September 2001, for example, DIMIA spearheaded an unprecedented initiative in Parliament to “excise” a range of islands from Australia’s “migration zone.”¹⁴ This excision allowed the government to justify sending illegal arrivals—albeit avowed asylum seekers—to the island of Nauru, while simultaneously declaring Australia’s continued commitment to nonrefoulement, as enshrined in the Refugee Convention of 1951 and the New York Protocol of 1967.¹⁵

In essence, because of the excision, individuals who had originally landed on territorial Australian islands in the Java Sea off the coast of Indonesia were deemed to have never officially “entered” Australia,¹⁶ the government thus argued that the refugees had received all the protections to which they were entitled under international law. This legal transformation of the excised islands from places of potential refuge to mere weigh-stations of further insecurity and degradation¹⁷ was striking in its ingenuity and audacity. It also supports the suspicion that DIMIA will continue to craft justifications for detaining refugee applicants who might otherwise deserve to be released.

Detention of illegal immigrants raises additional concerns. When detaining individuals, for instance, Australia might take actions that are reminiscent of its racist past to effectuate its immigration policies.¹⁸ These actions could have dire consequences both for refugees seeking asylum in Australia and for DIMIA itself. The refugee provisions also run the risk of being ambiguous. Should DIMIA’s new policies generate legal confusion, it will be more difficult for DIMIA to achieve its goals.¹⁹ One of the most

14. See Migration Amendment (Excision from Migration Zone) Bill 2001; Migration Amendment (Excision from Migration Zone / Consequent Provisions) Bill 2001. (The Migration Zone is the area around Australia’s coastlines (as recognized by international law) and at airports (as recognized by statute) where individuals are allowed to effectuate entry into Australia by submitting themselves to Australian immigration authorities.)

15. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. Nonrefoulement is a more narrow remedy than asylum. The host country withholds removal, but does not guarantee permanent status within its borders. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 871–75 (3d ed. 2002).

16. See Migration Amendment, *supra* note 14 (defining “entry” to include only those places that are within Australia but not in the exclusion zone).

17. See Tame, *supra* note 1.

18. See Stuart Rintoul, *Emerging from the Shadows to Face New ‘Crisis of Whiteness,’* THE AUSTRALIAN, May 6, 2002, at 8 (asking, “was it border protection or . . . a deeper racism that underpinned the [recent] closing of Australia’s doors?”).

19. A primary example of a confused statute rushed hastily through Parliament is Migration Regulation 866.215. The regulation governs the rights of Temporary Protection Visa holders (“TPV”/visa subclass XA785), who are largely illegal boat arrivals from Iraq and Afghanistan, to apply for Permanent Protection Visas (“PPVs”/visa subclass XA866). In addition to leaving undefined many of the terms of the regulation, it creates a class of TPV holders who could not obtain a PPV

disconcerting approaches DIMIA might attempt is to use the HIV/AIDS-positive status of those arriving without visas to justify prolonging their detention. Unfortunately, this approach appears to comport with High Court precedent, as well as similar attempts by the United States.

In *Chu Kheng Lim v. Minister for Immigration and Multicultural Affairs*,²⁰ the High Court upheld both the executive's authority to use non-punitive administrative detention to implement immigration policy and for multiple, non-punitive purposes. Foremost among these non-punitive purposes was ensuring public health. Given the absence of an Australian bill of rights,²¹ however, the High Court's opinion leaves unanswered whether illegal arrivals with HIV/AIDS could be detained indefinitely on the basis of their health status without any right to *habeas corpus* proceedings and curial review.

The U.S. attempt to incarcerate HIV-positive Haitians *en masse* in Guantanamo, Cuba in the early 1990s²² may fuel the inclinations of DIMIA officials inclined to try such an approach on a more limited basis in Australia. Indeed, in *Haitian Centers Council, Inc. v. Sale*, a U.S. district court concluded that this form of detention was "usually reserved for spies and murderers," and deprived the Haitians of due process.²³ The court further held that the camp was the "only known refugee camp in the world composed entirely of HIV refugees."²⁴ DIMIA representatives may attempt, however, to distinguish DIMIA's use of HIV/AIDS-positive status to prolong the detention of illegal arrivals by arguing a difference in degree: namely, that the detention would never approach such egregious

merely because of logistical inconsistencies between the regulation and old law. Thus, the implementation of the regulation will likely result in significant litigation. See Press Release No. MPS 47/2002, Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, *Decision Time for TPV Holders*, Australian Capital Territory (Jun. 11, 2002), available at http://www.minister.immi.gov.au/media_releases/ruddock_media02/r02047.htm (last visited Feb. 13, 2005).

20. *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1.

21. See MURRAY R. WILCOX, *AN AUSTRALIAN CHARTER OF RIGHTS* (1993) (discussing the benefits and costs of a bill of rights from a federal judge's point of view); GEORGE WILLIAMS, *A BILL OF RIGHTS FOR AUSTRALIA* 35–36 (2000) (outlining the key arguments for and against a bill of rights).

22. See *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993).

23. *Id.* at 1045. Judge Johnson noted that the camps were surrounded by razor barbed wire, and the detainees tied plastic garbage bags to the sides of the building to keep the rain out. They slept on cots and hung sheets to create some semblance of privacy, and were guarded by the military and prevented from leaving the camp except under military escort. The Haitian detainees were also subjected to pre-dawn military sweeps by as many as 400 soldiers dressed in full riot gear. *Id.* at 1037.

24. *Id.* at 1045. See also George J. Annas, *Detention of HIV-Positive Haitians at Guantanamo: Human Rights and Medical Care*, 329 *NEW ENG. J. MED.* 589 (1993) (discussing the egregious lack of medical care facilities available for the detainees).

treatment as existed in Guantanamo. In essence, like the U.S. treatment of Haitians in Guantanamo, Australia would justify its continued detention of illegal arrivals as an effort to preserve public health. With HIV/AIDS-infected individuals already subject to potentially indefinite immigration detention (independent of their HIV status), the idea of transubstantiating justifications to authorize continued non-punitive detention may appear to be a timely and relevant subterfuge within a seemingly straightforward, narrowly tailored, and facially secure statutory scheme.

This Article argues that any attempt by DIMIA to use HIV/AIDS-status to justify the indefinite detention of illegal arrivals would be difficult to uphold. Journalists and the public alike would also likely view it negatively, placing it alongside the now defunct “White Australia Policy.”²⁵ This analysis will show, first, that Australia’s mandatory immigration detention policies, which potentially allow for indefinite detention, have imputed time limits both generally and, in particular, with respect to HIV/AIDS-infected individuals. Second, while continued administrative detention of illegal arrivals might be justified under state and federal quarantine legislation, the text and context of Australia’s immigration and quarantine laws suggest otherwise. Third, while public health legislation was used during the time of the “White Australia” Policy to restrict significantly the number of immigrants, recent state legislation has created a context that should prevent the reintroduction of this practice.

Part II of this Article summarizes Australia’s current mandatory detention laws and the risk of prolonged detention created by the absence of explicit time limits on detention in these laws. Part III argues that Australia’s current immigration laws contain implicit time limits on detention. It outlines statutory, consequentialist, and international legal arguments to demonstrate that Australia’s immigration laws would be unconstitutional and unlawful without time limits after which detainees must be released. Part IV describes why HIV/AIDS cannot be used to justify continued administrative detention of illegal arrivals by first overviewing HIV/AIDS and related laws in Australia and, second, highlighting key rationales supporting the continued detention of illegal arrivals having HIV/AIDS. The third subsection illustrates why such detention is unjustified by examining (a) Australian state public health and anti-discrimination legislation, (b) Australian commonwealth health concerns, (c) non-discrimination legislation enacted to comport with

25. See *infra* note 415.

international guidelines, and (d) Australian social mores. Part V finally highlights several alternatives to prolonged administrative detention that would enable the government to meet Australian immigration goals without prolonging the detention of illegal arrivals.

II. MANDATORY IMMIGRATION DETENTION & THE INDEFINITENESS PROBLEM

As in many other democratic nations, Australia has a Parliament that exercises its authority over immigration matters subject to the limits of a constitution.²⁶ It has done so since Britain established colonies there in the late 1700s, often modeling its federal legislation on previously passed state legislation. In the 1800s, for instance, Australian states passed statutes limiting the numbers of Chinese people who could enter Australia.²⁷ After federalization in 1901, Commonwealth legislation mirrored these state statutes and restricted the number of Kanaka Island²⁸ and non-white laborer entrants.²⁹ These powers were consolidated in 1949 when the High Court upheld the right of the Commonwealth to deport legally at any time anyone who had migrated to Australia based on any criteria, including “age, sex, race, nationality, personal character, occupation, [or] time of arrival.”³⁰ Eventually, Australian immigration processes and procedures were codified in the Migration Act of 1958.³¹

A. Law & Current Policy

The Migration Act of 1958 continues to be the locus of Australian law governing the detention and removal of unlawful non-citizens. In particular, two sets of provisions guide immigration practices: (a) Division 6,³² and (b) Divisions 7 and 8.³³ Division 6 mandates the detention of

26. See AUSTL. CONST. ch. I, pt. v, § 51 (xxvii).

27. See Chinese Immigrant Statute, 1855 (Vict.); Chinese Act, 1881 (Vict.); Aliens Act, 1867 (Queensl.).

28. Pacific Island Labourers Act, 1901 (Austl.).

29. Sugar Cultivation Act, 1913 (Austl.).

30. *Koon Wing Lau v. Calwell* (1949) 80 C.L.R. 533, 561–62. This decision echoed a series of cases by the U.S. Supreme Court that upheld the plenary power of Congress to manage all immigration affairs. For a more detailed discussion of the Plenary Power Doctrine and the series of cases supporting it, see LEGOMSKY, *supra* note 15. One of the first pieces of legislation enacted by the new Commonwealth Government was the Immigration Restriction Act of 1901, which had an infamous “dictation test” that became a centerpiece of the “White Australia Policy.” Immigration Restriction Act, 1901, § 3 (Austl.).

31. See Migration Act, 1958 (Austl.) [hereinafter Migration Act].

32. See Migration Act, p.2, Div. 6, §§ 176–187 (Austl.).

“designated persons,” defined as persons arriving illegally by boat from late 1989 through the mid-1990s.³⁴ Divisions 7 and 8 are comparatively more comprehensive. Division 7 outlines provisions mandating detention of all “unlawful non-citizens”³⁵ and affects both individuals who lack valid visas and individuals whose visas were cancelled. Essentially, individuals who arrived without authority³⁶ or overstayed the period for which they were authorized³⁷ are considered to lack valid visas. Individuals may also have their visas cancelled for conduct before, upon,³⁸ or after entering Australia.³⁹ Division 8 then outlines the procedures and guidelines for removing unlawful non-citizens.⁴⁰

Division 6⁴¹ outlines the detention guidelines for “designated persons,”⁴² the majority of whom are illegal boat arrivals. Although Division 6 may seem irrelevant given more recent amendments requiring the detention of *all* unlawful non-citizens, it is important to understand this division because its provisions form the foundation for the High Court’s holding in *Lim*.⁴³ *Lim* held that the detention of non-citizens without judicial sanction is lawful as an “incident of executive power”⁴⁴ and an act of “sovereignty over territory”⁴⁵ if its purpose is to safeguard the security of the country.⁴⁶

The provisions of Division 6 are more detailed than those of Divisions 7 and 8 in several ways. Because Divisions 7 and 8 were amended after

33. See Migration Act, p.2, Div. 7 and 8.

34. Migration Act, p.2, Div. 6, § 177(a).

35. See MARY CROCK, IMMIGRATION AND REFUGEE LAW IN AUSTRALIA 178 (1998).

36. Migration Act, §§ 172(4), 173, 177.

37. *Id.* § 82(7).

38. *Id.* §§ 15, 97–109, 128, 140, 501.

39. *Id.* § 116.

40. *Id.* §§ 198–99.

41. Division 6 was numbered as Division 4B when Parliament inserted the section with the Migration Amendment Act of 1992. The High Court and Tribunals refer to it as Division 4B in their judgments. See Migration Amendment Act, 1992, n.24, § 3 (Austl.). However, the Migration legislation Amendment Act of 1994 renumbered the division as six. Migration Amendment Act, 1994, no. 60 (Austl.).

42. Migration Act, § 178. Section 178 of the Migration Act provides that “a designated person must be kept in immigration detention”, and “(2) . . . is to be released from immigration detention if, and only if, he or she is: removed from Australia under section 181; or granted a visa under section 65, 351, 391, 417, or 454.” Indeed, “if subsection 181(3) applies to a designated person, the person must be kept in immigration detention until the person is removed from Australia under that subsection.” *Id.* Section 178 is subject to Section 182 of the Migration Act. Migration Act, § 172.

43. *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1, 2–3.

44. *Id.* at 34.

45. *Id.* at 9.

46. *Id.* See CROCK, *supra* note 35, at 211 (discussing in greater detail the ramifications of the High Court’s holding in *Lim* for Australian immigration law and policy).

Division 6, their interpretation should reflect that of Division 6, particularly as to whether particular details should be accorded weight when making decisions with regard to time limits.

In its initial sections, Division 6 fails to specify the amount of time allowed for removal of a “designated person” from Australia. It only notes that removal should be effectuated “as soon as practicable.”⁴⁷ Later sections limit the amount of time “designated persons” can be held in detention to 273 days.⁴⁸ Divisions 7 and 8 address the problem of managing illegal arrivals in ways similar to those of Division 6 (i.e., via mandatory detention); the provisions of Divisions 7 and 8, however, are far more comprehensive. Division 6 addressed neither the increasingly diverse places from which, nor the means by which, individuals were illegally entering Australia.⁴⁹ In contrast, after reiterating the authority of government personnel to require all individuals to provide evidence of their lawful status in Australia,⁵⁰ Divisions 7 and 8 state that an officer “must detain” individuals known or “reasonably” suspected of being unlawful non-citizens within Australian territory either in or outside the migration zone⁵¹ and excised offshore places.⁵² Lawful non-citizens, furthermore, “may” be detained if an officer “knows or reasonably suspects” they hold visas that may be cancelled.⁵³ The division limits the length of detention to a maximum of four hours within a forty-eight hour

47. Migration Act, § 181 of the Migration Act states:

(1) An officer must remove a designated person from Australia as soon as practicable if the designated person asks . . . to be removed . . .

(2) An officer must remove a designated person from Australia *as soon as practicable* if [one has been in Australia without a visa for two months or more]

(3) An officer must remove a designated person from Australia as soon as practicable if [one’s visa application has been refused].

Id.

48. *Id.* § 182. Section 182 of the Migration Act states:

(1) Sections 178 and 181 *cease to apply* to a designated person who was in Australia on 27 April 1992 if the person has been in application immigration detention after commencement for a continuous period of, or periods whose sum is, 273 days.

Id. Additional provisions in § 182(5-6) allow for an additional ninety days of authorized immigration detention pending an individual’s beginning court or tribunal proceedings regarding a refused entry application. *Id.*

49. *See supra* note 3.

50. *See* Migration Act, §§ 166, 167; *see also* NAN CROCK & BEN SAUL, *FUTURE SEEKERS: REFUGEES AND THE LAW IN AUSTRALIA* 8 (2002) (noting “[t]he federal Migration Act of 1958 and the Migration Regulations of 1994 establish a detailed system centered on the idea that every non-citizen who enters or remains in Australia must possess a visa”).

51. Migration Act, § 189.

52. *Id.* § 189.

53. *Id.* § 192(1).

period,⁵⁴ implying four hours should be sufficient to determine whether a visa is valid. It also illustrates the lengths to which Parliament was willing to go to prevent illegal immigration.⁵⁵

Although Divisions 7 and 8 require detainees to be told the consequences of detention⁵⁶ and how to apply for a visa,⁵⁷ there is no maximum limit on the length of detention.⁵⁸ Division 6 parallels Divisions 7 and 8 in its *modus operandi* for removing non-citizens, providing that “removal” is to be conducted “as soon as reasonably practicable.”⁵⁹ Essentially, the word “reasonably” was added to the language of Division 6 and reiterated throughout Divisions 7 and 8.⁶⁰ Unlike Division 6, however, Divisions 7 and 8 explicitly limit the number of days a person can be detained.⁶¹ The only specific time limits in Division 6 are those allowing transitory persons in Australia (for six months) to ask the

54. *Id.* § 192(6).

55. See ROBERT HUGHES, *THE FATAL SHORE: A HISTORY OF THE TRANSPORTATION OF CONVICTS TO AUSTRALIA: 1787–1968* (1986).

56. Migration Act, § 194.

57. *Id.* § 195.

58. *Id.* § 196. Section 196 of the Migration Act states:

(1) An unlawful non-citizen detained under section 189 [see text referencing note 51] must be kept in immigration detention until he or she is:

(a) removed from Australia [under section 198 or 199 governing the removal of non-citizens and their dependents]; or (b) deported under section 200; or granted a visa.

(2) To avoid doubt, subsection (1) does *not prevent the release* from immigration detention of a citizen or a lawful non-citizen.

(3) To avoid doubt, subsection (1) *prevents the release, even by a court*, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has made a valid application for a visa and he or she has been granted a visa.

Id.

59. Migration Act, § 198(1A).

60. *Id.* § 198. Section 198 of the Migration Act states:

An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia . . . for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia An officer must remove as soon as reasonably practicable an unlawful non-citizen [who is covered by specific provisions in § 193].

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen [who is covered by specific provisions in § 194].

. . . .

An officer must remove as soon as reasonably practicable an unlawful non-citizen if the citizen [is detained and specific provisions regarding their application for a visa and communications with the Minister may have been made].

Id.

61. *Id.* §§ 196, 198.

Refugee Review Tribunal⁶² to assess whether they can be considered legitimate refugees.⁶³ A similar six-month time-period limits the time during which the Minister may determine whether a non-citizen is eligible for a bridging visa.⁶⁴ Only those who have been “in immigration detention for a period of more than six months” after applying for protection visas are eligible for a determination under this subsection; it therefore applies essentially to non-citizens⁶⁵ who entered Australia unlawfully⁶⁶ and applied for protection visas afterward.

B. *The “Problem”*

The two main problems with Divisions 7 and 8 are the lack of both clearly defined terms and maximum time limits on detention. While Division 6 specified time limits, Divisions 7 and 8 merely require the removal of illegal arrivals from Australia “as soon as reasonably practicable,” without any apparent limit on the possible length of detention.⁶⁷ Although the preliminary section of the Migration Act outlines and defines terms, it provides little help because it does not provide any standard definitions for the relevant words and phrases.⁶⁸ Divisions 7 and 8, therefore, do not give explicit guidance for interpretation of the “practicable” standard for removal. Rather, interpretation seems to require the adoption of Division 6’s similar standard.

Because Divisions 7 and 8 were approved after the *Lim* decision, *Lim* likely influenced Parliament in drafting these provisions. Further, the lack of specificity may help prevent the legislation from appearing too rigid or unwieldy. It also, however, raises questions regarding the validity of Divisions 7 and 8 because they constrain the liberty of illegal arrivals who have not broken any laws. A clearer understanding of the implicit bounds of Divisions 7 and 8 would thus help ensure that Australia respects the

62. The Refugee Review Tribunal (RRT) was established in 1993 to relieve the burgeoning caseload of refugee claims that began to amass following the arrival of boat people from Vietnam in the late 1980s. For more information on the RRT, its history, and its current operations, see CROCK, *supra* note 35; Website of the RRT, at <http://www.rrt.gov.au> (last visited Feb. 13, 2005). The RRT is required by law to be impartial, though critics have argued that it is far from unbiased. See Trung Doan, *Desperate Times for Country*, THE HERALD SUN, May 5, 2003, at 18.

63. See Migration Act, § 198C(2).

64. *Id.* § 72(2)(c).

65. *Id.* § 72(2).

