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Rights of refugees

Nicholas Cowdery considers the rights of refugees from the perspective of human rights issues. He identifies, discusses and critiques relevant United Nations conventions and Australia's "Pacific Solution".[1]

Human Rights

The Universal Declaration of Human Rights of 1948 declared that:

"All human beings are born free and equal in dignity and rights ... and should act towards one another in a spirit of brotherhood".

We Australians know we can do that; but it is not always so, especially at the official level. As Malcolm Fraser wrote earlier this year:

"There is a golden rule that should govern the behaviour of all democracies, indeed all people, if we want a civilised world. That golden rule proclaims that all people, endowed with reason and conscience, must accept a responsibility to each and all, to families and communities, to races, nations and religions in a spirit of solidarity: 'What you do not wish to be done to yourself, do not do to others'."[2]

Refugees

In 1938 – 64 years ago and one year before the Second World War officially commenced – there was a refugee problem. An international conference was convened in Evian-les-Bains to address it. Many of the refugees from Nazi Germany had been driven to poor neighbouring countries without possessions, without papers and often only after paying their way. They tried to board ships and trains to safer, richer countries, to be told that refugee quotas were full. There was no room for queue-jumpers like them. Government delegates to the conference announced that they were sorry, but their countries could not help. Australia's representative, Sir Thomas White (a former High Commissioner to Britain and Minister in the Lyons Government), said that he came from a country which "does not have a racial problem, and [is] not desirous of importing one". (It should not be forgotten, of course, that the White Australia Policy had been the subject of the first law passed by the new Commonwealth Government in 1901.) Back home, a conservative member of the NSW Parliament, Graham Pratten, said that the "inflow of foreign Jews" had to be checked to prevent "a serious problem which will undoubtedly strike at the social, economical and political structure of this State".

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More recently, refugees have fled oppressive and undemocratic regimes in countries including Iraq, Iran and Afghanistan. The US war against Afghanistan has created millions more. Those who have tried to come to Australia have been described by the Prime Minister and other ministers as queue-jumpers (as if the line forms in Islamabad and flows in an orderly way to safe havens; in any event, to the extent that there is a queue, many illegal arrivals reached the head of it long ago and got tired of waiting), illegals, forum shoppers, economic refugees, criminals, potential terrorists and the ▶

victims of people-smugglers (although there is not much concealment attempted) who, in the Prime Minister's words, are "trying to intimidate us with our own decency". This is the language of vilification. How will those words sound in 64 years time? And how will the lack of official opposition to them be judged?

One cannot help wondering what the official approach would be towards a boatload of white farmers and their families fleeing Zimbabwe arriving off Fremantle.

It is said that "boat people" are attempting to buy their way into Australia ahead of more deserving cases. Have we forgotten the business migration scheme? As was expressed in an editorial in *The Australian* earlier this year:

"Genuine refugees who make their lives in Australia are a national asset. These people, who have made sacrifices and taken risks to make a better life for their families, free from persecution, are a self-selected aspirational class. They set up businesses, put a high value on education, and make an invaluable contribution to our economic, social and cultural life."[3]

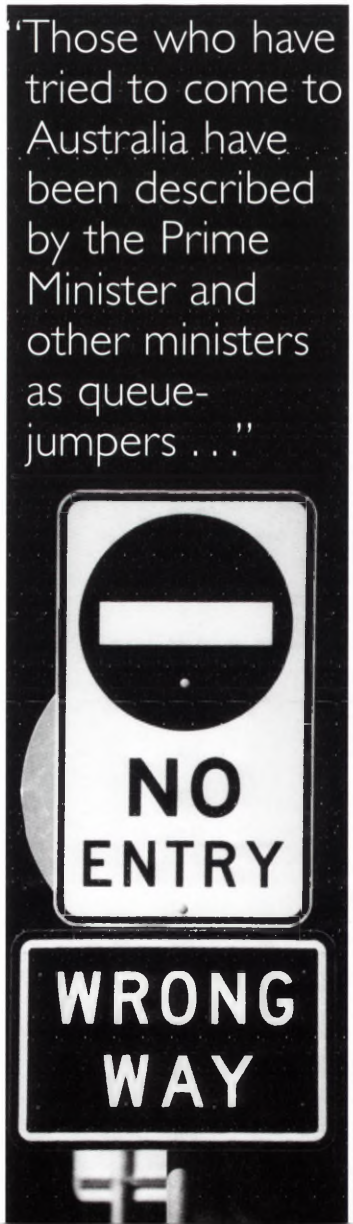
People attempt to enter Australia without permission for various reasons. Some seek asylum and must be assessed. If they qualify, they may be granted refugee status. A significant issue in Australia is the way in which that assessment process should be undertaken and how the people should be treated while it is taking place. At present we have a policy of mandatory detention for some of those involved.

