

LEGAL STUDIES

'Everyone has the right to seek and to enjoy in other countries asylum from persecution.' This concept is enshrined in Article 14(1) of The *Universal Declaration of Human Rights*, but due to the nature of international law and state sovereignty, is not always abided by.

The 1948 *Universal Declaration of Human Rights* came about as a result of World War II and is the first expression of rights belonging to all human beings. Article 14(1) of the *Universal Declaration* states that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. Further, Article 1A(2) of the *Refugee Convention* defines a refugee as a person who 'owing to 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 fear is unwilling to return to it.' The Right to Asylum is a current Human Rights issue reflected in the complete disregard for International Law that Australia has shown in recent decades. Under the *International Convention of Civil and Political Rights* and the *Convention Against Torture*, Australia must not disallow anyone asylum who faces abuse of their rights, whether or not they fit the definition of refugee in the *Migration Act 1958 (Cth)*.

In past decades, Australia has created for itself a reputation of creating an overwhelming amount of fear and grief in those who sought refuge in their country. In addition to this, asylum seekers also experienced a sense of total dislocation not just from the society from which they fled, but from the society in which they hoped would allow them to begin a new and prosperous life. These emotions were evoked by policies such as the Pacific Solution, which disallowed asylum seekers to land on Australia's mainland and sent them to detention camps on small pacific islands including Christmas Island and Manus Island. Fortunately, under the Rudd government the pacific solution was abolished in early 2008 with the closing of the last immigration centre on the pacific island of Nauru in Australia, which housed twenty-one Sri Lankan men. In a media release from HREOC, Australian Human Rights Commissioner Graeme Innes commented that he "was pleased that the Sri Lankan men could finally access the protection to which they are entitled under international law." Despite this major step, detention centres still exist around Australia including Villawood and Perth detention centres. Asylum seekers are placed here if they arrive without a visa. Those who reside in these centres are often subject to poor conditions and more frequently, affected by mental illness and suicidal attitudes perpetuated by their current situation. "The department of immigration documented... 'Between July and December 2001, there were 688 major incidents involving 1149 detainees across all detention centres. 174 were self-harm incidents (25 of which involved children)" (Phillips, 2007 p. 102) *The Convention on the Rights of the Child* also requires Australia to provide special protection to refugee children and children seeking asylum in Australia, which as evidenced in the facts above, is not being carried out.

In addition to this, the Howard government also made use of the Temporary Protection Visa scheme, which presented refugees with an uncertain future. Further, a media release from a U.S. initiative, Human Rights Watch stated that Australia was "the only country to require refugees who have already been recognized as genuine refugees, as a result of rigorous and demanding determination procedures, to re-prove their claim in light of new circumstances, several years later...Nothing in the drafting or preparatory notes for Article 1A of the *Refugee Convention* suggests that States would determine status over and over again in each individual case." (Human Rights Watch, 2008)

The Australian Government disallowed refugees to enjoy in other countries asylum from persecution and by implication, contradicted the *Universal Declaration of Human Rights*. Despite being looked upon negatively by the international community, The Howard Government was acting in accordance with the Australian Constitution.

Domestic measures

The *1951 United Nations Convention Relating to the Status of Refugees* and the *1967 United Nations Protocol Relating to the Status of Refugees* has been given a domestic effect in the *Migration Act 1958* (Cth). This act determines whether an asylum seeker is actually a refugee. However, this act, although seemingly in accordance with Australia's international obligations, provides differing meanings to the word 'persecution' and 'refugee'.

Under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), HREOC has the power to inspect the conditions within detention centres annually, along with many other responsibilities. This includes investigating individual complaints of breaches of human rights in detention. Often, HREOC's reports find their way into Parliament through the Attorney general as a point of debate. However, HREOC's recommendations are not legally enforceable.

The Immigration Detention Advisory Group is a government initiative that aims to provide advice to the Minister. The members of this group regularly visit detention centres, individually or in a collective group, to gather information and note the "appropriateness and adequacy of services, accommodation and amenities in detention." However, similarly to HREOC, their decisions are not enforceable and act simply in an advisory role. (IDAG, 2008)

The Department of Immigration and Citizenship acts similarly to HREOC as it conducts inspections of Immigration detention centres. Their key objectives are:

- To control lawful entry of people into Australia.
- To maintain effective border security.
- Encourage Australia to value citizenship, welcome cultural diversity and allow migrants to live equitable.

These objectives reflect the attitude of Australian Parliament while incorporating the values of the *Universal Declaration of Human Rights*. In essence, The Department of Immigration and Citizenship takes a humanitarian approach to the issue of asylum seekers and refugees.