66. *Id.* § 72(2)(a).

67. *Id.* § 198.

68. *Id.* § 5 (defining key terms used in the act).

fundamental rights of individuals and avoids breaching central social mores and principles.

III. IMPLICIT TIME LIMITS TO MANDATORY IMMIGRATION DETENTION

It is because the High Court explicitly upheld the validity of Division 6 in the context of Australian statutory and common law that Divisions 7 and 8 should be interpreted and validated with reference to Division 6.⁶⁹ Indeed, while it is true that Parliament omitted specific time limits from Divisions 7 and 8, Parliament had already drafted limits in Division 6, and limits were also found in the common law. This context imputes time limits to Divisions 7 and 8 by augmenting their lack of specificity. Consequentialist and international legal arguments further support the imputation of time limits into Divisions 7 and 8. The following three subsections address each argument in turn.

A. Contextual Statutory & Common Law Arguments

The statutory context of Divisions 7 and 8 provides the basis for the first argument: namely, that these provisions contain implicit time limits by deducing the most logical meanings that should be ascribed to the provisions. This is demonstrated by: (a) examining how the old provisions operated; (b) identifying how the new provisions could operate; (c) confirming how the new provisions are fundamentally similar to the old provisions (in that the new provisions largely apply to the same groups of people covered by the old provisions); and (d) concluding that the only apparent difference in the new provisions—namely, the use of the word “practicably” in connoting when detention must end—comports with the interpretation that time limits in the old provisions should be inferred in the new provisions. The upshot is that individuals currently subject to mandatory immigration detention cannot be detained indefinitely.

First, as mentioned earlier, the provisions of the Migration Act reviewed in *Lim* equate the principle of removal “as soon as practicable”⁷⁰ with a time limit of 273 days.⁷¹ When considered along with accepted constitutional and legal constraints on the state’s ability to infringe on an individual’s liberty, it seems likely that Parliament was concerned that the

69. See *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1, at 52.

70. Migration Act, § 181.

71. *Id.* § 182. This time limit is explicitly extendable by ninety days if certain criteria are met. *Id.*

term “as soon as practicable”⁷² needed further clarification. This combination also illustrates that Parliament did not intend to place a maximum limit on the length of detention when removal is not practicable. Indeed, Parliament delineated criteria to determine which days constitute part of the time limit.⁷³ These provisions expressly exclude days when events beyond “the control” of DIMIA occurred.⁷⁴ Thus, the time during which the Australian government is essentially powerless does not fall under the “practicability” aegis. In Division 6, detention of “suspected offenders” includes both (a) the time during which prosecution of the ostensible offences occurs, and (b) all the time required by the legal proceedings.⁷⁵ Additionally, other parts of Division 6, detailing the scope of detention of “suspected offenders,” parallel Divisions 7 and 8.⁷⁶

The High Court’s decision in *Minister for Immigration & Ethnic Affairs v. Tang Jia Xin* (the *Bolkus* case)⁷⁷ illustrates both the significance of Division 6’s guidelines and the connection between the “practicable” standard and the express detention time limit. Relying on the statutory context of Division 6, the High Court in *Bolkus* held that the statutory time limit included the time during which DIMIA worked to secure a detainee’s release.⁷⁸ The Court, however, rejected arguments that the time following a legitimate request for information is included in the limits.⁷⁹ For example, the time during which DIMIA attempted to address matters outside its control was not included. The High Court specifically focused on how the time limits in Division 6 should be applied when an individual had been detained for over a year,⁸⁰ concluding that the 273-day time limit included the time during which DIMIA had made several inquiries into the matter because DIMIA had not clearly demonstrated that it had an “inability to obtain information . . . by a person who was not under its control.”⁸¹ The practicability standard thus required the detainee’s release.

72. *Id.* § 250 (addressing the specific reasons why non-citizens detained as a “suspected offenders” of certain laws should be kept in immigration detention).

73. *Id.* § 182(3)(c)–(f).

74. *Id.*

75. *Id.* § 250(3)(1); *see also* *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1 (noting how these provisions are entirely consistent with the power of a sovereign state, such as Australia, to ensure firm control over those whom it admits or deports).

76. *Id.* § 250(4).

77. *Minister for Immigration & Ethnic Affairs v. Tang Jia Xin* (1994) 69 A.L.J.R. 8. The case will hereinafter be referred to as the *Bolkus* case, after Senator Nick Bolkus, who was at the time serving as Minister for Immigration & Ethnic Affairs.

78. *See id.* ¶ 15.

79. *Id.* ¶ 8.

80. Migration Act, § 182.

81. *Bolkus*, 69 A.L.J.R. ¶ 15.

The court explained that the provisions of Division 6 “all imply . . . something which has happened to interrupt the decision-making by the Department in regard to the application”⁸² Furthermore, the court held that not only was DIMIA’s “legitimate request for information awaited, but also that the continued departmental dealing with the application was, on that account, interrupted.”⁸³ The court implied that if DIMIA had finalized a decision—and did not require any additional, explicit information to continue its decision making process—the time that subsequently passed should count toward the limit of clear “practicability.”⁸⁴

Like Division 6, the new provisions of Divisions 7 and 8 address issues of detention and removal, but provide no express time limits with regard to detention. Again, on their surface, the sovereign power of the state to control who enters its borders appears to be the means of justifying such provisions. Moreover, the High Court has upheld the foundational principles of *prima facie* non-punitive administrative detention that underlie immigration detention.⁸⁵ It is telling, however, that the removal stipulations in Divisions 7 and 8 expressly direct that detention must continue until one is (a) removed, (b) deported, or (c) granted a visa,⁸⁶ employing language that parallels Division 6. This does not mean that the deleted provisions of Division 6 should be definitively read back into the new provisions of Divisions 7 and 8. It *does*, however, demand an analysis of whether their similarity to the old provisions means that elements of the old provisions should be embraced, thereafter suggesting how the new provisions could then operate.

Central to determining whether time limits inure in the new provisions is determining whether the words “as soon as reasonably practicable” in the new provisions⁸⁷ mean the same thing as the words “as soon as practicable” in the old provisions⁸⁸ and, if so, why. Two alternatives exist. First, the addition of the word “reasonably” could reflect the difference between the removal addressed in the different divisions;⁸⁹ or second, the removal in each division is fundamentally similar in character, and the

82. *Id.* ¶ 9.

83. *Id.* ¶ 10.

84. The implications of these holdings for those whose applications to stay in Australia have been finalized is discussed in greater detail below.

85. *See* Koon Wing Lau v. Calwell (1949) 80 C.L.R. 533 (holding that the executive has the administrative authority to detain aliens).

86. *See* Migration Act, § 196.

87. *Id.* § 198.

88. *Id.* § 181.

89. *Id.* §§ 181, 198.

additional word “reasonably” implies that Divisions 7 and 8 include temporal maxima similar to those explicitly iterated in Division 6.⁹⁰ In the former case, one must assess the import of the word “reasonably” and how best to interpret it in light of the differences between the divisions; in the latter case, one can reasonably argue that the similarities between the divisions indicate that the guidelines of Division 6⁹¹ should apply to individuals under Divisions 7 and 8 as well. In either case, the Migration Act’s language and context imply that time limits exist and that lengthy detention is unlawful.

Division 6 and Divisions 7 and 8 largely affect the same people—namely, illegal boat arrivals.⁹² Division 6 mandates the detention of “designated persons,” defined as boat people⁹³ who had not received valid visas upon entering Australia.⁹⁴ Divisions 7 and 8 appear to expand this group to include both “unlawful non-citizens” and people who are “reasonably suspected” of seeking to take actions that would make them “unlawful non-citizens” (i.e., by entering the migration zone).⁹⁵ Because Divisions 7 and 8 define “unlawful non-citizens”⁹⁶ as anyone in the migration zone who does not hold a valid visa, or who is an “illegal entrant,”⁹⁷ the term “unlawful non-citizens”⁹⁸ includes anyone (a) in the migration zone, (b) in an excised offshore place, (c) in Australia and reasonably suspected of seeking to enter the migration zone, or (d) in Australia and reasonably suspected of seeking to enter an excised offshore place.⁹⁹ Because it corresponds to the same people as categories (a) and (b), the term “designated persons” in Division 6 forms a subset of the

90. *Id.* § 182.

91. *Id.* § 181.

92. *See supra* notes 32 and 33 and accompanying text. *See also* CROCK & SAUL, *supra* note 50, at 29–51 (discussing that although the actual percentage of illegal boat arrivals is low, social perception of the problem is high, and Parliament has reacted by passing stringent immigration laws).

Having used such a system to detain illegal immigrants and, in particular, HIV-positive asylum-seekers, the United States provides significant guidance with regard to administrative detention systems. *See* Haitian Centers Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993). The *Sale* court found that the due process rights of HIV-positive asylum-seekers detained at Guantanamo Bay had been denied when their detention no longer served a legitimate purpose. It further explained that “[c]ontinued detention” “constitutes a denial of due process where there is no guarantee” that detention will end after all remedies have been exhausted. *Id.* at 1045, *citing* United States v. Gonzalez-Claudio, 806 F.2d 334, 341 (2d Cir. 1986).

93. *See* Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 C.L.R. 1, 23.

94. Migration Act, § 177 (defining the term “designated person” with five key criteria).

95. *Id.* §§ 189 and 198.

96. *Id.* §§ 13–14.

97. *See id.* § 14(2) (applying this term to those who arrived after Sept. 1, 1994).

98. *See id.* § 198.

99. *Id.* § 189 (iterating the four situations in which unlawful non-citizens must be detained).

“unlawful non-citizens” referenced in Divisions 7 and 8.¹⁰⁰ Thus, whether Division 6 and Divisions 7 and 8 are expressly different in character depends on whether the individuals included in categories (c) and (d) differ significantly from the overlapping subsets of (a) and (b).

In fact, the seemingly new subsets of individuals included in (c) and (d) arise from a legal slight of hand. The only question is whether one has entered the migration zone or an excised off-shore place without a visa, or is “reasonably suspected”¹⁰¹ of seeking to enter the migration zone or an excised off-shore place, without a visa. While those in the latter subset could be viewed as more culpable, individuals in both categories desire to be on the Australian mainland. The only difference is whether they were in places where their lawfulness could be practically determined. Accordingly, it would be illogical for a time limit to apply to individuals in categories (a) and (b), but not to individuals in categories (c) and (d) of Divisions 7 and 8.

If, therefore, the removal provisions in Division 6 and Divisions 7 and 8 apply to fundamentally similar individuals, the word “reasonably” should capture this similarity to a certain extent. Although not required, courts often apply conventional definitions to legal “terms of art.” Australian courts typically reference the *Merriam-Webster Dictionary of Standard English*, which defines “reasonable” as “being in accordance with reason; . . . not extreme or excessive; . . . moderate,” and “fair.”¹⁰² Thus, the term “reasonable” captures the essence of moderation, fairness, and rationality.

Although the meanings of legal terms can differ from statute to statute, these conceptions of the word “reasonably” exist in both Australian civil and criminal common law. In civil law, the “reasonable man” standard is the foremost foundation for determining tort liability,¹⁰³ and the High Court has found the concept of “reasonableness” to include both subjective and objective components.¹⁰⁴ In criminal law, the

100. See *Lim*, 176 C.L.R. at 64–65 (stating that “notwithstanding the vesting of discretion in the Department to determine who should be a ‘designated person,’ only a ‘non-citizen’ . . . can become a designated person . . . The effect of a Departmental designation is to confine the operation of Div. 4B to some only [sic] of the non-citizens who are in Australia”).

101. See Migration Act, § 189(2), (4).

102. MERRIAM-WEBSTER DICTIONARY OF STANDARD ENGLISH 974 (Frederick C. Mish et al. eds., 10th ed. 1999).

103. See, e.g., *Hackshaw v. Shaw* (1984) 155 C.L.R. 614, 651. “[Negligence does not] prescribe a special standard of care. The duty is a duty to *take reasonable care*. The standard is the standard of the *reasonable man*.” *Id.* Accord *Cook v. Cook* (1986) 162 C.L.R. 376.

104. *R. v. Kirstain William Katarzynski* (2002) N.S.W.S.C. 613 (stating that courts currently apply a mixed objective and subjective standard).

“reasonableness” concept has primarily been used to justify a defendant’s actions.¹⁰⁵

The High Court further elucidated the concept of reasonableness in the context of defenses to otherwise unlawful acts in *Taikato v. The Queen*.¹⁰⁶ The court noted that the “chief difficulty” in “interpreting ‘reasonable excuse’” was finding “a principled way of distinguishing cases in which the legislature could not conceivably have envisaged such a defense arising and those where it may well have envisaged such a defense being available.”¹⁰⁷ Thus, interpretation was much easier if the legislature established clear guideposts by statute. Justice Dawson stated, “a reasonable excuse is no more or less than an excuse which would be accepted by a reasonable person,”¹⁰⁸ bridging the gap between criminal and civil law by highlighting the similarity between the two.

In summary, modifying the word “practicable” with the term “reasonably,” as used in Divisions 7 and 8, clarifies when removal must be effectuated and suggests that what is “practicable” must be determined by standards that make sense, are prudent, and comport with societal mores. The time limits in Division 6 partially addressed these qualitative requirements, indicating that removal would be “impracticable” if a certain amount of time passed during which removal could not be effectuated.¹⁰⁹ Furthermore, the use of the word “reasonably” suggests that all guidelines to interpreting the term “practicable” should apply to Divisions 7 and 8 because Divisions 7 and 8 apply to essentially the same people as Division 6. Indeed, following *Bolkus*, these guidelines must include Division 6’s time limits. The High Court’s decision in *Bolkus* is, ultimately, the paramount example of why imputation of the time limits of Division 6 into Divisions 7 and 8 comports with the broader concept of “reasonableness.”¹¹⁰

105. Justice Cave noted in *The Queen v. Tolson*: “At common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence.” *The Queen v. Tolson* (1889) 23 Q.B.D. 168 (quoting the High Court in *He Kaw Teh v. the Queen* (1985) 157 C.L.R. 523).

106. *Taikato v. The Queen* (1996) 186 C.L.R. 454 (attempting to elucidate a clear standard that could be applied in determining whether a particular excuse was “reasonable”).

107. *Id.* at 465.

108. *See id.* at 470 (defining a “reasonable excuse”).

109. *See* Migration Act, §§ 181, 182; *see also* *Zadvydas v. Davis*, 533 U.S. 678, 699–700 (2001) (finding indefinite detention illegal and noting that the government should measure “reasonableness primarily in terms of the . . . basic purpose [of the statute authorizing detention], namely assuring the alien’s presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized . . .”).

110. *See generally* *Minister for Immigration & Ethnic Affairs v. Tang Jia Xin* (1994) 69 A.L.J.R. 8.

B. Consequentialist Arguments: Two Lines of Analysis

In addition to these contextual statutory arguments, two lines of consequentialist arguments also may be employed to impute time limits into the provisions of Divisions 7 and 8. Both arguments focus on the necessity of time limits to avoid shifting the character of the detention from “administrative” to “penal.” The first argument is based on the High Court’s decision in *Lim*, which upheld the legitimacy of mandatory immigration detention because it was clearly and explicitly limited: (a) by its purpose, (b) by the ability of the detainees to end their detention at any time, and (c) by the existence of maximum time limits.¹¹¹ Specifically, the High Court held that in the absence of time limits, “penal shifts” inevitably occur because lengthy detention would exceed what is absolutely necessary for deportation purposes.¹¹² The *Lim* court found the absence of time limits problematic for two reasons: first, because penal detention requires curial review (i.e., the penal detention must be reviewed by the judicial branch); and second, because this curial review necessarily divests the executive of authority.¹¹³

The second line of argument expands on the court’s rationale in *Lim*. If one focuses on the possibility that detention might advance an administrative end other than the deportation of illegal aliens, only administrative shifts can justify administrative detention after long periods of time. In essence, this argument asserts that time limits help ensure that any shifts in the character of detention are clear and explicit. Because such open, clear shifts are more easily challenged, this argument contends that time limits reduce the likelihood that detention will become penal and that significant injustices will occur.

1. *Lim*—Based Argument: Administrative Immigration Detention Is Only Valid When It Is Clearly Limited

Long before the promulgation of both Division 6 and Divisions 7 and 8, the High Court upheld the executive’s use of administrative detention in limited circumstances. First, in *Koon Wing Lau v. Calwell*,¹¹⁴ the High Court upheld the constitutionality of the Wartime Refugees Removal

111. *Chu Kheng Lim v. Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1.

112. *Lim*, 176 C.L.R. at 26–29.

113. *Lim*, 176 C.L.R. at 27.

114. *Koon Wing Lau v. Calwell* (1949) 80 C.L.R. 533.

Act's¹¹⁵ broad grant of deportation and detention authority to the Minister of Immigration. The act allowed the Minister to deport individuals who had entered Australia during World War II without being domiciled there.¹¹⁶ It also permitted the Minister to hold these individuals in custody "in order to ensure" deportation occurred,¹¹⁷ explaining that the Australian constitution gave Parliament these plenary powers.¹¹⁸

More recently, the *Lim* decision expressly held that the Australian Parliament can give the executive authority to subject aliens to mandatory detention within certain bounds.¹¹⁹ The court found that detention of non-citizens did not necessarily involve "an exercise of the judicial power that should have been reserved to the courts."¹²⁰ Furthermore, where the need to safeguard the country's security demanded detention, such action was constitutionally¹²¹ sufficient to prevent that review.¹²² The court further noted that the case involved purely civil matters, and the ability of detainees to leave Australia at any time prevented the detention from being a form of punishment.¹²³ The court upheld its own power to order the removal of individuals from detention if it found the detention illegal.¹²⁴ In upholding its own curial review, the court invalidated a provision denying the "court [authority] to order the release from custody of a designated person,"¹²⁵ a provision that failed judicial scrutiny because it was exceedingly broad.¹²⁶ It also did not account for circumstances when Chapter III of the Australian constitution required that unlawful custody be subject to curial review.¹²⁷ Nevertheless, even the minority of justices who considered the provision constitutional upheld the validity of the mandatory detention because it was clearly bounded.¹²⁸

In the court's view, the combination of (a) the purpose of detention, (b) individuals' ability to end their detention at any time, and (c) the existence

115. Wartime Refugees Removal Act, 1949 (Austl.).

116. See *Koon*, 80 C.L.R. at 550. See also CROCK, *supra* note 35, at 19–22.

117. *Koon*, 80 C.L.R. at 550–51. See also *Lim*, 176 C.L.R. at 47 (summarizing the key holdings of *Koon*).

118. *Lim*, 176 C.L.R. at 30–31.

119. *Id.* at 32.

120. CROCK, *supra* note 35, at 211.

121. See AUSTL. CONST. ch. I, § 51 (xix).

122. *Lim*, 176 C.L.R. at 114–15.

123. *Id.* at 33–34.

124. *Id.* at 2–3; see also CROCK, *supra* note 35, at 210–11.

125. The court invalidated § 54R. The Migration Legislation Amendment Act of 1994 renumbered and replaced the provision with § 183. See Migration Legislation Amendment Act, 1994 (Austl.).

126. *Lim*, 176 C.L.R. at 38.

127. *Id.* at 2.