The Australian also noted:

"Asylum-seekers, and the debate over how we should handle and treat them, will be with us for as far into the future as any of us might try to see. The world is beset by political persecution, poverty and war. Australia represents freedom, security and a better life and we will always find people seeking escape from oppression and a future for their children".

The numbers coming here are not great – certainly not the "flood" often mentioned. There is no emergency to be addressed. Australia processed 4,141 "boat people" and 1,508 "plane people" who were detected on entry in 2000-01. Britain processed 50,000 asylum seekers, Germany 100,000 and the US and Canada 420,000. We have about 2,000 people in detention, mostly "boat people" who arrive without documentation and frankly present themselves for processing (as opposed to "plane people" who usually try to deceive with false documentation and slip through if they can).

We are alone among the developed nations to have a policy of mandatory open-ended detention for asylum seekers. Many countries detain irregular arrivals for a short time, then release them into the community while they are processed further. Sweden has been there and done that in the Australian way – and has learnt its lessons. In the early 1990s, its system resembled Australia's, with all the problems we are experiencing at Woomera and other prison camps. After 1997 it changed its approach. Asylum seekers spend a couple of weeks in detention for health, identity and status checks and are then released into supervised custody of family or community centres. The results have been beneficial for all concerned.



The United Nations

For all its faults, the UN has done some good in this area. The 1951 Geneva Convention relating to the status of refugees entered into force on 22 April 1954 and Australia has been a party from the start. We are also a party to the 1967 Protocol.

One consideration in the preamble to the convention reads:

"Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature, cannot therefore be achieved without international cooperation . . . Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States ..."

The intention is clear – and flexibility and goodwill are required to make the treaty work.

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

The issue of whether or not a person found outside his or her country of nationality does in fact have the status of a refugee (or is not otherwise barred from the benefits of the convention) must be determined in each case. How is that person to be treated while that determination is made?

Article 16 of the convention provides:

"1. A refugee shall have free access to the courts of law on the territory of all Contracting States."

But what access should be provided in the determination process?

Article 31 of the convention provides:

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

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all necessary facilities to obtain admission into another country."

Article 32 provides:

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

Article 33 prohibits "refoulement" – expulsion or return to the territory where his or her life or freedom would be threatened on specified grounds.

Article 35 requires cooperation of the Contracting States with the United Nations.

Australia has had a mixed relationship with the UN. In recent times it has criticised it for attempting to meddle in Australia's domestic affairs. When UN agencies have criticised Australia, our response has been to shoot the messenger.

Last year was the 50th anniversary of the refugee convention. In the October 2001 issue of the *Alternative Law Journal,* Dianne Otto, a teacher of law at the University of Melbourne, wrote:

"The present Australian government has retreated, from what Professor Hilary Charlesworth has described as the 'reluctance' of its predecessors to domestically implement Australia's international human rights obligations, to the even less defensible position of Australian 'exceptionalism' with respect to these obligations. This new low point in Australia's commitment to the international human rights system was confirmed by the Joint Ministerial Statement of August 2000, which announced that the government's future cooperation with the human rights treaty committees would be 'strategic', in the sense of maximising positive outcomes for Australia, and contingent on unspecified reform of the system. The announcement conveniently side steps the fact that Australia is under an international legal obligation not only to domestically implement the rights enumerated in the treaties that are monitored by the committees, but also to periodically report to the committees on its progress, in good faith. There is no provision in the treaties, nor indeed in treaty law more generally, that would allow States to limit their interactions with the committees as they see fit, or to set preconditions for engagement with them".

Indeed, if individual countries decided to impose their own restrictions on treaty provisions, the treaty system would become unworkable and an international approach to problems such as refugees – or even a regional approach so favoured by the federal government – would become impracticable.

Also in October 2001, the Immigration Minister said that the UN High Commissioner for Refugees had tried to trick Australia into processing the Tampa refugees on Australian soil ▶

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by offering them refugee places in other countries – the point being that if they qualified here as refugees they could not then be forced to leave.