128. *Id.* at 1.

of maximum time limits all limited the Minister's authority. The first limit central to the court's decision to uphold the mandatory detention provision was the purpose of the detention. Because aliens are not outlaws, regardless of "whether [they are] lawfully or unlawfully" in Australia, the executive could not infringe their liberty without a legislative mandate.¹²⁹ The High Court further noted that because the provisions dealt with the admission and deportation of non-citizens from Australia, the legislature could delegate authority to the executive branch.¹³⁰ The High Court explicitly noted that "the context and . . . the purposes of executive powers to receive, investigate and determine [whether to] . . . admit or deport" aliens limited the Minister's authority, thereby keeping this grant of authority within the bounds of constitutionality.¹³¹ The issue before the court centered on illegal detention,¹³² and these purposes were independent of the fact that adjudicating and punishing criminal guilt under a law of the commonwealth were essentially and exclusively judicial in character.¹³³ The provision, therefore, complied with Chapter III of the Australian constitution.¹³⁴

The second limit underlying *Lim* was the ability of detainees to end their detention by requesting to leave Australia, an action that could be undertaken at any time. This ability to end one's own detention solely based on one's own actions led the court to conclude that the detention was not punitive.¹³⁵ It should be noted, however, that several justices highlighted that time limits alone would have been insufficient without this provision.¹³⁶

This leads to the final factor upon which the court relied: the existence of time limits. The court explained that the legislative provisions under review were never meant to apply indefinitely—or even for excessively

129. *Id.* at 19.

130. *See id.* at 25 (noting that aliens fall under the scope of the legislature's power to manage aliens under § 51(xix) of the constitution).

131. *Id.* at 32.

132. *Id.* at 35–26 (listing examples of situations in which illegal detention could occur).

133. *Id.* at 27.

134. *Id.*

135. *Id.* at 72. Section 198(a) of the Migration Act requires the Minister to remove individuals who request it in writing "as soon as reasonably practicable." Migration Act, § 192(1). The *Lim* court noted that "even if the provisions . . . could be characterized as a punishment . . . a designated person may release himself or herself from the custody imposed or enforced . . ." *Id.* at 72. Because this is still possible under Divisions 7 and 8, some argue that all immigration detention is still non-penal regardless of whether there are time limits. *See* Migration Act, § 198. However, even if individuals want and request to leave, they often cannot do so; thus, they could remain indefinitely in detention.

136. *Lim*, 176 C.L.R. at 33.

long periods of time. Rather, the provisions were “intended to have a strictly temporary operation.”¹³⁷ They only authorized a transitory “period of custody . . . pending the departure” of the ship on which the detainee had arrived.¹³⁸ Indeed, the court noted that:

the time limitations imposed by other provisions [in addition to those requiring the removal from detention of individuals who request it] suffice, in our view, to preclude a conclusion that the powers of detention which are conferred upon the Executive exceed what is reasonably capable of being seen as necessary for the purposes of deportation or for the making and consideration of an entry application.¹³⁹

Because these time limits prevented indefinite detention, which was implicitly assumed to “exceed what is reasonably capable of being seen as necessary for . . . deportation,”¹⁴⁰ the provisions were not held to be punitive in nature and, therefore, were not found to be subject to Chapter III of the constitution.¹⁴¹

Justice McHugh reinforced this conclusion by writing, with regard to the nine-month maximum (i.e., 273 days),¹⁴² that

[i]nordinately long as the potential period of detention [of nine months] may seem to be, it has to be evaluated in . . . context The appropriateness of the period of detention for the individual cannot be isolated from the administrative burden cast on the Department in investigating and determining the vast number of applications”¹⁴³

Justice McHugh, while indicating that he actually found the nine-month limit “inordinately long,” thus suggested that it would be very difficult to find an “administrative burden” capable of justifying a breach of this limit. Justice Mason further echoed these sentiments in observing that while “a failure to remove a designated person from Australia ‘as soon as practicable’ would deprive the Executive of legal authority to retain that person in custody,”¹⁴⁴ the Executive’s power was secure given

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *See* Migration Act, § 182.

143. *Id.* at 41.

144. *Id.* at 12.

the time limits in place. Indeed, he pointed out that because “Parliament did specifically provide for . . . circumstances in which lawful custody would terminate,”¹⁴⁵ it could also justifiably prevent the courts from terminating the detention. Among these “circumstances” were clear time limits to detention, after which the detention had to cease.¹⁴⁶

This first line of argument imputes time limits into the new provisions of the Migration Act by relying on the High Court’s *Lim* analysis. The *Lim* court upheld the authorization in Division 6 of the detention of unlawful non-citizens because it was limited by: (a) the purpose of the detention; (b) the ability of individuals to end their detention at any time; and, most importantly for these purposes, (c) the existence of maximum time limits.¹⁴⁷ Notably, the *Lim* decision reiterates the High Court’s authority under Chapter III of the constitution to review writs of *habeas corpus* where detention is non-administrative and punitive in nature.

2. *Argument Transcending Lim: “Administrative Shifts” Cannot Be Made Without Explicit Time Limits*

Examining the purpose of immigration detention both enables one to see how its character can change, and provides a framework for recognizing the importance of avoiding “penal” shifts by means of imputing time limits on administrative detention. Under Divisions 7 and 8,¹⁴⁸ DIMIA may detain all illegal arrivals until they are removed, deported, or granted a visa.¹⁴⁹ This grant implies that the purpose of detention is to supervise individuals until they either leave Australia or get a visa authorizing their continued stay.¹⁵⁰ If, however, there is no reasonable prospect of the individual’s release, then the purpose of the detention is not for immigration reasons,¹⁵¹ thus fundamentally changing the character of the detention.¹⁵² Furthermore, because the “involuntary

145. *Id.*

146. *Id.* at 11.

147. *See id.* at 1.

148. Migration Act, § 196.

149. *Id.* § 196(1)(a)–(c) (outlining the specifics of these three possibilities).

150. *See Lim*, 176 C.L.R. at 71. Justice McHugh noted:

[I]mprisonment of a person who is the subject of a deportation order is not ordinarily punitive in nature because the purpose of the imprisonment is to ensure that the deportee is excluded from the community pending his or her removal from the country But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.

Id.

151. *See id.* at 12.

152. *Id.* at 71.

detention of a citizen in custody by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt,”¹⁵³ it is essential that the character of detention be identified clearly and precisely. This is true especially in cases where that character changes. Indeed, it is likely that Parliament was aware that such a change can occur. First, Parliament expressed this notion when it set forth the explicit time limits of Division 6, and incorporated time limits implicitly in Divisions 7 and 8. Second, Parliament created the “reasonably practicable” guideline in Divisions 7 and 8, which suggested that a line be drawn after which the nature of the detention fundamentally changes.

The *Lim* court seems to have been cognizant of this shift when it wrote that such a “character change” to detention was evidenced in the law. Judge McHugh noted that “a law authorizing the detention of an alien beyond what was reasonably necessary to effect the deportation of that person, might be invalid because it infringed the provisions of Ch. III of the Constitution.”¹⁵⁴ Detention that continued, for example, even after all “reasonably practicable” actions had been taken to end it would go “beyond what was necessary.”¹⁵⁵ Furthermore, because the “reasonableness” of an action is determined on a case-by-case basis, courts are the most effective venue for the adjudication of reasonableness.¹⁵⁶

The character of detention can change in two ways. Detention can undergo an administrative shift, in which it remains administratively non-punitive in nature; thus, only the administrative purpose of the detention changes. Alternatively, detention can become punitive in nature—and therefore no longer administratively mandated—through a penal shift. In the case of the former, Parliament must explicitly authorize the detention either directly or through the executive; in the case of the latter, Chapter III of the constitution is invoked and the detention is reviewable by the courts.¹⁵⁷

153. *Id.* at 27 (discussing the implications of Chapter III of the Australian constitution with regard to the judiciary reviewing the lawfulness of detention).

154. *Id.* at 65.

155. See *Al Masri v. Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 192 A.L.R. 609 (ordering the release of a Palestinian detainee due to the fact that all reasonably practicable means had been exhausted).

156. Based on these comments it appears that the existence or likelihood of excessive periods of time passing while an individual is detained could be used as a *sui generis* test to determine whether detention has changed in character.

157. See *Lim*, 176 C.L.R. at 27 (noting that among the functions that are “exclusively judicial in character,” is the “adjudgment and punishment of criminal guilt under a law of the Commonwealth”).

To identify “administrative shifts” simply requires an awareness of the situations that permit administrative, non-punitive detention. These situations typically involve issues of public health or national security.¹⁵⁸ One can envisage a scenario in which immigrants in detention could become seriously ill or harbor a disease that could be passed on to others. In these cases, lengthy detention could be justified under an “administrative shift” by Parliamentary acts, which take effect when the alternative “non-punitive” public health “objectives” are brought forth. The continued detention of individuals who do not fall within these “exceptional cases,” on the other hand, must be scrutinized closely to determine whether the detention has shifted from non-punitive to punitive.¹⁵⁹

Penal shifts can occur in three typical situations, including when: (a) the legal prerequisites cannot reasonably be established that allow for the achievement of non-punitive ends; (b) a lengthy period of time has passed that precludes achievement of a non-punitive object; or (c) the non-punitive goals are explicitly or impliedly rescinded in favor of punitive goals.¹⁶⁰

The first form of penal shift occurs when the non-punitive goals of detention become legally impossible to achieve. For example, the *Lim* court upheld executive detention authority because it advanced the non-punitive detention purposes of expulsion and deportation.¹⁶¹ When detention can no longer reasonably be viewed as serving these purposes, there has been a penal shift.¹⁶² Although rare, this form of penal shift can occur in Australia, for instance, when: (a) Australia lacks a repatriation agreement with a detainee’s home country, and there is no reasonable prospect of such an agreement being wrought (e.g., Iraq); (b) the detainee is stateless, and, therefore, there is nowhere to which the detainee can be returned (e.g., Hazara Kurds); and (c) the detainee’s citizenship does not allow her a right of return (e.g., Palestinians from the Gaza Strip).¹⁶³ In

158. *Id.* at 55 (noting that a person “may lawfully be held in custody” pursuant to mental health legislation and on remand pending trial); *see also* *Kable v. The Director of Public Prosecutions for the State of New South Wales* (1996) 189 C.L.R. 57, 86 (explaining that “[i]nvoluntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character).

159. *See Lim*, 176 C.L.R. at 27 (noting that “putting to one side the exceptional cases . . . the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.”).

160. *See generally id.* at 26–29.

161. *Id.* at 30–31.

162. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

163. *See Al Masri*, 192 A.L.R. ¶¶ 43–65.

these situations, the detainee cannot be removed from immigration detention because removal is predicated upon international legal prerequisites that cannot be satisfied, or there is nowhere to which the detainee can practicably be removed. When the ends of non-punitive administrative detention become unachievable, continued detention must become unlawful.¹⁶⁴ Notwithstanding additional laws authorizing continued administrative detention, the detainee either must be released or the continued detention must be subjected to curial review.¹⁶⁵

Second, non-punitive detention can become punitive after a lengthy period of time. The imposition of time limits in Division 6¹⁶⁶ illustrates Parliament's perception that lengthy periods of detention are, by that very lengthiness, punitive. These time limits also show that the use of the term "reasonably practicable" indicates that administrative authorities cannot achieve the desired administrative ends. Indeed, the *Lim* court reflected this conclusion, holding that excessively long detention could be construed as confirming the inability of the administrative proceedings to be conducted in a "reasonably practicable" manner¹⁶⁷ and, consequently, that further detention required curial review.¹⁶⁸ In this respect, it stands to reason that even though Divisions 7 and 8 do not include specific maximum time limits, the period of detention is neither unbounded nor indefinite. At the very least, the time limits in Division 6 constitute a guideline to be applied in determining whether non-punitive detention has become punitive.

Courts in the United States, the United Kingdom, and Hong Kong have upheld the idea that lengthy detentions are punitive, and Australian judges have often sought guidance from these courts. In *Zadvydas v. Davis*, for example, the U.S. Supreme Court held that the indefinite detention of U.S. resident aliens from Cambodia and Lithuania (when their home countries refused to readmit them) violated the 5th Amendment of the U.S. Constitution.¹⁶⁹ The 5th Amendment's procedural due process guarantees protect "all persons" in the United States, whether they are here lawfully or unlawfully, temporarily or permanently.¹⁷⁰ In essence, the U.S.

164. See *Lim*, 176 C.L.R. at 51.

165. *Al Masri*, 192 A.L.R. ¶¶ 16–18.

166. Migration Act, § 182.

167. *Lim*, 176 C.L.R. at 21.

168. *Id.* at 31.

169. *Zadvydas*, 533 U.S. at 690. See Sev Ozdowski, *US Supreme Court Decisions Challenge Australian Assumptions*, CANBERRA TIMES, Aug. 2, 2001, available at http://www.hreoc.gov.au/media_releases/op_ed/us_supreme_court.html (last visited Feb. 21, 2005).

170. *Zadvydas*, 533 U.S. at 693.

Supreme Court held that this protection only existed for immigration detainees if there was (a) an implicit reasonableness limitation, and (b) a presumptive limit of six months on the reasonable duration of post-removal immigration detention. After six months, the government faces the burden of rebutting a presumption that “there is no significant likelihood of removal in the reasonably foreseeable future.”¹⁷¹ The Court noted that the issue presented a choice “between imprisonment and supervision under release conditions that may not be violated.”¹⁷² Moreover, it acknowledged that the statute applied “not only to terrorists and criminals, but also to ordinary visa violators,” whose only burden was showing the unreasonableness of their detention.¹⁷³ The Court, therefore, assumed that detainees should not be given legal rights to “live at large,”¹⁷⁴ nor could detainees be forced to demonstrate the impossibility of effectuating their removal.¹⁷⁵ Meanwhile, however, the Court held that the judiciary should give “expert agencies decisionmaking leeway in matters that invoke their expertise,”¹⁷⁶ an apparent effort to ensure that time limits were not a means of excising executive power, but of ensuring that justice is served.

The U.S. Supreme Court’s findings parallel holdings in Great Britain and Hong Kong. In the United Kingdom, Justice Woolf, in *Regina v. Governor of Durham Prison, ex parte Hardial Singh*,¹⁷⁷ interpreted the UK Immigration Act of 1971 as authorizing detention that was “impliedly limited to a period which is reasonably necessary for [the] purpose” of “enabling the machinery of deportation to be carried out.”¹⁷⁸ Hong Kong’s Privy Council echoed this finding in *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre*.¹⁷⁹ Explaining that detention must be reasonable, the Privy Council further stated that “if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised.”¹⁸⁰

Finally, if administrative authorities explicitly state (or imply) that punitive goals undergird a purported administrative detention, the detention is punitive even if concurrent non-punitive goals exist. The

171. *Id.* at 701.

172. *Id.* at 696.

173. *Id.* at 697.

174. *Id.* at 679.

175. *Id.* at 702.

176. *Id.* at 700.

177. *Reg. v. Governor of Durham Prison, ex parte Hardial Singh* (1984) 1 W.L.R. 704.

178. *Al Masri*, 192 A.L.R. ¶ 25.

179. *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* (1997) A.C. 97.

180. *Id.* at 111.

detention of unlawful boat arrivals, held to deter others from arriving unlawfully by boat, is one example.¹⁸¹ Holding detainees as punishment for having illegally arrived (by boat or other means) illustrates the non-administrative character of their detention; applying Justice McHugh's approach in *Lim*, it has a clear punitive object. Such detention is patently unlawful because it involves the Executive's exercise of detention authority without any legislative mandate. It also contravenes the United Nations High Commissioner for Refugees (UNHCR) Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers.¹⁸² Furthermore, because the detention is punitive, Chapter II of the Australian constitution gives the judiciary jurisdiction to review the detention.¹⁸³

These observations imply that individuals can be unlawfully held in immigration detention where a penal shift has occurred. These penal shifts occur when the length of the detention renders it punitive or the authorized, non-punitive administrative ends of the detention have been frustrated. These cases should be subject to judicial review, and, as required, the detentions should cease, even in the face of executive authorization.

C. *International Legal Arguments*

Finally, time limits can be implied within the new provisions of the Migration Act through international legal arguments. Australia is a member of many international organizations¹⁸⁴ and party to international covenants that address immigration detention.¹⁸⁵ The requirements of these

181. These arguments are suggested by public comments of Philip Ruddock. On August 1, 2002, for example, he stated the Department is "not about to unwind detention arrangements which . . . [are] a very important deterrent in prevent [sic] people from getting into boats which we know can be life taking." *Detention as a deterrent may be unlawful* (ABC Local Radio broadcast, Aug. 2, 2002), at <http://www.abc.net.au/am/stories/s638106.htm> (last visited Apr. 3, 2005).

182. Office of the U.N. High Commissioner for Refugees (UNHCR), *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, Guideline 3 (Feb. 1999), available at www.inhcr.ch (last visited Mar. 19, 2005) [hereinafter UNHCR Guidelines].

183. AUSTL. CONST. ch. III, § 73. See *Lim*, 176 C.L.R. at 65 (explaining that "[i]f a law authorizing the detention of an alien went beyond what was reasonably necessary to effect the deportation of that person, the law might be invalid because it infringed the provisions of Chapter III of the Constitution.>").

184. See, e.g., CROCK & SAUL, *supra* note 50, at 13, 14, and 19 (noting Australia's membership in the U.N. High Commissioner for Refugees (UNHCR), where Australia is a member of the Executive Committee, and the U.N. Human Rights Committee).

185. See, e.g., *id.* at 13, 14, 17, and 19 (noting that Australia is a party to several international covenants dealing with immigration detention, including: the International Covenant of Civil & Political Rights (ICCPR) (1966); the 1951 Refugee Convention; and the Convention against Torture

memberships and agreements suggest that Australia has broken—or at least runs the risk of breaking—its international commitments if it does not implement guidelines preventing the indefinite detention of unlawful arrivals.

The U.N. Human Rights Committee found, in April 1997, that Australia's detention policy, as it operated before 1994, breached the International Covenant on Civil and Political Rights (ICCPR).¹⁸⁶ While Australia has neither a constitutional nor statutory bill of rights, it has ratified the ICCPR, which guarantees the liberty of “all persons” in Australia and establishes that individuals cannot be detained arbitrarily.¹⁸⁷ Because detention had been imposed on all unauthorized arrivals without distinction and without administrative or judicial review,¹⁸⁸ the Human Rights Committee considered the law arbitrary and violative of the ICCPR.¹⁸⁹

In *A v. Australia*, the Committee questioned whether Australia's mandatory detention policy violated “article 9, paragraph 1, of the Covenant.”¹⁹⁰ The Committee found that judicial review was necessary to confirm the lawfulness of detention.¹⁹¹ The Human Rights Committee thus observed that “every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.”¹⁹² It further noted that “detention should not continue beyond the period for which the State can provide appropriate justification.”¹⁹³ Thus, even if detention is authorized by law and is non-punitive and

and Other Cruel, Inhuman or Degrading Treatment or Punishment).

186. *A v. Australia*, U.N. GAOR, Hum. Rts. Comm., Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997).

187. *Id.* arts. 9(1), (4). Article 9(1) provides, that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” *Id.* art. 9(1).

Article 9(4) provides, that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” *Id.* art. 9(4).

188. See Amnesty International Australia, *Submission to the National Inquiry into Children in Immigration Detention*, available at http://www.humanrights.gov.au/human_rights/children_detention/submissions/index.html (last visited Feb. 15, 2005).

189. See *A v. Australia*, *supra* note 186, ¶ 9.4.

190. *Id.* ¶ 9.1(a); see also Andrew N. Langham, *The Erosion of Refugee Rights in Australia: Two Proposed Amendments to the Migration Act*, 8 PAC. RIM L. & POL'Y J. 651, 676 n.181 (1999).

191. See ICCPR, *supra* note 186, art. 9(4).

192. *A v. Australia*, *supra* note 186, ¶ 9.4.

193. *Id.* See also Australian Section of the International Commission of Jurists, *Submission to the National Inquiry into Children in Immigration Detention*, available at http://www.humanrights.gov.au/human_rights/children_detention/submissions/jurist.html (last visited Feb. 15, 2005).

administrative in character, the detention is arbitrary if it can continue indefinitely without curial review.

One method of making detention less arbitrary is by adopting explicit time limits dictating how long individuals can be detained before being released. Numerous international legal sources support this conclusion. First, the U.N. Commission on Human Rights' Working Group on Arbitrary Detention (UNCHR Working Group) includes among its guarantees against arbitrariness that individuals are "not to be held in custody for an excessive or an unlimited period."¹⁹⁴ Indeed, it specifies that "a maximum period [should be] set, as appropriate, by the regulations."¹⁹⁵ Second, the U.N. Convention on the Rights of the Child requires parties to ensure that "[n]o child [is] deprived of his or her liberty unlawfully or arbitrarily."¹⁹⁶ Specifically, the convention states that "the detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time."¹⁹⁷

Finally, the prolonged detentions common under Australia's Migration Act may violate other provisions of the ICCPR and Convention on the Rights of the Child that prohibit "torture," and "cruel, inhuman or degrading treatment or punishment."¹⁹⁸ A 1996 report by the U.S. State Department noted that the majority of asylum seekers "are detained for the duration of the often-prolonged review process."¹⁹⁹ Indeed, the Australian Human Rights and Equal Opportunity Commission (HREOC) reported in 1997 that "many of the conditions of detention . . . become unacceptable

194. Amnesty International Australia, *supra* note 188, *citing* Working Group on Arbitrary Detention, Civil, and Political Rights, Including Questions of Torture and Detention, *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/1999/63 (1998), ¶ 69, Guarantee 10.

195. *Id.*

196. Convention on the Rights of the Child, Nov. 20, 1989, art. 37(b), 1577 U.N.T.S. 44, 28 I.L.M. 1457. Strikingly, only the United States of America and Somalia have not ratified the Convention as of Dec. 2, 2002. Australia ratified the Convention on the Rights of the Child in 1990, though with reservations to article 37(c). United Nations Treaty Collection on the Internet, *Multilateral Treaties Deposited with Secretary General: Convention on the Rights of the Child, Participants*, at <http://intreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp> (last visited Feb. 13, 2005).

197. Convention on the Rights of the Child, *supra* note 196, art. 37(a)–(b).

198. ICCPR, *supra* note 186, art. 7; Convention on the Rights of the Child, *supra* note 196, art. 37(a).

199. U.S. Department of State, *Australia Report on Human Rights Practices for 1996*, available at http://www.state.gov/www/global/human_rights/1996_hrp_report/australi.html (last visited Mar. 14, 2005). See also CROCK & SAUL, *supra* note 50, at 90–91. It is important to note that more recent reports fail to mention these issues. This may be due to Australia's recent attempts to align its foreign policy with that of the United States, particularly with regard to Iraq. See Geoffrey Barker, *Dare We Go All the Way With the USA*, AUSTRALIA FINANCIAL REVIEW, Sept. 28, 2002, at 24.

. . . when detention is prolonged thereby violating Australia's own human rights commitments."²⁰⁰

IV. HIV AS AN ILLEGITIMATE JUSTIFICATION FOR PROLONGED IMMIGRATION DETENTION

The preceding arguments suggest that detainees must be released from administrative detention after a limited period of time. Because the government cannot justify keeping illegal arrivals administratively detained forever, DIMIA may seek alternative justifications to prolong detention. This is particularly pressing now that an Australian court has assessed for the first time, in the *Al Masri* decision, whether the "reasonably practicable" standard had been met when it ordered a detainee's release.²⁰¹ Notably, the court limited its decision to *Al-Masri's* particularly egregious case and refrained from addressing (or setting concrete limits on) the general circumstances under which individuals could remain detained.²⁰²

Given the High Court's suggestion in *Lim* that the administrative character of detention could change and that infectious diseases and public health grounds are legitimate justifications for change, DIMIA might use HIV/AIDS as a public health justification for prolonging the detention of infected illegal arrivals.²⁰³ Indeed, *Lim* essentially holds that the specific purposes of the law can relate to such issues as national security and public health. Under this logic, when the character of administrative detention changes via administrative shifts, security and public health grounds may serve as two forms of such change.²⁰⁴ This suggests public

200. Human Rights and Equal Opportunity Commission (HREOC), *Those Who've Come Across the Seas: Detention of Unauthorized Arrivals*, Executive Summary, at iv, at http://www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf (last visited Apr. 8, 2005). The conditions noted by the HREOC included: (a) the failure to apprise individuals of legal counsel, (b) the use of force to restrain individuals and curb disturbances within detention centers, (c) the isolation of detainees, and (d) the failure to rectify generally poor living conditions with regard to food, medical services, clothing, education, privacy, and sleeping arrangements. *Id.* at iv. See also Angel Lewis, *Australia's Internal Dispute: Does the Mandatory Detention of Illegal Entrants Violate Human Rights*, 13 GEO. IMMIGR. L.J. 151 (1998); Louise Newman, *The Right Human Cost of Detention*, NEWCASTLE HERALD, Jan. 7, 2003, at 9 (questioning the effects of the detention conditions on the mental health and well-being of detainees); CROCK & SAUL, *supra* note 50, at 92.

201. *Al Masri v. Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 192 A.L.R. 609, ¶¶ 38–39 (finding the detainee should be released because there was no "reasonably practicable" likelihood that he would be released in the foreseeable future).

202. See *id.*

203. *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1, 66.

204. *Id.* at 66–74 (discussing the difference between penal and non-penal detention, as well as

health grounds might be an inviting alternative ground for continued detention. Furthermore, among the most hotly contested issues among public health advocates—both in Australia and around the world—is how to manage AIDS and, more specifically, individuals who are HIV-positive. An obvious opportunity therefore presents itself to DIMIA: keeping illegal arrivals who are HIV-positive or have AIDS detained under a public health administrative exclusion. Such an approach seems straightforward, easily justified, and squarely under the ambit of DIMIA's discretionary authority. This appears particularly true after examining Australia's public health laws.

A. *Overview of HIV/AIDS & Public Health Law in Australia*

1. *Historical Context*

Australia's history of managing infectious diseases reminded government authorities of many precedents when AIDS first surfaced in the early 1980s.²⁰⁵ Ever since Britain's founding of the Australian colonies in the late 1700s, Australian authorities viewed health care as one of the most important ways to ensure the safety of Australia's residents.²⁰⁶ A portion of this sentiment certainly stemmed from Australia's extraordinary isolation and inability to acquire swift assistance from Great Britain. Indeed, the fact that Australia's aborigines were feared to carry unknown pathogens explains to some extent why they were kept separate from early settlers.²⁰⁷ Second, there was the simple fact that Australia was a penal colony during its first fifty years of colonial occupation, and appointed government authorities had the express responsibility to ensure the health of the prisoners. Australia's Parliament passed the first Quarantine Act on July 28, 1832, largely in response to the cholera epidemic in Britain that claimed over 23,000 lives and was rumored to be headed toward Australia.²⁰⁸ A key goal was to ensure Australia was protected against diseases from afar; this theme of unfounded fears playing inflated roles would come to dominate public health policy in succeeding years. Indeed,

Parliament's constitutional ability to alter the purpose of non-penal detention).

205. See Peter Cuisson, *Spreading Disease: The Geography of AIDS*, 3 *VENEREOLGY* 71, 72 (Aug. 1990).

206. See SIR RAPHAEL CILENTO, *BLUEPRINT FOR THE HEALTH OF A NATION* (1944).

207. See C. D. ROWLEY, *THE DESTRUCTION OF ABORIGINAL SOCIETY* 39 (1970).

208. Pub. N.S.W. Stat. 3 William iv, No. 1, 28-7-1832. The act was entitled "An Act for subjecting Vessels coming to New South Wales from certain places to the performance of Quarantine." See JEAN DUNCAN FOLEY, *IN QUARANTINE: A HISTORY OF SYDNEY'S QUARANTINE STATION 1828-1984*, 19-20 (1995).

this fear ultimately became intertwined within Australia's public health and immigration policies.

Soon after Australian federation, a debate ensued over whether states or the central government should manage quarantine procedures. This debate led to quarantine centers being used by multiple authorities for multiple purposes, paralleling the ways DIMIA would later detain illegal arrivals with AIDS in immigration detention centers. During the smallpox epidemic of 1913, for example, the federal government made the unprecedented move of temporarily handing over the quarantine station in Sydney to the local government of New South Wales;²⁰⁹ this move was based largely on the belief that the state authorities knew better how to manage the local populace and had more legitimacy in the eyes of the families being ordered to leave their neighbors. In later years, authority over the quarantine station returned to the federal government, which used it for different purposes than those for which it was originally built. In April 1975, for example, 100 children rescued from Saigon were placed in two of the quarantine center's hospital wards that had been converted into dormitories.²¹⁰ Similarly, in June and July of 1977, the station provided temporary shelter to 125 boat people from Vietnam, as well as other illegal immigrants, until other arrangements could be made.²¹¹ The children remained there for thirteen days until homes could be found for them,²¹² with others waiting somewhat longer. This illustrates the temporary nature of the accommodations, as well as the intersection of immigration, quarantine, and public health concerns.

In line with its history of significant involvement in managing disease, the Australian government paid considerable attention to AIDS when the malady first appeared.²¹³ This may explain why quarantine was so quickly suggested for AIDS sufferers,²¹⁴ as it continued Australia's tradition of using health laws and quarantine procedures to justify any activity under the pretense of protecting the public from feared foreign ills.²¹⁵

209. *Id.* at 106–07.

210. *Id.* at 128.

211. *Id.* at 128 n.3.

212. *Id.* at 128.

213. See Dennis Altman, *The Most Political of Diseases*, in AIDS IN AUSTRALIA 55 (Eric Timewell et al. eds., 1992). See also Raymond Donovan, *The Plaguening of a Faggot, the Leperising of a Whore: Criminally Cultured AIDS Bodies, and 'Carrier Laws,'* in CULTURES OF CRIME AND VIOLENCE: THE AUSTRALIAN EXPERIENCE 110 (Judith Bessant et al. eds., 1995).

214. See Edward A. Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U. L. REV. 441 (1988).

215. Parallels can be drawn between the ways in which homosexuality was traditionally seen as a mental illness and was used to prevent individuals from entering industrialized nations like the United

Throughout Australian history, the public increasingly believed disease to be connected with foreigners. Aborigines notwithstanding, non-European immigrants were significantly feared by Australian settlers. As early as 1836, Australian colonies wrestled with determining means of ensuring immigrants were healthy and locating individuals in the penal establishments who had the requisite skills to transform the settlements into *bona fide*, full-fledged British colonies.²¹⁶ The immigrants were prisoners, but the government hoped they had the gumption to transcend their predicaments,²¹⁷ meaning individuals needed to arrive healthy and able to work. This was a significant challenge in light of the overcrowding, malnutrition, and infectious diseases that affected settlers on the long journey from Britain.²¹⁸ The government subsequently imposed vigorous quarantine standards to separate those who were unhealthy from those able to work. Later, after Australia centralized control over its affairs in 1901, ensuring healthy immigrants remained a top priority. Generally, white immigrants were considered the healthiest immigrants, not to mention the strongest and the brightest.²¹⁹

The parallels between race and HIV/AIDS *vis-à-vis* immigration policy in Australia are striking. Australia, like the United States, focused significantly on barring immigrants of different races from immigrating to its shores during the twentieth century.²²⁰ The panic surrounding AIDS in

States. See Christopher A. Dueñas, *Coming to America: The Immigration Obstacle Facing Bi-national Same-Sex Couples*, 73 S. CAL. L. REV. 811 (2000). Today, the U.S. approaches to lesbian and gay asylees still fail to comport with local laws and customs. See Lucy H. Halatyn, *Political Asylum and Equal Protection: Hypocrisy of United States Protection of Gay Men and Lesbians*, 22 SUFFOLK TRANSNAT'L L. REV. 133 (1998); John A. Russ, IV, *The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards*, 4 U.C. DAVIS J. INT'L L. & POL'Y 29 (1998).

216. FOLEY, *supra* note 208, at 24.

217. Much like the re-education campaigns among Chinese bourgeoisie banished to the countryside during the Cultural Revolution, the prisoners in Australia were envisaged—consistent with the observations of Max Weber—to bring a Protestant work ethic to fruition in illustrating their predestined worth. See generally MAX WEBER, *THE PROTESTANT ETHIC AND THE SPRIT OF CAPITALISM* (Roxbury Pub. Co. 2002) (1864) (discussing ways in which one's predetermined fate after death—namely, heaven or hell—could be determined by one's financial successes. Weber argued that this ethic drove economic activity as individuals were implicitly compelled to work hard, achieve economic success, and obtain the predetermined signs that they had been saved by God). See also GAO YUAN, *BORN RED* (1987) (discussing the pogroms carried out by the Red Guards under Mao Zedong's command to purge the People's Republic of China of "bad elements," including the bourgeoisie, intellectuals, and Communist-party *intelligentia* who were determined to have pursued counter-revolutionary ideals).

218. See FOLEY, *supra* note 208, at 47.

219. DIANE KIRKBY, *OF PEOPLE AND PLACE: DEBATES OVER AUSTRALIA'S IMMIGRATION PROGRAM FROM 1939*, 55 (1997).

220. See Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589 (1995).

Australia resembled Australia's response to the smallpox epidemic of 1881; instead of just targeting Chinese people, however, individuals of "foreign" races and nationalities were also singled out.²²¹ Furthermore, just as the Chinese began viewing themselves as inferior to the dominant culture because of the diseases they carried, so, too, were they subordinated by the dominant Australian culture.²²² By applying this concept of "multiple marginalized identities" to HIV-positive individuals,²²³ one can see how DIMIA's marginalizing HIV-positive and AIDS-infected individuals from abroad through prolonged administrative detention procedures is consistent with historical precedents.

2. *Legal Lenses*

The health exclusions in Australia's current immigration laws reflect a policy of marginalization in determining who should be granted visas and who should be given waivers for statutorily mandated health exclusions. These immigration laws afford significant discretion to the Minister of DIMIA. Indeed, following the explosion in refugee applications and cases in the early 1990s²²⁴ as well as increasing attempts by refugee advocates to overcome health exclusions—the Migration Review Tribunal (MRT) explained that the discretion of officers conducting the reviews was paramount to the system's effective operation.²²⁵ In light of this statement, one may be led to believe that the Minister and his representatives could use this discretion to justify the continued detention of individuals with HIV/AIDS.

221. See P. H. CURSON, *TIMES OF CRISIS: EPIDEMICS IN SYDNEY: 1788–1900*, xi, 87 (1985) (noting how the smallpox epidemic of 1881–82 became "inexorably intertwined with the issue of Chinese immigration and a concentrated campaign of abuse was directed against Sydney's Chinese. Much was made of their apparent susceptibility to diseases such as plague, leprosy, and smallpox.").

222. See Peter Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, 8 *GEO. IMMIGR. L.J.* 521, 522 (1994) (discussing the ways individuals can be subordinated by a dominant culture when multiple labels—often negative—are employed to define their identity).

223. *Id.* (applying principles of intersectionality theory to issues concerning HIV-positive individuals, as well as issues of race, class, and gender).

224. See CROCK, *supra* note 35, at 60.

225. *Re Papaioannou* (1991) I.R.T. v90/00215. These findings were echoed in *Re Dusa* (1991) I.R.T. 285.

Waiver provisions clearly envisage that a certain level of harm and/or cost can be endured by the Australian community . . . as long as [it] . . . is not unjustified An applicant could be found to have a disease . . . which may require significant care or treatment, or the use of community resources in short supply . . . and notwithstanding these findings, it is envisaged that a decision maker may still find that undue harm or undue cost is unlikely to result to the Australian community.

Australia's health exclusions, outlined in the Migration Regulations, establish a series of key health-related criteria that must be met to get a visa.²²⁶ In essence, these regulations address four key issues. A visa applicant must not have (i) a "disease or condition," which (ii) is a threat to Australia's public health, or (iii) requires health care or community services that would likely produce significant costs for the Australian community, or (iv) prejudices the access of Australian citizens and permanent residents to health services.²²⁷ These health provisions apply to all of the 118 visa subclasses.²²⁸ Twenty-nine of these subclasses include an additional provision giving the minister discretion to "waive the requirements of paragraph (1)(c)" if certain conditions are met.²²⁹ Even if all other criteria for the visa are satisfied,²³⁰ "the Minister must be satisfied that the granting of the visa is unlikely to result in . . . undue cost to the Australian community[,] or undue prejudice to the access of health care or community services of all Australian citizen or permanent resident."²³¹

Three additional provisions help to clarify how the Immigration Review Tribunal (IRT) has excluded individuals with HIV/AIDS. For the Minister to have discretion to waive the health requirements, the applicant

226. Migration Regulations, § 4005. The regulations specifically require that an applicant:

- (a) is free from tuberculosis;
- (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
- (c) is not a person who has a disease or condition to which the following subparagraphs apply:
 - (i) the disease or condition is such that a person who has it would be likely to:
 - (A) require health care or community services; or
 - (B) meet the medical criteria for the provision of a community service during the period of the applicant's proposed stay in Australia;
 - (ii) provision of the health care or community services relating to the disease or condition would be likely to:
 - (A) result in a significant cost to the Australian community in the areas of health care and community services; or
 - (B) prejudice the access of an Australian citizen or permanent resident to health care or community services; regardless of whether the health care or community services will actually be used in connection with the applicant; and
- (d) [if the applicant promised to appear for a required medical check-up, they have done so].

227. *Bui v. Minister of Immigration and Multicultural Affairs* (1999) F.C.A. 118.

228. See Migration Regulations, sched. 2 (listing every visa sub-class by number and qualitative designation (e.g., "Parent" (subclass 103), "Medical Treatment–Short Stay" (subclass 675), "Religious Worker" (subclass 428), and "Prospective Marriage Spouse" (subclass 831)).

229. See generally Migration Regulations, scheds. 1, 2 (detailing the specific requirements and provisions of each visa subclass).

230. Migration Regulations, § 4007 (containing provisions identical to § 4005 with the "waiver provision" added).

231. *Id.*

first cannot have a “disease or condition” that poses a threat to Australia’s public health.”²³² In essence, a disease or condition is something that cannot be ameliorated, and to a certain degree has either resulted in (or is likely to result in) a permanent disability that can neither be overcome nor cured.²³³ HIV/AIDS clearly satisfies this definition as a cure continues to elude medical researchers, leaving HIV/AIDS a “serious, difficult-to-treat and ultimately fatal disease.”²³⁴

Second, waiver is only possible if the Minister concludes that the applicant does not represent an “undue burden on the Australian community.”²³⁵ As provided by the Migration Act, there are two distinct ways to evaluate whether granting a visa to a specific applicant would be an “undue burden” on Australia.²³⁶ The first is to assess whether there would be undue cost to the Australian community,²³⁷ while the second is to consider whether granting the visa would unduly prejudice the access of Australian citizens or permanent residents to health care or community services.²³⁸ When courts assess the undue burden present in individual cases, however, they treat the statute as if it were written in the conjunctive, rather than in the disjunctive manner in which it is actually written.²³⁹

Interpreting these standards is critical as any individuals potentially subject to continued mandatory detention due to their HIV/AIDS status must prove they qualify for a health waiver based upon a determination that obtaining a visa would not result in any undue costs or prejudice.²⁴⁰ In *Bui*, for example, the High Court pointedly criticized the IRT for failing to consider the individual circumstances of a Vietnamese man denied a family reunion visa on the basis of his “borderline intellectual

232. See CROCK, *supra* note 35, at 57–61.

233. Notwithstanding the extraordinary amount of leeway contained in this definition, examples of “diseases” and “conditions” include mental retardation (as opposed to lower than average intelligence) and paraplegia (as opposed to childhood poliomyelitis). See *Re Nguyen* (1995) I.R.T. 5667. See also Russell Skelton, *Living Life Neither Here Nor There*, THE AGE, Feb. 18, 2003, at 13.