The Pacific Solution

On 26 August 2001 Captain Arne Rinnan of the Norwegian container ship MV *Tampa* (who has since been decorated by his country for his actions) picked up in the Indian Ocean 433 people from an unseaworthy boat. The Conventions on Safety of Life at Sea and the Law of the Sea – as well as common humanity – require assistance to be rendered where vessels are in distress. (I note in passing that the federal government is even now trying to sidestep that obligation on our behalf by arguing that only leisure and commercial craft in distress, and not refugee boats, need to be assisted. There is no basis in international law or practice for such a distinction.) Entry to territorial waters and to a port are required to be given to any vessel on which the master has declared a state of emergency.

While the *Tampa* was still in international waters but heading towards Christmas Island, the Australian Government gave Captain Rinnan, by telephone, the warning given to people smugglers – go away from Australian territory or face the penalties in the *Migration Act*. (The *Migration Act* applies only when a landing has been made on soil in the declared migration zone.) The Administrator of Christmas Island was ordered to ensure that no boat from there approached the *Tampa*. Medical and humanitarian assistance was requested and refused. The UN, which wanted the people processed on Christmas Island, was rebuffed. The Prime Minister announced that the people on the *Tampa* "will not be given permission to land in Australia or any Australian territories". This was said in an election campaign. An official mindset had been formed. It became a core promise and the die was cast – the "Pacific Solution" had been conceived. Its birth, however, was not easy.

The UN High Commissioner for Refugees had found countries to take many of those on the *Tampa*, but this was the trick or "ruse" to which the Immigration Minister had referred. Most of the people involved were fleeing from Afghanistan and belonged to one of the most highly persecuted minority groups in the world.

The Navy and the SAS were deployed and events unfolded that are well known to any newspaper reader. They allowed Peter Bailey, lecturer in human rights law at ANU, to write in the *Alternative Law Journal*:

"Who would have thought, five years ago, that Australian officials would be hunting round the Pacific islands pleading at great cost for a processing place for a paltry few hundred people seeking refugee status in Australia? Who would have expected our national government, in response to these arrivals, to enact – or even parliament to pass – 'emergency' legislation ousting the courts, paving the way for extensive use of executive power, using naval vessels for migration purposes, and becoming an object of derision around the world? Coming on top of tiffs with the main international human rights treaty committees about Australia's racially discriminatory treatment of its own citizens, its treatment of refugees contrary to international law, and its failure adequately to meet its reporting obligations, Australia's reputation as a 'good international citizen' is distinctly in disrepair".

The Rule of Law

Migration law was already a difficult enough area of practice

before the *Tampa*. Now it has become even more complicated.

On the court front, on 31 August 2001, lawyers acting *pro bono* challenged the detention of the people on the Tampa which was now hove off Christmas Island. The Victorian Council for Civil Liberties filed an application for habeas corpus and mandamus in the Federal Court and for an injunction to preserve the territorial jurisdiction of the court.

Justice North at first instance ordered that the asylum seekers be released from detention and delivered to the Australian mainland. The Full Court, by majority, reversed that decision. Three weeks later, HMAS *Manoora*, having loaded them from the *Tampa*, disembarked the asylum seekers on Nauru. The "Pacific Solution" had been born.

On the legislation front, the government reacted by introducing into parliament a bundle of six enactments that were passed with the assistance of the Opposition, amending the *Migration Act* and associated legislation.

The *Border Protection (Validation and Enforcement Powers) Act 2001* retrospectively validates all action taken between 26 August and 27 September 2001 on the *Tampa* and other vessels, and prohibits any criminal or civil proceedings in respect of that action. As Gavan Griffith QC, former Commonwealth Solicitor General, submitted to the High Court in November 2001 during a challenge to the legislation:

"If a Commonwealth officer stole or damaged property belonging to any of the rescuees, or even murdered a rescuee or the captain of the ship, the sections purport to require courts to treat such actions as lawful. They would preclude any judicial examination of the bona fides or reasonableness of any actions of the Commonwealth or its officers and agents in effecting the exclusion or expulsion of the rescuees. The sections are capable of covering the exercise or non-exercise by officers of the Commonwealth of statutory and non-statutory powers".

The Act also allows the future detention of ships and those on board in certain circumstances. It imposes a mandatory penalty of five years imprisonment on anyone involved in bringing asylum seekers to Australia – but not on asylum seekers. (The Federal Opposition once opposed mandatory sentences.)