234. See Anne Christiansen Bullers, *Living with AIDS—20 Years Later*, FDA CONSUMER, Nov.–Dec. 2001, at 30, available at http://www.fda.gov/fdac/features/2001/601_aids.html (last visited Feb. 11, 2004).

235. See Migration Act, *supra* note 32, § 4007(2)(b).

236. *Id.*

237. *Id.* § 4007(2)(b)(i).

238. *Id.* § 4007(2)(b)(ii).

239. See, e.g., *In re Lu* (1991) I.R.T. 207; *In re Yatim* (1995) I.R.T. 5157 (evaluating both of the subprovisions that would constitute an undue burden).

240. The only way in which individuals subject to detention on the basis of the HIV/AIDS status could secure release from the Department of Immigration is to be granted a visa; therefore, the Department would need to illustrate that they were *not* authorized to receive a visa because they did *not* meet the standards established under the waiver provisions in § 4007 of the Migration Regulations.

functioning.”²⁴¹ The court found evidence that the applicant would burden the health care system and be a significant cost to the Australian government;²⁴² the court then remanded the case to DIMIA to review its previous decision not to waive the medical requirements for the applicant’s admission.²⁴³ Justice French found, that:

There are obviously broad judgments to be made in determining what amounts to “undue cost” and “undue prejudice”. Reading . . . the criteria . . . it is apparent that the occasion for the exercise of the waiver will only arise where it is already established that the cost to Australia, if the visa is granted, is likely to be “significant.” The Minister will therefore need to be satisfied that a likely “significant” cost will nevertheless not be “undue.” In the former determination he or she is evidently to be bound by the opinion of a Medical Officer of the Commonwealth.

The evaluative judgment whether the cost to the Australian community or prejudice to others, if the visa is granted, is “undue” may import consideration of compassion or other circumstances. It may be to Australia’s benefit in moral or other terms to admit a person *even though it could be anticipated that such a person will make some significant call upon health and community services*. There may be circumstances of a “compelling” character, not included in the “compassionate” category that mandate such an outcome. But over and above the consideration of the likelihood that cost or prejudice will be “undue” there is the discretionary element of the ministerial waiver. And within that discretion compassionate circumstances or the more widely expressed “compelling circumstances” may properly have a part to play.²⁴⁴

In the wake of the High Court’s holding in *Bui*, the IRT has found itself wrestling continually with what is and is not “undue,” waffling with regard to applicants with HIV/AIDS and the costs Australia would incur to care for those individuals. Most often, the discussion has come down to bare-bones calculations and estimates of the anticipated cost to care for someone with HIV/AIDS, with the figures ranging widely and wildly. In *Visa Applicant S*, for example, the Tribunal allowed an HIV-positive

241. See *Bui* (1999) F.C.A. ¶ 54.

242. *Id.* ¶¶ 43, 64(3).

243. *Id.* ¶ 66.

244. *Id.* ¶¶ 46–47.

Fijian man to stay with his Australian wife, despite the fact that lifetime cost for his care had an estimated range from A\$93,000 to A\$2,160,000.²⁴⁵ In *Re SS*,²⁴⁶ the IRT decided *not* to grant a spousal visa on the grounds that the applicant's husband was not working and it would cost over A\$250,000 for his lifetime care.²⁴⁷ In *Re PPG*, the IRT granted the HIV-positive applicant an interdependency visa despite the fact that cost estimates ranged from A\$39,000 to A\$239,000;²⁴⁸ the applicant's monthly income of A\$24,000 and assets of US\$5,800,000 in the United States played a critical role in the IRT's findings that the "undue" burden was moot.²⁴⁹ Other examples include *Re MC*,²⁵⁰ where an interdependency visa was denied, with the court citing lifetime healthcare costs of A\$400,000, and *Re PF*,²⁵¹ where an interdependency visa was granted, with the court citing lifetime healthcare costs of A\$240,000.

Trying to make sense of the morass, the IRT in 2001 commented that:

"Undue" is not defined in the Migration Act or Regulations. The Oxford English Dictionary defines "undue" as not in accordance with what is just or right, unjustifiable, and going beyond what is appropriate, warranted or natural, excessive. The assessment as to what constitutes undue cost must take account of all relevant . . . and compelling circumstances.²⁵²

The RRT further attempted to clarify the importance of an applicant's wealth while maintaining the Minister's complete discretion. It was not until April 2001, however, that the RRT finally noted for the first time that the traditional approaches to calculating the total health care costs of HIV/AIDS patients had become increasingly irrelevant.²⁵³ In its decision, the Tribunal quoted the head of HIV services at the Alfred Hospital as stating:

245. Visa Applicant S, IRT N94/01389 (1995) I.R.T.A. 6005. Annual cost estimates further ranged from A\$14,500 to A\$45,000. *Id.*

246. *Re SS* (2001) M.R.T.A. 2322.

247. *Id.* ¶ 48. It is interesting to note that the IRT explicitly noted that the applicant was originally from Thailand, and that she had met her husband in the "Bourbon and Beefsteak Bar," (*Id.* ¶ 11). This leads one to wonder whether this fact—and the assumptions made in many Western countries about Bangkok bars, Thai women, and prostitution—prejudiced the IRT's decision.

248. *Re PPG* (2000) M.R.T.A. 386, ¶ 12.

249. *Id.* ¶ 18.

250. *Re MC* (2001) M.R.T.A. 0330, ¶ 20.

251. *Re PF* (2001) M.R.T.A. 5304, ¶¶ 10, 39.

252. *Re SS* (2001) M.R.T.A. 2322, ¶ 46.

253. *Re LSD* (2001) M.R.T.A. 1316.

Clearly the introduction of highly active antiretroviral therapy or combination therapy which occurred [in] 1996 has made a substantial difference to HIV infection and disease There has been a huge reduction in AIDS illnesses and deaths from that period of time

Thus the highly expensive costs in the former studies of the mid-1990s are no longer relevant to the current practice of HIV medicine. These costs—*i.e.*, hospitalisation, terminal care, treatment of opportunistic infections, and day facilities for infusions of antimicrobials—have all been largely superseded [and] patients with normal immune function and undetectable Viral Load will not pose any burden of illness costs on the HIV community beyond the combination therapy itself and monitoring tests The majority of individuals with HIV infection are now working full-time, living full and healthy lives albeit attempting to deal with the burden of medications and some of the side effects In relation to [the applicant] LSD he has fulfilled the very best criteria for response to treatment. He has normal immune function, undetectable virus and he clearly will not pose a significant cost to the Australian community in the medium term future.²⁵⁴

The IRT wrestled with the A\$240,000 figure²⁵⁵ that had been cited in other decisions and concluded it was balanced by other factors that would not make it “undue.”²⁵⁶

The upshot of this analysis is that the Refugee Review Tribunal has sought to recognize the discretion of DIMIA executives in determining who is eligible for health exclusions, though the RRT also has illustrated in the wake of *Bui* that these grounds must be solidly laid. Furthermore, the importance of “compassion” in the determination calculus is also important, as evidenced by Justice French’s comments in *Bui* and the IRT’s findings in *Re PF*, holding that what is undue “may import consideration of compassionate circumstances.”²⁵⁷ This, of course, did not stop the Tribunal recently from denying asylum to an HIV-positive Indian man in *Re Applicant N97*²⁵⁸ and an Indonesian woman in *Re*

254. *Id.* ¶ 20.

255. *Id.* ¶ 30.

256. *Id.* ¶¶ 31–36 (listing factors such as (a) the extent and cost of medical, social, or other institutional assistance, (b) the occupational needs of the applicant, (c) the potential for the applicant’s health to deteriorate, and (d) the merits of the case).

257. *Re PF* (2001) M.R.T.A. 5304, ¶ 35.

258. *Re Applicant N97* (1998) R.R.T. N97/20754.

Applicant N98.²⁵⁹ In both cases, the Tribunal found that rejection on the basis of HIV-positive status alone did not amount to discrimination under the Refugee Convention.²⁶⁰ In each case, the individuals were ordered to leave Australia immediately.

Controlling HIV/AIDS remains a significant concern of Australian immigration policy. In Australia, AIDS diagnoses have leveled off²⁶¹ and the incidence rate is lower than in other Western industrialized countries.²⁶² The rates in other Asia-Pacific nations from which significant emigration to Australia occurs, however, is substantial.²⁶³ Transmission rates in Australia are also higher for individuals born outside Australia, the United Kingdom, and Europe than for individuals born in Australia.²⁶⁴ Finally, although the factors determining who is most likely to contract AIDS are still undetermined,²⁶⁵ the disease still primarily affects homosexual men.²⁶⁶ This convergence of AIDS, race, class, and social groups warrants concern.²⁶⁷ Even more troublesome, though, is the application of Australia's health exclusions to individuals with HIV/AIDS, and, in particular, its potential failure to comply with basic human rights requirements.²⁶⁸

259. *Re Applicant N98* (1999) R.R.T. N98/22232.

260. *See* Refugee Convention, *supra* note 15.

261. NATIONAL CENTRE IN HIV EPIDEMIOLOGY AND CLINICAL RESEARCH, HIV/AIDS, VIRAL HEPATITIS & SEXUALLY TRANSMISSIBLE INFECTIONS IN AUSTRALIA: ANNUAL SURVEILLANCE REPORT 2002 [hereinafter ANNUAL SURVEILLANCE REPORT 2002], *HIV/AIDS diagnoses in Australia*, at <http://www.med.unsw.edu.au/nchecr/Downloads/AHSR2002pres/sld001.htm> (last visited Apr. 3, 2005) (illustrating the current trend of HIV infectious and AIDS diagnoses in Australia).

262. ANNUAL SURVEILLANCE REPORT 2002, *supra* note 261, *AIDS in selected industrialized countries by year*, at <http://www.med.unsw.edu.au/nchecr/Downloads/AHSR2002pres/sld007.htm> (last visited Apr. 3, 2005) (comparing Australia's HIV incidence rate to other major industrialized countries from 1992–2001).

263. ANNUAL SURVEILLANCE REPORT 2002, *supra* note 261, *HIV prevalence in selected countries in the Asia-Pacific region*, at <http://www.med.unsw.edu.au/nchecr/Downloads/AHSR2002pres/sld008.htm> (last visited Apr. 3, 2005) (comparing Australia's HIV prevalence rate to the incidence rates of other countries in the Asia-Pacific region).

264. ANNUAL SURVEILLANCE REPORT 2002, *supra* note 261, *AIDS incidence in Australia, 1991–2001, by year and region of birth*, at <http://www.med.unsw.edu.au/nchecr/Downloads/AHSR2002pres/sld006.htm> (last visited Apr. 3, 2005) (comparing the rates of HIV transmission among individuals in Australia, by birthplace).

265. Nick Crofts, *Patterns of Infection*, in *AIDS IN AUSTRALIA*, *supra* note 213, at 24, 28.

266. ANNUAL SURVEILLANCE REPORT 2002, *supra* note 261, *AIDS diagnoses, 1997–2001, by HIV exposure category*, at <http://www.med.unsw.edu.au/nchecr/Downloads/AHSR2002pres/sld004.htm> (last visited Apr. 3, 2005) (illustrating that diagnosed AIDS cases in Australia typically come from male homosexual contact).

267. *See* Michael Helfin et al., *Recent Developments in International Law: Symposium Proceedings*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 199 (2001) (discussing how HIV-positive individuals can be seen as legitimate members of a social group for refugee purposes under the 1957 Convention).

268. *See* Australian National Council on AIDS, Hepatitis C, and Related Diseases, *ANCAHRD*

B. Arguments Supporting the HIV/AIDS Justification: Law, Domestic Policy, International Precedents, Pragmatism, and History

Several theoretical arguments can be advanced to justify granting discretion to the Minister of DIMIA to continue administrative detention of illegal arrivals with HIV/AIDS. These arguments arise from the nature and purpose of laws protecting public health, the actions of other leading industrialized democracies, and fundamental and pragmatic concerns over the spread of HIV/AIDS. While DIMIA's actions are consistent with Australia's historical approach to managing its borders through the now-abandoned White Australia Policy, the basic premise of this argument certainly resides in the Australian government's ability to exercise control over its borders.

First, as mentioned, Australian immigration law grants the Minister of Immigration exclusive discretionary authority to waive health requirements or, alternatively, deny a visa for failure to satisfy these health requirements. Individuals with HIV/AIDS are thus considered to have a "disease or condition" that would bar them from entry to Australia if they do not qualify for the health waiver provisions of the Migration Act.²⁶⁹ Both the IRT and the High Court have upheld the Minister's right to utilize his discretion as he sees fit, and there is no reason to believe this will change. This executive authority allowing the Minister to detain illegal arrivals is explicitly granted and, in fact, its exercise required by the Migration Act. The recent introduction of privative clauses²⁷⁰ into the Migration Act supports this view. These privative clauses require that immigration detention decisions, as of 2001, "must not be challenged, appealed against, reviewed, quashed or called in question by any court."²⁷¹

Ultimately, to detain an individual, DIMIA needs only to find that the individual has HIV/AIDS and that the detention is necessary to prevent the spread of the virus.²⁷² To be justified, the detention must shift

Annual Report 2000–2001, at 22, at <http://www.ancahrd.org/pubs/pdfs/report00.pdf> (last visited Mar. 20, 2005) [hereinafter ANCAHRD Report].

269. Migration Act, § 4007.

270. This term is used throughout Australian law to connote any statutory provision limiting judicial review. Webster's Dictionary defines the term as an adjective meaning, "causing deprivation, lack, or loss," or alternatively, "altering the meaning of a term from positive to negative." WEBSTER'S II NEW COLLEGE DICTIONARY 880 (2001).

271. Migration Act, § 474(b). The Federal Court has noted, however, that these privative clauses cannot prevent it from granting relief in *habeas corpus* cases. *Al-Masri v. Minister of Immigration and Multicultural and Indigenous Affairs* (2002) F.C.A. 1009.

272. See Hnin Hnin Pyne, *International Law & the Rights of People Living with HIV/AIDS*, in *CONFRONTING AIDS: EVIDENCE FROM THE DEVELOPING WORLD* (Martha Ainsworth et al. eds.,

administratively from the initial immigration rationale. This poses significant questions about the executive's ability to continue exercising control over individuals when the grounds upon which that authority was initially granted have changed. Despite this difficulty, courts have traditionally deferred to the executive's assumed expertise to achieve the executive's ends—at least to the extent those ends are explicitly authorized by Parliament.

A second line of argument supporting DIMIA's continued detention of individuals with HIV/AIDS stems from the state's role in ensuring the public health and safety of its people. In its purest form, this implies that a federally empowered executive should prevent the entry of any individual who poses a public health risk to the nation's citizenry. Public health laws are fundamentally "intended to protect the community from exposure to health and safety risks."²⁷³ They deal, therefore, with a "broad range of subjects,"²⁷⁴ including determining which non-citizens should be allowed to enter the country. Public health rationales, in fact, have provided a legitimate basis for the state to deprive individuals of liberty through quarantine and internment, particularly those with communicable diseases. Rules, however, need to be in place to ensure these actions are reasonable, not arbitrary, and comport with due process of law.²⁷⁵

Third, other nations' use of administrative detention may be used to justify similar practices by DIMIA. In a survey of ninety-three low- and middle-income countries in 1996, eight countries had admitted people with AIDS into special centers and eleven countries had laws prescribing "compulsory confinement or quarantine."²⁷⁶ While some countries enforce these laws restricting the freedom of movement of people with HIV/AIDS,²⁷⁷ others do not.²⁷⁸ Some countries detain persons with AIDS

1998).

273. GREGORY TILLET, *AIDS & THE WORKPLACE: A PRACTICAL APPROACH* 139 (1989).

274. *Id.*

275. In the case of HIV/AIDS, the WHO recommends that "persons suspected or known to be HIV-infected should remain integrated within society to the maximum possible extent and be helped to assume responsibility for HIV transmission to others." *Report of the Secretary-General on International and Domestic Measures Taken to Protect Human Rights and Prevent Discrimination in the Context of HIV/AIDS*, U.N. Economic and Social Council, Commission on Human Rights, 51st Sess., § 27, U.N. Doc. E/CN.4/1995/45, available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0182b067cfb1dcf1858025670d003babdb?opendocument> (last visited Feb. 11, 2005) [hereinafter U.N. Human Rights Commission Report].

276. See Pyne, *supra* note 272, at 85.

277. Examples include Azerbaijan, Algeria, the Kyrgyz Republic, Turkmenistan, and Malaysia. *Id.*

278. Examples include Costa Rica, Senegal, Russia, Jordan, and Syria. *Id.*

without any legislative provisions whatsoever.²⁷⁹ Canada, for example, has prevented individuals with HIV/AIDS from entering the country.²⁸⁰

Additionally, UNAIDS has recognized limited ways in which criminal detention can be used to manage HIV.²⁸¹ It grounds its recommendations in several guiding principles. First, the state must ensure that preventing the spread of HIV/AIDS is the primary goal of the detention policy.²⁸² Second, the policy must be imbued with respect for human rights.²⁸³ And third, the policy must clearly justify any infringement of human rights.²⁸⁴ Therefore, if DIMIA coupled the arguably legitimate purpose of protecting public health with regular review of its detentions, it is possible that extended detention for individuals with HIV/AIDS could be justified to the extent that the UNAIDS report represents legitimating international precedent.

Fourth, pragmatic public health concerns support DIMIA subjecting individuals with HIV/AIDS to continued administrative detention. International travel, for example, is well-documented as a significant means of HIV/AIDS transmission. Indeed, HIV most likely came to Australia in 1980 or 1981 from California,²⁸⁵ with the first diagnosis in December 1982.²⁸⁶ Overseas contact has also fueled heterosexual HIV infections among Australians.²⁸⁷ Current incidence rates are also linked to national origin. Data from Africa and South America drive Australian

279. Venezuela and Mali are examples. *Id.*

280. See Canadian HIV/AIDS Legal Network, at <http://www.aidslw.ca/Maincontent/issues/Immigration/finalreport/currentpolicy.htm> (last visited Apr. 3, 2004).

281. Richard Elliot, U.N. *Program On HIV/AIDS, Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, at 10, U.N. Doc. UNAIDS/02.12E (2002), available at <http://www.unaids.org/htmlpublications/irc-pub02/JC733-CriminalLaw-en-pdf/nav.htm> (last visited Feb. 4, 2005).

282. *Id.* at 15.

283. *Id.* at 15–17.

284. *Id.* at 17–20.

285. Nick Crofts, *Patterns of Infection, in AIDS IN AUSTRALIA*, *supra* note 213, at 33, citing Cuison, *supra* note 205, at 71–72.

286. Crofts, *supra* note 285, at 52 n.44, citing NHMRC Working Party, *Acquired immune deficiency syndrome (AIDS)*, 141 *MED. J. AUS.* 561, 561–68 (1984). See also Rob Moodie, *The Situation Now and Possible Futures, in NO PLACE FOR BORDERS: THE HIV/AIDS EPIDEMIC AND DEVELOPMENT IN ASIA AND THE PACIFIC* 24, 30 (Godfrey Linge & Doug Porter eds., 1997).

287. “Australian” is used here to denote individuals in Australia who are reporting their positive HIV-status; it does not denote individuals’ citizenship or residency status. See ANNUAL SURVEILLANCE REPORT 2002, *supra* note 261, *HIV prevalence among people seen at sexual health clinics*, at <http://www.med.unsw.edu.au/ncheer/Downloads/AHSR2002pres/sld030.htm> (last visited Apr. 3, 2005) (highlighting how overseas heterosexual contact, particularly among women, has fueled HIV infections among people visiting Australian health clinics).

fears that individuals from those countries are more likely to carry and spread the disease within Australia.²⁸⁸

Retroviral medications notwithstanding, the data suggest that more HIV-positive individuals will develop AIDS as time passes.²⁸⁹ Given the widespread incidence of HIV/AIDS in the Asia-Pacific region,²⁹⁰ it is not surprising that Australia would be concerned about the number of immigrants coming from these countries²⁹¹ because they as a group are more likely to spread HIV and eventually develop AIDS, thereby potentially placing an additional burden on the already overburdened Australian health care system. Furthermore, as modern medicine increases the lifespan of infected individuals, this burden will likely last for longer periods of time.²⁹²

Finally, the context and history surrounding any initiative to use HIV/AIDS as a justification for detaining illegal arrivals may make the justification seem unpalatable; such justification, however, appears to comport with Australia's current Liberal regime.²⁹³ Historically, Australia's primary goal in increasing immigration after federation of the country was to create a "White" Australia.²⁹⁴ This policy was effectuated through a dictation test in which foreigners were told to transcribe a

288. See ANNUAL SURVEILLANCE REPORT 2002, *supra* note 261, *AIDS incidence in Australia, 1991–2001, by year and region of birth*, at <http://www.med.unsw.edu.au/nchecr/Downloads/AHSR2002pres/sld006.htm>. See also G. Dore et al., *Spectrum of AIDS-Defining Illnesses in Australia, 1992 to 1998: Influence of Country/Region of Birth*, 26 J. ACQUIR. IMMUNE DEFIC. SYNDR. 283 (2001).

289. See Crofts, *supra* note 285, at 28 (noting that after ten years, up to fifty percent of HIV-infected individuals will have developed AIDS).

290. The Australian Red Cross has noted that "it is estimated that in the next [ten] years the spread of AIDS in Asia may eclipse the 22.5 million cases in Sub-Saharan Africa and become the largest regional epidemic in the world—mostly due to population density." Australian Red Cross, *HIV/AIDS in the Asia-Pacific Region*, Oct. 8, 2001, available at <http://1.redcross.org.au/?Fuseaction=NEWSROOM.archive&sub=29> (last visited Feb. 15, 2005).

291. DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, SETTLER ARRIVALS 1993–1994 TO 2003–2004, 3 (2004) (summarizing arrival statistics of immigrants to Australia by birthplace).

292. See ANNUAL SURVEILLANCE REPORT 2002, *supra* note 261, *Survival following AIDS*, at <http://www.med.unsw.edu.au/nchecr/Downloads/AHSR2002pres/sld036.htm> (last visited Apr. 3, 2005) (illustrating that the survival rates of individuals living with AIDS have been largely increasing over the 1990s).

293. Political parlance in Australia differs significantly from that used in other industrialized countries. For example, although the Democratic party in the United States is oft-termed "liberal," Australia's Liberal party is more synonymous with U.S. Republican ideology. The Australian Labour party, which is similar in ideology to the U.S. Democratic Party, currently heads the opposition.

294. See Mary Crock, *Apart from Us or a Part of Us? Immigrant's Rights, Public Opinion, and the Rule of Law*, 10 INT'L J. OF REFUGEE L. 49, 53 (1998) (referencing "Australia's somewhat xenophobic beginnings").

paragraph read in a European language.²⁹⁵ This test was described by the HREOC in 1985 as a perfect example of legislation enabling the executive to implement its “White” policy.²⁹⁶ Though the Migration Act of 1958 abolished the test, the level of discretion given to the Minister allowed DIMIA to continue to advance the “White” policy.²⁹⁷ Over time racial discrimination policies were increasingly relaxed, until the policy was formally abolished in 1973.²⁹⁸

The current Liberal government, however, is suspected of wanting to reintroduce racially discriminatory policies.²⁹⁹ Although not as blatant as a policy basing visa decisions explicitly on racial grounds, a conflation of HIV/AIDS status, ethnicity, and national origin would allow Australia to accomplish the same ends by requiring the continued detention of illegal arrivals with HIV/AIDS in the name of public health and safety.

C. Arguments Against the HIV/AIDS Justification

The arguments and rationales for using HIV/AIDS to justify prolonged administrative detention of illegal arrivals are destined to falter for one fundamental reason: they fail to consider the legal and social contexts in which they must be exercised. The discretion of the Minister of DIMIA is not unbounded because the judiciary remains a check on his discretion. If prolonged detention becomes penal in character, Chapter III of the constitution applies and ministerial discretion alone is insufficient to justify prolonging such detention.³⁰⁰ Furthermore, within Australia, detention has been decidedly discounted as an effective management tool except in the most extreme cases. The illegitimacy of HIV/AIDS as a justification for prolonging the administrative detention of illegal arrivals, however, becomes most clear through an analysis of the laws of various Australian states, Australian Commonwealth law, international law, and Australian social mores.

295. Immigration Restriction Act, 1901, § 3(a) (Austl.).

296. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION OF AUSTRALIA, REPORT NO. 13: HUMAN RIGHTS AND THE MIGRATION ACT OF 1958 (Apr. 1985), ¶ 17.

297. *Id.* ¶ 18.

298. Gianni Zappala & Stephen Castles, *Citizenship and Immigration in Australia*, 13 GEO. IMMIGR. L.J. 273, 279–80 (1999). It was only at that time that all permanent migrants were allowed to become citizens within three years and overseas posts were directed to disregard race as a factor in issuing visas. *Id.*

299. Irmgard Glende et al., *Statue of Stature*, THE DAILY TELEGRAPH, Nov. 26, 1997, at 12.

300. See *Chu Kheng Lim v. Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1, 27.

1. *Health & Non-Discrimination Guidelines in State Law*

Arguments against the legitimacy of the HIV/AIDS justification are first grounded in state and territory, rather than federal, law. Local governments have historically managed the bulk of Australian public health and discrimination issues.³⁰¹ The federal government has deferred to states and territories largely because local municipalities are seen as better able to act swiftly and deliberately in a public health crisis than the federal government.³⁰² Additionally, local governments have always been the focus of Australian identity.³⁰³ For example, soon after AIDS was identified in Australia, state-sponsored AIDS councils were created in every state and territory³⁰⁴ and the federal government consciously ceded management of AIDS programs to the states and territories.³⁰⁵

This decentralization, however, has often produced a disparate array of approaches to public health and discrimination issues.³⁰⁶ In particular, there has been little national uniformity in “most areas touched on by the AIDS epidemic.”³⁰⁷ In Queensland, for example, the names of HIV-positive individuals are collected and reported to the central health authority,³⁰⁸ meanwhile, Victoria has strong statutory confidentiality guarantees.³⁰⁹ Despite these differences, trends exist that could inform Australian courts adjudicating the legality of continued administrative detention of illegal arrivals with HIV/AIDS.

a. *Public Health Legislation*

Generally, Australian states and territories have viewed themselves as responsible for ensuring that potential health threats are addressed as swiftly as possible. Thus, state and territory legislation has focused on identifying and tracking public health threats,³¹⁰ as well as ameliorating

301. Roger S. Magnusson, *A Decade of HIV Testing in Australia, Part I: A Review of Current Legal Requirements*, 18 U. NEW S. WALES L.J. 341 (1995).

302. *Id.*

303. *Id.* at 348.

304. *Id.*

305. Altman, *supra* note 213, at 63.

306. Magnusson, *supra* note 301, at 345.

307. Altman, *supra* note 213, at 61.

308. Health Act, 1937, § 32a(1)–(5) (Quensl). *See also* Magnusson, *supra* note 301, at 350.

309. Health Act, 1958, § 199(a), (Vict.). *See also* Magnusson, *supra* note 301, at 347, 353.

310. In 1983, West Australia and the Northern Territory declared AIDS a “notifiable disease,” requiring individuals with AIDS to report their illness and public health personnel encountering individuals with AIDS to report these individuals’ names to the public health authorities. *See, e.g.*, Health Act, 1911 (W. Austl.) and Notifiable Diseases Act, 1981 (N. Terr.). Two years later, other

threats that have spun out of control by mandating administrative detention. Each of Australia's seven states, as well as the Northern Territory, have passed laws implementing these two goals.³¹¹

What is most striking, however, are the state and territorial rules addressing the amelioration of public health threats—and, in particular, the guidelines surrounding mandatory administrative detention. While state and territorial rules allow the mandatory detention of individuals infected with a notifiable disease, detention procedures are subject to an array of checks, balances, and restrictions to ensure that the detention only advances public health goals.³¹² Generally, if there are alternatives to detention, those alternatives must be pursued.³¹³ According to prevalent state and territorial law, therefore, it is practically impossible to impose detention on individuals with infectious diseases if it can be demonstrated that they do not pose a risk of infecting others or can be monitored in ways that preclude mandatory administrative detention. This is critical for illegal entrants because detention based on one's HIV/AIDS status would be subject to similar heightened scrutiny by the courts.³¹⁴

Several themes are common to the public health detention regulations in Australian states and territories, namely: (a) the requirement of explicit public health goals; (b) the use of detention as the primary means of achieving these goals; and (c) the creation of processes subjecting the detention to review and imposing explicit time limits. In New South Wales, for example, detention is typically authorized via a “public health order,”³¹⁵ issued by the state executive when an individual is seen as “endangering, or [i]s likely to endanger, the health of the public” due to

symptoms of AIDS and HIV-infection were brought under the ambit of what was notifiable, including: “AIDS-related complexes, lymphadenopathy syndrome, and HTLV III infection” in West Australia; in 1988, “HIV infection groups I-IV” was added in the Northern Territory; and “human immunodeficiency virus infection” was later added in Queensland. *See* Health Act, 1937, § 32 (Queensl.) (published in the Government Gazette on June 4, 1988).

311. The eight pieces of legislation are: Health Act, 1911 (W. Austl.); Health Act, 1937 (Queensl.); Health Act, 1958 (Vict.); Notifiable Diseases Act, 1981 (N. Terr.); Public and Environmental Health Act, 1987 (S. Austl.); Public Health Act, 1991 (N.S.W.); Public Health Act, 1997 (Tas.); and Public Health Act, 1997 (ACT Austl. Cop. Terr.). For an analysis of the ways in which historical health and quarantine legislation was used to detain “undesirables,” see Raymond Evans, *The Hidden Colonists: Deviance and Social Control in Colonial Queensland*, in *SOCIAL POLICY IN AUSTRALIA: SOME PERSPECTIVES 1901–1975*, 74, 90–91 (Jill Roe ed., 1976).

312. *See, e.g.*, Public Health Act, 1991, § 23(1)(a) (N.S.W.).

313. *See, e.g., id.* § 25.

314. *Toonen v. Australia*, U.N. GAOR, Hum. Rts. Comm., 50th Sess., 448th mtg., U.N. Doc. CCPR/c/50/D/488/1992 (1994). The term heightened scrutiny is used to mirror the level of scrutiny employed by the U.S. Supreme Court in Fourteenth Amendment cases. *See, e.g.*, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1989).

315. Public Health Act, 1991, § 23(1)(a) (N.S.W.).

their medical condition.³¹⁶ The order must fully detail the circumstances that “purport to justify the making of the order,” the public health goals served by detention, and the processes that will be followed in reviewing the detention.³¹⁷ In New South Wales, detention may legitimately advance not only treatment, but limitations on conduct.³¹⁸ Most notably, detention “at a specific place” is legitimate solely when an individual has a “category 5 medical condition.”³¹⁹ To date, only HIV and AIDS have been declared “category 5” conditions.³²⁰

While all individuals subject to detention have the right to contest their detention before a public tribunal composed of public health officials and experts, a special tribunal is mandated for those with “category 5” conditions.³²¹ This tribunal must inquire into the circumstances underlying the order to confirm its validity,³²² vary the order if necessary,³²³ and review any requests to continue orders³²⁴ for a maximum of six months.³²⁵ Individuals with HIV/AIDS who fail to fulfill the requirements of an order can be found guilty of a penal offense, though they are likely to be subject to administrative detention imposed by the order, rather than penal detention under article III of the constitution. As of 1991, only one individual had been detained under the New South Wales legislation.³²⁶

Other states’ provisions mirror those in New South Wales. In several cases, they illustrate administrative detention on public health grounds that is more aptly viewed as a restriction on one’s liberty rather than confinement in “prison.” This largely stems from the fact that these provisions allow individuals to spend their detention at home. In West Australia, for example, the Executive Director of Public Health may exercise “special powers”³²⁷ to prevent the “spread of . . . infectious disease,”³²⁸ including “forbidding persons to leave . . . the place in which they are isolated or quarantined until they have been medically examined

316. *Id.* In essence, this provision requires that individuals are seen to be endangering others. This may seem like a high bar, but it is understandable given that detention is viewed as something only employed in the most serious cases.

317. *Id.* § 23(2)(b).

318. *Id.* § 23 (3) (a)–(f).

319. *Id.*

320. *Id.* § 25(1)–(3).

321. *Id.* § 25.

322. *Id.*

323. *Id.* § 25(1)–(3).

324. *Id.* § 26.

325. *Id.* § 25(4)(a).

326. See JOHN GODWIN ET AL., AUSTRALIAN HIV/AIDS LEGAL GUIDE 3 n.3 (1991).

327. Health Act, 1911, § 251 (W. Austl.).

328. *Id.*

and found to be free from . . . disease.”³²⁹ The law explicitly notes that individuals should be sent to “hospitals” only if they are “without proper accommodation” or are living in houses “where the person cannot be effectively isolated so as to prevent the risk” of their infection spreading “to other persons in the house.”³³⁰ Isolation in one’s home is, therefore, the preferred approach so long as it is possible with no demonstrable public health risk.

The respective public health laws of Queensland and New South Wales also express a preference for treating individuals in their homes. The Queensland Health Act of 1937 permits detention of an individual who has a notifiable disease and refuses testing, examination, or treatment.³³¹ In this case, the detention is for treatment purposes and, while not subject to explicit time limits,³³² is subject to judicial review to confirm that the isolation is “proper.”³³³ Notably, treatment can occur anywhere so long as the treatment takes place and a caregiver oversees it. The statutes in New South Wales similarly note that a person can be given directions to stay home to deal with health issues,³³⁴ albeit under the direction of a Health Commission staff member.³³⁵ This staff member may be charged with ensuring that the detainee is available for requisite medical examinations,³³⁶ refrains from certain types of work,³³⁷ and follows any other guidelines to “prevent the spread of infection.”³³⁸

Finally, most states and territories impose time limits on any public health administrative detention and subject such detention to review procedures. The situation in Victoria is demonstrative. Victoria’s Health Act of 1958 grants the Secretary of the Department of Human Services broad powers to issue an order requiring an individual to undergo testing for an infectious disease, followed by mandatory counseling and administrative detention.³³⁹ He may only exercise these powers, however, if he believes that a person (a) is infected with or has been exposed to an

329. *Id.*

330. *Id.* § 263(1)–(2).

331. Health Act, 1937, § 36 (Queensl.).

332. *See id.* § 37(1) (noting that “any such order may be limited to some specific time, but with full power to any stipendiary magistrate to enlarge such time as often as may appear to the magistrate to be necessary”).

333. *Id.* § 36(4).

334. Public Health Act, 1991, § 33 (N.S.W.).

335. *Id.* § 33(2)(b).

336. *Id.* § 33(2)(c).

337. *Id.* § 33(2)(d).

338. *Id.* § 33(2)(e).

339. *See* Health Act, 1958 (Vict.). *See also* Magnusson, *supra* note 301, at 345.

infectious disease and (b) is likely to transmit that disease.³⁴⁰ Time limits are subsequently imposed on the Secretary's power as well: the Secretary has seventy-two hours to administer medical tests,³⁴¹ and mandatory isolation is subject to review at least every twenty-eight days.³⁴²

Furthermore, the Victoria Supreme Court has jurisdiction to review all public health orders. Any order appealed to the court "must [be] hear[d] and determine[d] . . . urgently."³⁴³ A separate section of the statute lists the Secretary's emergency powers,³⁴⁴ which include the authority to issue a proclamation preventing persons of a "specified class" from entering or leaving "specified areas" and subjecting them to mandatory administrative detention in the "proclaimed area."³⁴⁵ The statute again imposes explicit time limits of two weeks on the detention and any renewal period.³⁴⁶ The state parliament has sole authority to review and confirm such emergency proclamations, and the act requires parliament to meet "as soon as possible" if anyone submits a petition objecting to the proclamation.³⁴⁷

Similar time limits are found in public health mandates in Tasmania and orders in New South Wales. The Tasmanian Public Health Act of 1997³⁴⁸ limits administrative detention to forty-eight hours for medical examinations³⁴⁹ and to six months for ensuring a disease is controlled effectively.³⁵⁰ New South Wales also limits the time period for medical exams to forty-eight hours and administrative detention to seventy-two hours, unless approved by a magistrate.³⁵¹ New South Wales further requires a medical practitioner to examine detainees at intervals not exceeding four weeks,³⁵² and detainee refusal will most likely result in continued detention.

340. Health Act, 1958, § 121(1)(a)–(c) (Vict.).

341. *Id.* § 121(5).

342. *Id.* § 121(8).

343. *Id.* § 122(5). The court is further required to consider four key elements in any appeal: (a) the method by which the disease in the public health order is transmitted; (b) the seriousness of the risk of other people being infected; (c) the past behaviour and likely conduct of the person to whom the order relates; and (d) the extent of the restrictions imposed on the person to whom the order relates. This lattermost provision suggests that individuals be prevented from staying at home, as in West Australia. See *supra* note 330 and accompanying text.

344. Health Act, 1958, §§ 123–125 (Vict.).

345. *Id.* § 124(1)(a)–(b).

346. *Id.* §§ 123(2)(b)(c).

347. *Id.* § 123(4)(a)–(b)(ii).

348. Public Health Act, 1997 (Tas.).

349. *Id.* § 41.

350. *Id.* § 44(2). The Supreme Court of Tasmania can extend mandatory detention periods over six months, as well as hear all magistrate decisions on appeal. *Id.* §§ 44(3), 47.

351. *Id.* § 32(5).

352. *Id.* § 32(7)(a).

In summary, the laws of various Australian states suggest that any attempts by DIMIA to detain illegal arrivals with HIV/AIDS on the basis of their HIV/AIDS status would require significant justification. The various statutes, taken together, suggest DIMIA would need to prove: (a) why an individual could not stay with their family in Australia or be released into homes under supervision, and (b) how their detention significantly advances the treatment of their illness and ensures they would not pose a risk to the Australian community. DIMIA then would also need to ensure that detention would be subject to thorough review procedures and time limits. Although due process provisions like that of the 14th Amendment of the U.S. Constitution do not protect illegal arrivals in Australia, Australian courts do have authority to review *habeas corpus* petitions for all individuals regardless of whether they are citizens.³⁵³ Australian courts, therefore, have a role in ensuring the preservation of fundamental rights. This protection impliedly extends to individuals subject to prolonged administrative detention because of their HIV/AIDS status.

b. Anti-Discrimination Legislation

Anti-discrimination laws in the states and territories operate in tandem with public health laws and provide a second argument against the legitimacy of subjecting illegal arrivals with HIV/AIDS to prolonged administrative detention. Because of the greater incidence of HIV/AIDS in certain ethnic, racial and gender groups, HIV/AIDS status often overlaps issues of race and sex. To prevent detention procedures from becoming arbitrary, it is important to limit detention to a specific purpose, such as protecting public health.³⁵⁴ State anti-discrimination laws underscore the burden that should be placed on an executive attempting to subject illegal arrivals to continued detention.³⁵⁵

State anti-discrimination statutes address an extraordinary breadth of issues.³⁵⁶ All states except Tasmania protect individuals with HIV/AIDS. The New South Wales Anti-Discrimination Act of 1977 explicitly outlaws

353. AUSTRL. CONST. ch. III, § 75.

354. See *Toonen v. Australia*, *supra* note 314.

355. See *infra* note 366 and accompanying text.

356. The eight pieces of legislation examined are: Anti-Discrimination Act, 1977 (N.S.W.); Equal Opportunity Act, 1984 (S. Austl.); Equal Opportunity Act, 1984 (W. Austl.); Anti-Discrimination Act, 1991 (Queensl.); Discrimination Act, 1991 (Austl. Cap. Terr.); Sex Discrimination Act, 1994 (Tas.); Equal Opportunity Act, 1995 (Vict.); Gender Reassignment Act, 2000 (W. Austl.); and the Anti-Discrimination Act, 2004 (N. Terr.).

discrimination based on “HIV/AIDS status/vilification.”³⁵⁷ Other state statutes provide similar protection by prohibiting discrimination on the basis of one’s lawful sexual activity,³⁵⁸ irrelevant medical and criminal records,³⁵⁹ and impairment.³⁶⁰

Overall, the statutes consistently address discrimination directed at individuals who are identified with stipulated attributes, and three states have expanded this protection to include individuals who are “associated” with an individual with a stipulated attribute.³⁶¹ Furthermore, two states explicitly note that judicial remedies are available to individuals who are believed to have a stipulated attribute, independent of whether they *actually* have the attribute.³⁶² Also, it should be noted that HIV and AIDS claims have been brought under disability discrimination legislation.³⁶³

This broad array of regulations suggests that any attempt by DIMIA to subject individuals with HIV/AIDS to continued administrative detention would require vigorous justification. These regulations also imply that the health concerns of all detainees must be equally addressed to avoid the risk of discrimination. If there were a correlation between this treatment and race, sex, or sexual orientation, the government would need to demonstrate that these factors were not being used to justify giving these minorities *additional* assistance. Given the difficulty of proving the absence of reverse discrimination, DIMIA would do well to avoid this minefield.