The *Migration Amendment (Excision from Migration Zone) Act 2001* casts out from Australia for migration purposes a number of our 10 external territories including Christmas Island, Ashmore Reef, Cartier Island and the Cocos (Keeling) Islands and prevents asylum seekers who land there from applying for visas (except in limited circumstances).

The *Migration Amendment Excision from Migration Zone (Consequential Provisions) Act 2001* penalises people who arrive not directly from their country of origin by only permitting them successive temporary visas and preventing them indefinitely from applying for permanent visas. Family rights are affected. (This, like the other legislation, can apply to all asylum seekers, not just those arriving by leaky Indonesian boats.) Consequently, these asylum seekers who are found to be refugees will never have access to the same social and welfare services as those holding permanent visas.

The *Migration Legislation Amendment Act (No. 6) 2001* affects all asylum seekers, including those already in Australia. It redefines terms such as "persecution" (requiring it to be the "essential or significant" reason involving "serious harm" to a person) and so affects the proof of refugee status. It excludes persons who are included in a family application from applying in an individual capacity. It allows a decision-maker to draw adverse inferences from an applicant's demeanour or conduct in certain respects.

The *Migration Legislation Amendment Act (No. 1) 2001* limits judicial review of decisions about a person's visa entitlements, prohibits class actions and limits the classes of people who have standing to bring proceedings in the Federal Court. Offshore entrants may not initiate legal proceedings in Australia for breaches of human rights. Time limits are placed on applications to the High Court.

The *Migration Legislation Amendment (Judicial Review) Act 2001* creates a new judicial review scheme in the Federal and High Courts and narrows the courts' jurisdictions.

These are but some of the more recent steps that have been taken by federal governments to limit access to the courts by asylum seekers. In 1992 the Labor Government limited appeals to the Federal Court from administrative decisions. The merits of decisions could not be questioned; but judges could correct procedural irregularities. In 1998 the Coalition ▶

Government tried to end all migration appeals but Labor opposed it. Now courts have been all but removed from the process. Victims of procedural irregularity such as bias, fraud, error of law, lack of evidence and improper use of power have nowhere to go; subject to what the High Court may yet say.

A Better Way

It is not too late to get off this slippery slope to disorder while still enabling everyone concerned to preserve their rights and values. Remember that "boat people" are only a small part of the problem – more than twice their number are "plane people". They arrive on aircraft, on tourist or student visas or with false papers, and are either detected as false on arrival or later claim refugee status. With few exceptions, they are not put into detention while they are processed and those who live among us have not brought about the ruin of civilisation as we know it.

In *The Australian* earlier this year some proposed solutions were presented that deserve consideration (although I do not advocate all of them).[4] Peter Mares also put forward a workable series of proposals in the *Sydney Morning Herald* late last year.[5] The following propositions may be distilled from those and from other suggestions that have since been made:

1 Australia may not be able to decide who comes here; but we can control, to a very large extent, who stays here.
2 Short-term detention for unauthorised arrivals and asylum seekers for immediate checking should be followed by release of asylum seekers into supervised accommodation in the community (and not in absurdly remote locations) while their applications are processed. Unattached children should not be put into detention at all.
3 Processing should be done more quickly by more personnel.
4 The final decision should be reviewable by one court only, preferably the Federal Court.
5 People arriving in groups should be housed and processed as groups.
6 Agreements should be negotiated with source countries that would enable humane repatriation of those not qualifying as refugees (provided that adequate conditions for receiving them existed in those countries).

Conclusion

If we could approach the problem in the above fashion we could remove most of the stubbornness and acrimony that presently surrounds almost every discussion of this subject. We could reverse the trend to demonise anybody who is not like us. We could heal the rift in Australian society and become a more comfortable global citizen.

Plaintiff lawyers, acting *pro bono* or otherwise, have a significant role to play in ensuring that we end up with a country to which asylum seekers will still want to come. PL

Footnotes:

1 This is an edited version of a paper presented by Nicholas Cowdery QC at the APLA NSW State Conference in March 2002.
2 *Sydney Morning Herald*, 5 February 2002.
3 *The Australian*, 6 February 2002.
4 *The Australian*, 6 February 2002.
5 Peter Mares, *Sydney Morning Herald*, 7 December 2001.