2. *Health Concerns and Non-Discrimination Guidelines in Commonwealth & International Law*

In addition to the state regulations mentioned, Australia’s Parliament has enacted public health and anti-discrimination legislation. Especially when considered in conjunction with international law, these federal,

357. Anti-Discrimination Act, 1977, §§ 49ZXA-49ZXC (N.S.W.).

358. Equal Opportunity Act, 1995, § 6 (Vict.).

359. Anti-Discrimination Act, 2004, § 19 (N. Terr.).

360. *Id.* § 4 (N. Terr.).

361. *See* Anti-Discrimination Act, 1991, § 7 (Queensl.); Discrimination Act, 1991, § 7 (Austl. Cap. Terr.); Equal Opportunity Act, 1995, § 6 (Vict.).

362. *See* Anti-Discrimination Act, 2004, § 19 (N. Terr.); Equal Opportunity Act, 1984, § 4 (W. Austl.).

363. *See* Georgeana K. Roussos, *Protections Against HIV-Based Employment Discrimination in the United States and Australia*, 13 HASTINGS INT’L & COMP. L. REV. 609, 660 n.323 (1990) (citing J. Tillett, *AIDS, Discrimination, and the Law*, in NATIONAL CONFERENCE ON AIDS, LIVING WITH AIDS: TOWARD THE YEAR 2000, 705 (1988)).

health-related laws also suggest that DIMIA cannot prolong the detention of individuals with HIV/AIDS.³⁶⁴

Australian Commonwealth legislation mirrors state legislation in many ways, though it leaves many public health issues unaddressed. The Commonwealth explicitly turned over government management of public health issues to the states with one notable exception—international quarantine under the Commonwealth's Quarantine Act of 1908.³⁶⁵ In essence, the Quarantine Act of 1908 has only three sets of provisions that DIMIA could use to justify the continued administrative detention of unauthorized entrants with HIV/AIDS,³⁶⁶ with the first justification turning on the definition of "quarantinable disease." The introduction to the Quarantine Act states that, "quarantinable disease" means small-pox, plague, cholera, yellow fever, typhus fever, leprosy, or "any disease declared by the Governor-General, by proclamation, to be a quarantinable disease."³⁶⁷ This formulation of the definition of "quarantinable disease" grants discretion to the Governor-General to add diseases to the list. This obviously makes the position of the Governor-General critical to the issue of detention based on HIV/AIDS status.

The executive authority conferred by Parliament on the Governor-General parallels that of the Minister of Immigration on matters of executive discretion for public health issues. As the recognized arm of Queen Elizabeth II, the Australian Head of State,³⁶⁸ there is considerable weight given to the Governor-General's authority. Indeed, giving the Governor-General the discretion and sole authority to declare a disease quarantinable, reflects Parliament's desire to accord significant weight to such a declaration. Notwithstanding the fact that the Governor-General's role has become increasingly symbolic as the Queen's direct influence on the workings of the Australian Commonwealth has waned, the fact

364. In recent years, health has become a central focus of the human rights field in Australia. The ways in which the government manages health concerns significantly affect other areas of the law. See Caroline J. O'Neill, *Health is a Human Right: Why the U.S. Immigration Law Response to Gender-Based Asylum Claims Requires More Attention to International Human Rights Norms*, 17 J. CONTEMP. HEALTH L. & POL'Y 241 (2000); Michelle Forrest, *Using the Power of the World Health Organization: The International Health Regulations and the Future of International Health Law*, 33 COLUM. J.L. & J. PROBS. 153 (2000).

365. See Quarantine Act, 1906, § 5-18 (Austl.).

366. Notably, the Minister of Health, like the Minister of Immigration, may detain illegal arrivals. However, the Minister of Health's power is purely discretionary, while the Minister of Immigration must comply with the new set of provisions in the Migration Act. See *infra* note 371 and accompanying text.

367. Quarantine Act, 1908, § 5 (Austl.).

368. Australia is not a republic, and the Queen is Head of State. CIA World Factbook, *Australia*, at <http://www.odci.gov/cia/publications/factbook/print/as.html> (last visited Mar. 20, 2005).

remains that the Governor-General continues to be powerful, as he retains such powers as the ability to dissolve Parliament.³⁶⁹

Were HIV/AIDS-status to be declared a “quarantinable disease,” the Quarantine Act would vest the Minister of Health with authority to determine how to manage the disease.³⁷⁰ Specifically, the act gives the minister discretion when he believes an emergency has arisen to “take such quarantine measures, or measures incidental to quarantine, and give such directions as he or she thinks necessary or desirable for the diagnosis, prevention or control of, the introduction, establishment or spread, for the eradication, or for the treatment of any disease or pest”.³⁷¹ The act also vests the minister with discretion to quarantine: persons “infected with a quarantinable disease or quarantinable pest;” persons who have been “in contact with . . . infection from any person subject to quarantine;” and, most notably, “every person who enters Australia or the Cocos Islands unlawfully.”³⁷²

Despite the authorization in section 18(1)(b) to detain those who enter Australia unlawfully, it ultimately seems logical that HIV/AIDS would have to be declared a quarantinable disease by the Governor-General to justify the continued detention of illegal arrivals with HIV/AIDS due to both the length of time and change in grounds on which these individuals were initially detained. Typically, the Minister of Immigration will have initiated the detention at the time when the infected individuals arrived without visas; in most cases, the Minister of Health will not have also simultaneously detained them under a quarantine. As a result, if the question is analyzed under the authority of the quarantine regulations, it does not matter whether individuals could be released under immigration law; they would simply remain detained under the quarantine regulations. If, however, DIMIA seeks to justify the continued detention of

369. AUSTL. CONST. ch. I, § 5 “Sessions of Parliament: Prorogation and Dissolution” (noting that the “Governor-General . . . may dissolve the House of Representatives”).

370. Quarantine Act, 1908, § 12A(1) (Austl.).

371. *Id.* (emphasis added).

372. *Id.* §§ 18(1)(b)–(c),(e). This explicit authorization to quarantine anyone who has arrived unlawfully— independent of whether the individual has a quarantinable disease— suggests that the question of whether HIV/AIDS is a quarantinable condition, at least for unlawful immigrants, is moot. In this case, there would be no need for DIMIA to force the Minister of Health to quarantine individuals with HIV/AIDS by having HIV/AIDS declared a quarantinable condition. Notably, the statute allows the Minister of Health to issue a proclamation directing detention of all illegal arrivals, even if no diseases are declared quarantinable. *Id.* § 18(1). Doing so, however, would be unwise. Given DIMIA’s desire to limit illegal immigration, DIMIA should declare a disease quarantinable to compel such a proclamation from the Minister of Health.

unauthorized arrivals under the public health laws, then whether the detainees' disease is now quarantinable is significant.³⁷³

Quarantining individuals with HIV/AIDS also raises issues of equal treatment. For example, while the Commonwealth has never outlawed discrimination on the basis of sexual orientation, it has, on the other hand, enacted legislation that affects the quarantine of individuals with HIV/AIDS.³⁷⁴ These Commonwealth laws include the Racial Discrimination Act of 1975,³⁷⁵ the Sex Discrimination Act of 1984,³⁷⁶ and, most notably, the Disability Discrimination Act of 1992.³⁷⁷ The Disability Discrimination Act of 1992 explicitly defines "disability" as including "the presence in the body of organisms causing . . . or capable of causing disease or illness,"³⁷⁸ employing language paralleling that of several state statutes.³⁷⁹ While these laws focus predominantly on issues of employment discrimination,³⁸⁰ they are supplemented by the Human Rights and Equal Opportunity Commission Act of 1986 (Human Rights Act).³⁸¹ The Human Rights Act not only led to the formation of the HREOC, but also fueled HREOC's role in ensuring consistent application of Commonwealth laws to individuals in areas such as gun control, racial hatred on the internet, substance abuse on aboriginal lands, and, most notably for these purposes, the mandatory immigration detention of children.³⁸² HREOC monitoring and enforcement of key statutes has a direct bearing on the scope of those

373. Hence, if DIMIA justifies the continued detention of individuals with HIV/AIDS based on its status as a quarantinable disease, future unauthorized arrivals with HIV/AIDS would similarly be subject to detention under the Migration Act and the Quarantine Act. This would remove such detention from DIMIA's jurisdiction.

The initial justification for continued administrative detention of illegal arrivals with HIV/AIDS no longer allows DIMIA to continue this administrative detention. Most illegal arrivals in administrative detention who have had visas denied await deportation and the issue whether these individuals have HIV/AIDS is irrelevant to their continued detention.

374. It is worth reiterating that the stipulations serve more as advice than as a mandate because the individuals being detained are not Australian citizens and, as such, are not afforded the privileges of Commonwealth legislation.

375. Racial Discrimination Act, 1975 (Austl.).

376. Disability Discrimination Act, 1992 (Austl.). The act bears on those with HIV/AIDS given the correlation between sexual orientation and HIV/AIDS. *See supra* note 266.

377. Sex Discrimination Act, 1984, 20 F.C.R. 217, Div. 3 §§ 28A–28B (Austl.)

378. Disability Discrimination Act, 1992, § 4(1) (Austl.).

379. *See, e.g.*, Equal Opportunity Act, 1995, § 4 (Vict.); Anti-Discrimination Act, 1991, § 4 (Queensl.); Anti-Discrimination Act, 1991, § 4 (Austl. Cap. Terr.).

380. Australia has some of the most stringent protections in the world in this regard. *See Roussos, supra* note 363.

381. Human Rights and Equal Opportunity Commission Act, 1986 (Austl.) [hereinafter Human Rights Act].

382. For a discussion of the wide array of areas investigated by HREOC, see the website of HREOC, at <http://www.hreoc.gov.au/index.html> (last visited Nov. 10, 2004).

statutes, at least in their application. These HREOC investigations can be a means of discerning if Parliament intended that anti-discrimination legislation be applied to individuals in circumstances beyond those specifically identified in the original acts—here on behalf of detained illegal arrivals—so long as the application is “consistent” with the spirit of the acts and the formation of HREOC.

While the Australian Parliament does not consider itself bound by the literal terms³⁸³ of the international treaties it has signed,³⁸⁴ there is no question regarding the level of commitment required of Australia under the general principles of these international treaties.³⁸⁵ Australia’s adherence to the principles in the International Covenant on Economic, Social, and Cultural Rights,³⁸⁶ the ICCPR,³⁸⁷ the U.N. Declaration on the Rights of Disabled Persons,³⁸⁸ and the Resolution of the Forty-First World Health Assembly³⁸⁹ illustrates its commitment to the equal treatment of people with HIV/AIDS. The foci of these agreements complement and underscore the rights in the Universal Declaration of Human Rights (Universal Declaration), including the right of individuals to “seek and to enjoy in other countries asylum from persecution.”³⁹⁰

International precedent on detention issues is also readily available. The European Court of Human Rights, for example, has stated that deprivation of liberty is permitted “only when such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority.”³⁹¹ For a state to justify detention measures for individuals with HIV/AIDS, the state would also need to establish that

383. Roussos, *supra* note 363, at 650 n.255, *citing* Commonwealth v. Tasmania (1983) 46 A.L.R. 625, 693–94 (holding that Australia is allowed “latitude when interpreting international instruments”).

384. Roussos, *supra* note 363, at 650 n.256, *citing* P. McCarry, *Landmines Among the Landmarks: Constitutional Aspects of Anti-Discrimination Laws*, 63 AUSTL. L. J. 327, 328 (1989).

385. See Press Release, Philip Ruddock MP, New Australian Framework for Human Rights (Dec. 23, 2004), available at http://www.ag.gov.au/agd/www/MinisterRuddockHome.nsf/Page/Media_Releases (last visited Mar. 21, 2005).

386. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

387. International Covenant on Civil and Political Rights Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

388. Declaration on the Rights of Disabled Persons, § 1, G.A. Res. 3447(XXX), 30 U.N. GAOR Supp. (No. 34) at 88, U.N. Doc. A/12034 (1975). While this declaration does not mention AIDS, the preamble’s reference to the “physically and mentally disadvantaged” suggests those with HIV/AIDS would be covered. *Id.* pmb1.

389. Avoidance of Discrimination in Relation to HIV-Infected People and People With AIDS, Res. WHA 41.24, World Health Assembly (1988), available at http://policy.who.int/cgi-bin/om_isapi.dll?infobase=wha&record={3646}&softpage=Document42 (last visited Mar. 21, 2005).

390. Universal Declaration of Human Rights, art. 14, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

391. *Lawless v. Ireland*, 1 Eur. Ct. H.R. 15, 27 (1961).

“both the individual concerned had the infection and that his or her detention was necessary for preventing its spread.”³⁹² Furthermore, the European Court of Human Rights has held in subsequent cases that detention for an indeterminate period is lawful only if detainees are given a right to “regular and periodic judicial reviews in order to ascertain whether the reasons for his or her detention continue to be . . . lawful.”³⁹³

There are also policy benefits to sparing individuals with HIV/AIDS from continued detention. First and foremost, as the World Health Organization (WHO) has stated explicitly, the best strategy for preventing the spread of HIV/AIDS is to ensure that HIV-infected individuals remain “integrated within society to the maximum possible extent and be helped to assume responsibility for preventing HIV transmission to others.”³⁹⁴ Allowing illegal arrivals with HIV/AIDS to leave detention would help to foster this integration, empowerment, and responsibility, in place of the feeling of victimization associated with detention. Second, eliminating HIV/AIDS as a justification for continued detention would help to curb the excessive discretion exercised by health officials in deciding when to release HIV/AIDS patients. This is important because the length of incarceration³⁹⁵ must be consistent with the goal of ensuring and preserving human rights.³⁹⁶

There are also important international policy implications to prolonging the detention of unauthorized arrivals. Philip Ruddock, the former Minister of Immigration, Multicultural, and Aboriginal Affairs and Australia’s current Attorney General, explained that cooperation between Australia and southeast-Asian nations has helped stem the tide of illegal

392. PAUL SIEGHART, AIDS AND HUMAN RIGHTS: A UK PERSPECTIVE, 44 (1989).

393. *Id.* at 46. See also *Winterwerp v. the Netherlands*, 2 Eur. Ct. H.R. 387 (1979); *X v. United Kingdom*, 4 Eur. Ct. H.R. 188 (1981); *Van Droogenbroek v. Belgium*, 4 Eur. Ct. H.R. 443 (1982); *Weeks v. United Kingdom*, Judgment of the Court (1987) 10 Eur. Ct. H.R. 293, cited in SIEGHART, *supra* note 391, at 46 nn.80–81.

394. SIEGHART, *supra* note 391, at 45 n.77, citing WORLD HEALTH ORGANIZATION, SOCIAL ASPECTS OF AIDS PREVENTION AND CONTROL PROGRAMMES (1987).

395. See ADRIAN P. JOEL, A PRACTICAL GUIDE TO OBTAINING PERMANENT RESIDENCE IN AUSTRALIA 51 (1987).

396. Such human rights can be derogated in times of public emergency or risk of “epidemic disease;” the derogation, however, is “only acceptable to the extent that the measures are not inconsistent with the state’s other obligations under international law.” INTERNATIONAL FEDERATION OF RED CROSS & RED CRESCENT SOCIETIES, AIDS, HEALTH, AND HUMAN RIGHTS: AN EXPLANATORY MANUAL 19 (1995). Consistency is particularly important in cases of quarantine and detention for “stigmatized” and “less powerful” social groups that have thus far been managed inconsistently. Examples of these stigmatized groups include homosexual men, lesbians, and immigrants. ALAN PETERSEN & DEBORAH LUFTON, THE NEW PUBLIC HEALTH: HEALTH AND SELF IN THE AGE OF RISK 72 (1996).

immigrants to Australia.³⁹⁷ Decreasing the number of illegal arrivals has in turn helped to ensure that “Australia’s asylum program was not abused” and could help the country to maintain its role as a “generous settler of refugees.”³⁹⁸ Ruddock believed it would be detrimental to Australia to use HIV/AIDS as a basis for explicitly refusing people asylum, expelling individuals who are infected, or subjecting these individuals to further administrative detention.³⁹⁹ Transcending the limited goal of relieving the social welfare burden caused by immigrants⁴⁰⁰ is essential if Australia is to become a leading industrialized nation in terms of its protection of individual human rights.

3. Pragmatism & Health Concerns in Australian Society

Statutory minutia and legal maneuverings aside, Australia is one of the world’s most progressive countries in its management of the spread of HIV/AIDS.⁴⁰¹ In this context, it is inconsistent with Australia’s otherwise progressive outlook for DIMIA to use individuals’ HIV/AIDS status in subjecting them to continued detention, especially when the populace would largely oppose these moves. Indeed, Australia’s progressive management of HIV/AIDS, along with the progressive opinions of its citizenry, suggest that DIMIA should not attempt to prolong the detention of illegal arrivals with HIV/AIDS.

One first turns to Australia’s historically progressive approach to HIV/AIDS management. Early in the AIDS epidemic, Australia acknowledged that safe sex was the key to arresting the spread of the disease.⁴⁰² The Australian government adopted explicit and aggressive AIDS education campaigns designed to “reduc[e] the incidence and impact of HIV/AIDS.”⁴⁰³ Indeed, the government considered legal initiatives to be far less effective than educational initiatives in managing

397. *Southeast Asian Cooperation Cuts Immigrant Flow: Australia*, AGENCE FRANCE PRESSE, Oct. 8, 2002.

398. *Id.*

399. *Id.*

400. See Robert Birrell, *Problems of Immigration Control in Liberal Democracies*, in *NATIONS OF IMMIGRANTS* 24 (Gary P. Freeman & James Jupp eds., 1992).

401. Paul Sendziuk, *Learning to Trust: Australian Responses to AIDS*, *GAY & LESBIAN REV.*, Mar. 1, 2004, available at 2004 WLNR 12672744.

402. John Ballard, *The Constitution of AIDS in Australia: Taking ‘Government at a Distance’ Seriously*, in *GOVERNING AUSTRALIA: STUDIES IN CONTEMPORARY RATIONALITIES OF GOVERNMENT* 125 (Mitchell Dean & Barry Hindess eds., 1998).

403. DON NUTBEAM ET AL., *GOALS AND TARGETS FOR AUSTRALIA’S HEALTH IN THE YEAR 2000 AND BEYOND: REPORT PREPARED FOR THE COMMONWEALTH DEPARTMENT OF HEALTH, HOUSING & COMMUNITY DEVELOPMENT* 66 (1993).

AIDS,⁴⁰⁴ and ideas of quarantine and compulsory detention were raised and discarded.⁴⁰⁵ Among its many initiatives, the government funded a homosexual community building,⁴⁰⁶ advocacy for safe sex practices among sex workers, and assistance for drug users.⁴⁰⁷ Although churches and right-wing politicians protested, advocates for these progressive programs prevailed.⁴⁰⁸ The Queensland Intravenous AIDS Association (QuIVAA)⁴⁰⁹ and the West Australia Intravenous Equity Association (WAIVE) are successful progeny of these efforts, as were dozens of other state-run and community-managed groups.⁴¹⁰

Social attitudes both informed and altered these policies. When compared to the United States, several factors facilitated Australia's relative ease in managing HIV/AIDS. In Australia, issues regarding sex were addressed more easily because the "agenda of the Moral Right" never took hold.⁴¹¹ Australian AIDS organizations did not minimize the connection between AIDS and homosexual men, as was done in the United States.⁴¹² They also emphasized "inventive and sex positive" educational techniques.⁴¹³ As a result of these approaches, gay men in Australia are more apt to have AIDS tests than even their counterparts in New Zealand, a nation long-considered to be a bastion of openness and progressiveness.⁴¹⁴

Following the dismantling of the White Australia Policy in 1973,⁴¹⁵ Australia also sought to ensure the fair and equal treatment of all non-

404. Roussos, *supra* note 363, at 643.

405. Roussos, *supra* note 363, at 645.

406. See G. W. Dowsett, *The Sociological Context, in AIDS IN AUSTRALIA*, *supra* note 213, at 92 n.19, citing S. Kippax et al., *Gay Men's Knowledge of HIV Transmission and 'Safe' Sex: A Question of Accuracy*, 25 AUSTL. J. SOC. ISSUES 199–219 (1990).

407. Intravenous drug users were included in a list of high risk groups and this continues to be true, as demonstrated by recent plans to create supervised injection facilities in New South Wales. See Ian Malkin, *Establishing Supervised Injecting Facilities: A Responsible Way to Help Minimize Harm*, 25 MELB. U. L. REV. 680 (2001).

408. See Altman, *supra* note 213, at 64.

409. See Website of the Queensland Intravenous Association, at <http://www.quivaa.org.au> (last visited Feb. 11, 2005) (advising people to "lust for life; shoot for safety").

410. For a full list of organizations, see Website of Medical Online—Australia AIDS Resources, at <http://www.medicalonline.com.au/medical/professional/aids/resources.htm> (last visited Feb. 15, 2005).

411. *Id.* at 67.

412. *Id.* at 68 n.30.

413. Altman, *supra* note 213, at 69 n.31.

414. See B.R.S. ROSSER, MALE HOMOSEXUAL BEHAVIOR AND THE EFFECTS OF AIDS EDUCATION: A STUDY OF BEHAVIOR AND SAFER SEX IN NEW ZEALAND AND SOUTH AUSTRALIA 65 (1991).

415. CROCK, *supra* note 35, at 33.

citizen entrants.⁴¹⁶ Organizations such as the Indo-Chinese Australian Women's Association (ICHAWA) and the Child Adolescent and Family Health Service (CAFHS) began employing "bicultural educators" early in the AIDS epidemic to ensure that the "major ethnic communities" were able to "provide more effective and relevant health services for migrants and refugees."⁴¹⁷ These initiatives operated within growing philosophical links between public health, refugees, and human rights policies⁴¹⁸ which arose largely out of the increasing advocacy of the HREOC of the principles in the Universal Declaration of Human Rights,⁴¹⁹ ICCPR,⁴²⁰ African Charter on Human and People's Rights,⁴²¹ and Convention on the Elimination of All Forms of Discrimination Against Women.⁴²² Australian participation in many of these instruments indicates for observers in general—and for refugees in particular—that Australians appear especially committed to upholding the key principles of article 9 of the ICCPR.⁴²³

Activism has affected government policy, as well. ACT UP arrived in Australia to press for change in late 1989,⁴²⁴ and the Australian National Council on AIDS (ANCA) obtained its first openly HIV-Positive member, the former President of the Australian Federation of AIDS Organizations, in 1991.⁴²⁵ The Australian government subsequently funded massive studies to address AIDS issues, such as the most recent *Sydney Men and Sexual Health* (SMASH) study. It lasted from 1993–1998 and is one of the largest and most comprehensive longitudinal studies of gay and homosexually active men ever conducted.⁴²⁶ Australia was also an early donor to the Global Programme on AIDS (GPA), a subdivision of

416. CROCK & SAUL, *supra* note 50, at 8.

417. Neil Wigg, *Promoting Health with Children, Adolescents, and Their Families*, in HEALTH FOR ALL: THE SOUTH AUSTRALIAN EXPERIENCE 403 (Fran Baum ed., 1995).

418. See Pyne, *supra* note 272, at 1.

419. See generally Universal Declaration, *supra* note 390.

420. See generally ICCPR, *supra* note 187, art. 9(1).

421. See generally African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* October 21, 1986.

422. See generally Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., 107th plen. mtg., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979).

423. ICCPR, *supra* note 187, art. 9, cls. 1, 4.

424. Altman, *supra* note 213, at 60. ACT UP is a direct action group that seeks to compel governments to expedite testing of new drugs and treatments. See Website of the AIDS Action Council, *Assessment of Significance*, at http://www.aidsaction.org.au/content/publications/cehpu/assessment_of_significance.pdf (last visited Mar. 10, 2005).

425. See Website of the Australian Federation of AIDS Organisations, at <http://www.afao.org.au/index.asp> (last visited Mar. 19, 2005); Altman, *supra* note 213, at 65.

426. See Juliet Richters et al., *Condom Use and 'Withdrawal': Exploring Gay Men's Practice of Anal Intercourse*, 11 INT. J. STD AIDS 96, 98 (2000).

UNAIDS,⁴²⁷ and it appointed Justice Michael Kirby, a current member of the Australian High Court and the highest-ranking openly gay judge in the world, to the Global Commission on AIDS soon after the Commission's founding.⁴²⁸ Most recently, Australia hosted the Sixth International Conference on AIDS in the Asia Pacific (ICAAP) on October 5–10, 2001 in Melbourne.⁴²⁹

Discrimination—against both homosexual individuals and migrants alike—has been a concern of the federal government, which has sought to ensure state legislative regimes protect these groups.⁴³⁰ Furthermore, notwithstanding DIMIA's response to illegal arrivals, the Australian Department of Health and Aging maintains funding for an array of programs and committees that combat AIDS, such as the Australian National Council on AIDS, Hepatitis C, and Related Diseases (ANCAHRD, formerly ANCA).⁴³¹ The legacy of former Prime Minister Gough Whitlam's "community health programmes,"⁴³² these programs formed his vision of making Australia one of the "most proactive of . . . developed countries in formulating legislative policies" to public health issues like HIV/AIDS.⁴³³

Australia must ensure it maintains its principles by ensuring that DIMIA's administrative detention of illegal arrivals with HIV/AIDS is rational and in accord with the country's progressive history with regard to HIV/AIDS policy.⁴³⁴ Certainly, the danger to Australia is great. In light of the unprecedented number of non-immigrant visitors in Australia,⁴³⁵ the escalation of the HIV/AIDS epidemic in the Asia-Pacific region poses a

427. See Website of UNAIDS, at <http://www.unaids.org> (last visited Feb. 13, 2005).

428. See Website of the High Court of Australia, *Current Justices—Michael Kirby*, at <http://www.hcourt.gov.au/kirbyj.htm> (last visited Feb. 4, 2005).

429. Mark Bebbington, *International Policy*, published on Website of the Australian Federation of Aids Organizations, at http://www.afao.org.au/library_docs/annual_reports/ar02_international_and_policy.pdf (last visited Mar. 15, 2005).

430. See generally Marlene C. McGuirl & Robert N. Gee, *AIDS: An Overview of the British, Australian, and American Responses*, 14 HOFSTRA L. REV. 107 (1985).

431. Australian Government Department of Health and Aging, *New and Expanded National Council on AIDS, Hepatitis C and Related Diseases Announced*, at <http://www.health.gov.au/internet/wcms/publishing.nsf/content/health-mediarel-yr1999-mw-mw99123.htm> (last visited Mar. 15, 2005).

432. See Altman, *supra* note 213, at 64 n.22, citing S. Duckett, *Structural Interests and Australian Health Policy*, 18 SOC. SCI. & MED. 959–66 (1984).

433. See Francine A. Hochberg, *HIV/AIDS and Blood Donation Policies: A Comparative Study of Public Health Policies and Individual Rights Norms*, 12 DUKE J. COMP. & INT'L L. 231 (2002).

434. See RED CROSS, *supra* note 396, at 54.

435. Statistics Section, Department of Immigration and Multicultural and Indigenous Affairs, *Australian Immigration Consolidated Statistics, Number 21, 1999–00* (2002), available at http://www.immi.gov.au/statistics/publications/consolidate_statistics/consol21.pdf (illustrating the number of non-immigrants arriving in Australia 1989–2000).

real threat to Australia's public health. Australia has promulgated a national strategy to combat AIDS that includes five priority areas, the first of which calls for both the creation of an "enabling environment" to address HIV/AIDS and the protection of the "human rights of people living with AIDS and people at risk of HIV infection."⁴³⁶ Because national strategies have not been adopted for other infectious diseases, such as Hepatitis C,⁴³⁷ or for issues affecting aboriginal health,⁴³⁸ the federal government appears to view HIV/AIDS as demanding special attention.

V. PRACTICAL ALTERNATIVES TO PROLONGED ADMINISTRATIVE DETENTION

There are practical alternatives to indefinite detention that respect the rights of illegal arrivals with HIV/AIDS and comport with international law and Australia's policy goals. The Migration Act provides that all unlawful non-citizens are subject to detention until they are either removed, deported, or granted a visa.⁴³⁹ Although it explains that the object of the Migration Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens,"⁴⁴⁰ it says nothing about the underlying purpose or goals of detention itself.⁴⁴¹ Despite its unqualified detention requirements, Australia's parliament amended the Migration Act in the mid-1990s to allow the release of certain unlawful non-citizens from detention under bridging visas.⁴⁴² These visas give qualified individuals, including the spouses of Australian citizens and permanent residents over seventy years old and people with special medical needs, temporary lawful status (pending consideration of their applications) to remain in Australia.⁴⁴³ The Minister of Immigration, furthermore, has discretion to confer a bridging visa to any person in detention for more than six months who meets a series of additional standards.⁴⁴⁴ A readily available alternative to indefinite detention thus already exists in Australia. By its terms, however, it affects only a "very

436. Australian National Council on AIDS, Hepatitis C, and Related Diseases (ANCAHRD), *2000–2001 Annual Report*, at 10, available at <http://www.ancahrd.org/pubs/pdfs/reportoo.pdf#search=ANCAHRD%2020002001%Annual%20Report> (last visited Feb. 6, 2005).

437. *Id.* at 14.

438. *Id.* at 17–18.

439. Migration Act, § 196(1).

440. *See* Migration Act, § 4; *see also* HREOC, *supra* note 200, at 15.

441. *See generally* Migration Act, §§ 100–199.

442. *See* Migration Act, § 73.

443. *See* Migration Regulation 2.20(8)(C).

444. *See* Migration Act, § 72(2), (3).

limited”⁴⁴⁵ class of people and fails to accommodate the broader concerns of indefinite detention.

Fortunately, there are other alternatives to indefinite detention that both meet the public policy objectives of the current mandatory administrative detention policy and assist a wider group of individuals. DIMIA’s current detention policy seeks to ensure that: (a) detainees are readily available during the processing of any visa applications and available for removal from Australia if their applications are unsuccessful; (b) detainees are available for the health checks that are required for a visa to be granted; and (c) unauthorized arrivals do not enter the Australian community until their identity and status has been properly assessed and their visa has been granted.⁴⁴⁶ Because any alternative to an indefinite detention regime must involve some sort of conditional release, it is critical to assess the degree to which alternative regimes achieve these three DIMIA goals. Overall, the first two goals can be attained following the conditional release of individuals who have been detained for an extended period of time. Illegal arrivals can then easily be released into communities with local guardians to keep track of their whereabouts and to inform the authorities in the rare event they abscond. The third goal is also achievable if the standards both clearly state the conditions for release and do not violate international human rights requirements.

In its Detention Guidelines, the UNHCR notes, that “alternatives to the detention of an asylum seeker . . . should be considered . . . which provide State authorities with a degree of control over the whereabouts of asylum seekers while allowing asylum seekers basic freedom of movement.”⁴⁴⁷ The UNHCR also notes that a range of options exist that can provide governments with the security they need in low-risk cases. These options include miscellaneous monitoring requirements, provisions for guarantors / surety, release on bail, and openly monitored centers.⁴⁴⁸

The Refugee Council of Australia (RCOA), building on the alternative systems to mandatory detention employed in Europe, has proposed a comprehensive system using a three-stage model to meet Australia’s policy goals.⁴⁴⁹ Under this system, all unlawful non-citizens are subject to

445. HREOC, *supra* note 200, at 20–21.

446. Website of the Department of Immigration and Multicultural and Indigenous Affairs, 82 *Immigration Detention: Fact Sheet*, at <http://www.immi.gov.au/facts/82detention.htm> (last visited Feb. 13, 2005).

447. UN Human Rights Commission Report, *supra* note 275, Guideline 4.

448. *Id.*, Guideline 4(i)–(iv).

449. Refugee Council of Australia, *Alternatives to Detention*, at http://www.refugeecouncil.org.au/html/current_issues/alternatives1.html (last visited Feb. 11, 2005).

closed detention for a maximum of ninety days. However, bridging visas may be granted, allowing the release of individuals who meet a series of key character and identity “checks.”⁴⁵⁰ This release can be either in the form of open detention or community release.⁴⁵¹

Identity “checks” also comport with the three principal reasons noted in the UNHCR Detention Guidelines for initially detaining asylum seekers, namely: (a) verifying identity, (b) determining the basis for refugee status or an asylum claim, and (c) protecting national security and the public order.⁴⁵² Indeed, while the UNHCR’s Guidelines justify short-term detention, failure to meet any of RCOA’s criteria would prevent long-term release. Mandatory detention would also apply to anyone breaching the terms of their release. The RCOA system relieves the government of significant burdens while simultaneously engaging interested community members in its operation.

Other alternative detention models with similar elements provide comparable benefits.⁴⁵³ For example, the HREOC outlines a system with benefits that include: (a) greater flexibility in moving applicants from one detention stage to another as their circumstances change; (b) financial savings by significantly reducing the use of costly closed detention; (c) enhanced equity by reducing disparities in treatment between individuals who are and are not allowed to immigrate; (d) increased Australian compliance with international obligations and standards; (e) a more

450. *Id.*

451. *Id.* In open detention, a detainee may freely leave a detention facility, subject to curfew restrictions. DIMIA also remains responsible for the accommodation and welfare of detainees. A community release system allows a detainee to live in the community under the supervision of family members or community organizations. Typically, there are only a few restrictions on community release. These include liberating the detainees’ residence to a particular address and requiring him to report to authorities at regular intervals. *Id.* The identity “checks” confirm (a) a detainee’s identity, (b) the existence of a valid visa application, (c) that the individual is not a threat to the national security or the public order, (d) that there is a demonstrated likelihood that the individual will not abscond, and (e) that the detainee has completed health clearances. *Id.*

452. UN Human Rights Commission Report, *supra* note 275, Guideline 3.

453. The alternative detention models include systems advocated by the Conference of Leaders of Religious Institutes (CONFERENCE OF LEADERS OF RELIGIOUS INSTITUTES (NSW), POLICY PROPOSAL FOR ADJUSTMENTS TO AUSTRALIA’S ASYLUM SEEKING PROCESS (Sydney, Australia, Conference of Leaders of Religious Institutes, 2001)); Justice for Asylum Seekers Project (JUSTICE FOR ASYLUM SEEKERS PROJECT, TRANSITIONAL PROCESSING AND RECEPTION MODEL (Sydney, Australia, Justice for Asylum Seekers Project, 2000)); and the Australian Council of Churches (AUSTRALIAN COUNCIL OF CHURCHES ET AL., CHARTER OF MINIMUM REQUIREMENTS FOR LEGISLATION RELATING TO THE DETENTION OF ASYLUM SEEKERS (Sydney, Australia, Australian Council of Churches, 2000)). See also Chris Sidoti, Commissioner of the Human Rights and Equal Employment Opportunity Commission, Refugee Policy: Is there a Way out of this Mess?, Address to the Racial Respect Seminar (Feb. 21, 2002); INDEPENDENT EDUCATION UNION, REFUGEE AND ASYLUM SEEKER POLICY IN AUSTRALIA (Sydney, Australia, 2002).

humane regime by providing for mechanisms that can meet individual circumstances; and (f) less domestic and international criticism for Australia's immigration detention practices.⁴⁵⁴

These alternative systems allow a set of controlled guidelines that can be readily introduced, avoid the risk of indefinite detention, and provide greater flexibility and justice. While most individuals who meet the key prerequisites would have already been released when the maximum time limit on detention expires, it ensures that indefinite detention is avoided—particularly for those with HIV/AIDS. It thus ensures compliance with legal and international principles.

VI. CONCLUSION

Australia's Department of Immigration has arrived at a crossroads. It must ensure the sanctity of Australia's borders while simultaneously respecting the human rights of illegal entrants. DIMIA can best advance these two demands by releasing individuals from administrative detention when the time to effectuate their removal has expired. While the continued detention of individuals based on their HIV/AIDS-positive status may perhaps appear benign, it is certainly problematic. DIMIA's authority to address public health matters directly is unclear. Moreover, the use of HIV/AIDS status to detain individuals may violate both social mores and numerous state and federal guidelines.

There are alternatives to administrative detention that avoid these problems, including proposals by the HREOC and other advocacy groups. These alternative detention schemes fulfill the government's two goals of both sending a message that it upholds the rule of law and dissuading individuals from attempting to enter Australia illegally to obtain immediate permanent residency.

The rise in the number of rejections of refugee applications for permanent residency in Australia raises the question of whether Australia still seeks to uphold the principles of justice and fairness.⁴⁵⁵ Australian tolerance for HIV/AIDS has decreased in recent years. In a recent survey,

454. HREOC, *supra* note 200, at 238.

455. East Timorese are a case in point, with individuals who have been in Australia over a decade being told they can now go "back home" because of the newly elected East Timorese government and the country's recent acceptance into the United Nations. Few would doubt that East Timor is now a sovereign nation, but ten years is also a significant enough time for individuals to lay roots in a new homeland, which is what many now consider Australia to be. Arguments in favor of a more compassionate policy toward East Timorese have been gaining publicity. *See* Editorial, *Compassion for East Timorese*, SYDNEY MORNING HERALD, Nov. 25, 2002, at 10.

more Australians wanted to quarantine HIV/AIDS-infected individuals than in the early years of the disease's epidemic.⁴⁵⁶ Fears that the epidemic is reasserting itself may underlie this change in public opinion. Indeed, infection rates have increased as the lifespan of individuals with HIV/AIDS and the incidence of unprotected sex have risen. Managing HIV/AIDS (and the public health more generally) should begin by relieving those fears. A more moderate immigration detention policy by DIMIA that does not rely on HIV/AIDS as grounds for continued detention, is a sound first step in that process.

456. In a public survey in 1990, 46% of Australians were reported to favour quarantining those with AIDS, up from 32% in 1987; comparable figures included 26% in the United States and 16% in France. L. Crisp, *You in the 90s*, THE BULLETIN, Sept. 18, 1990, at 50, cited in Altman, *supra* note 213, at 70 n.36.