Despite the numerous amounts of government initiatives in place to deal with complaints and the conditions of detention centres, there is still not enough in Australian legislation to regulate this.

International measures

The Office of the United Nations High Commissioner for Refugees was founded on December 14, 1950 by the United Nations General Assembly. This agency endeavors to promote, manage and defend the rights of refugees and to resolve the tribulations of refugees worldwide. It endeavors to make certain that all people have access to and can exercise the right to asylum with the option of returning to their country voluntarily. UNHCR bases their evaluation of refugees on Article 1A(2) of the Refugee Convention. In over fifty years, the agency has assisted an estimated 50 million refugees in rebuilding their lives.

The 1951 United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees (or together, the Refugee Convention) create the international framework outlining the responsibilities of nations towards refugees. World War II and the immense amount of refugees it created influenced these attitudes preserved in these two conventions.

These measures though small in number are succinct in their aim.

Effectiveness of these measures

International law is generally limited by the fact that it is not enforceable due to the nature of State Sovereignty and human rights laws are no exception. Many countries, to differing degrees, are seen to respect international laws, at the fear of being criticized by the international community.

Each country has its own measures for applying international obligations into domestic law. In some, the constitution indicates that treaties form part of the law of the land. In others, including Australia, a law must first be passed which reflects the terms of the treaty before its obligations can affect domestic law.

Australia has contradicted its obligation to many International agreements through the *Migration Act 1958 (Cth)*, which disallows asylum seekers entry into Australia if they have arrived without a visa. They are placed in detention awaiting temporary visas or removal from the Australia altogether. The *Migration Act 1958 (Cth)* limits the effect of the Refugee Convention. In many ways, International law influences Australian law and it would seem that Australian legislation is in compliance with its international obligations. However, slight changes to words such as 'persecution' and 'refugee', made under Australia's right to state sovereignty, can create an entirely different perspective on the treatment of asylum seekers.

In *A v. Australia 1993*, an asylum seeker of Cambodian decent complained to the Human Rights Committee that his extended detention was in breach of Article 9 of the International Covenant on Civil and Political Rights. Article 9 prohibits unwarranted detention of a person and gives the right to challenge a decision. In 1997 the commission recognized and communicated this violation to the Australian government, which wholly rejected the Committees view. In response to this, the committee simply expressed its concern at Australia's attitude. This response was the most it could do under the power it possessed.

The fact that there is nothing in Australian legislation which deals with breaches or conditions of detention centres, individuals who feel they have been treated unjustly can only take their cases to the international courts, whom in the end have no say in the operations of a sovereign state, like Australia.

The domestic measures implemented by the Australian government include a long list of government initiatives that although do influence the decisions of parliament, their decisions are not enforceable. Therefore, their attempts, similar to international law, to alter the attitudes of parliament are often in vain. Their aims, however, do reflect the humanitarian values behind the *Universal Declaration of Human Rights* which if applied in accordance to Commonwealth legislation would be a significant and effective step towards abolishing the attitudes that have been present in Australian society since the beginning of its history.

Ultimately, "the value of international human rights law lies in whether and to what extent it is implemented into domestic law." (Rice, 2001 p. 10)

Bibliography

Books

Adams, P et al., Lusher, D & Haslam, N (eds), 2007, *Seeking Asylum in Australia: Yearning to Breathe Free*, The Federation Press, Australia.

- This book was published a month before Kevin Rudd was elected which despite many policies still in place, including the pacific solution, better reflects societies current attitudes towards asylum seekers. This source does not contain bias as it presents the views of a wide range of

people in society including “academic, political, journalist and activist voices to similar degrees.” This source was useful for this reason. It provided varying perspectives, each valid in their discussion of the issue at hand.

Connelly, S 2002, *Questions from the Asylum*, Contemporary Otford Series, Kuala Lumpur.

- This source contains bias as it is written from a highly Christian point of view. It does not consider whether refugees are treated justly under the law, rather whether they are treated justly in the “eyes of God.” Despite its origin of publication, it does focus on Australia’s treatment of refugees from the perspective of a citizen during the Howard Government. Due to recent and radical changes made by the Rudd Government in the past year, many of the views expressed in this source are not applicable. It was however, useful in identifying empathetically with the plight of those who seek asylum in Australia and demonstrated clearly how the treatment of refugees is not utilitarian, therefore unjust which is the polar opposite of what the *Universal Declaration of Human Rights* aims for.

Journals

‘Outside the Paddock’ 2002, *Alternative Law Journal*, vol 5, pp 220-239

‘Truth in Law’ 2002. *Alternative Law Journal*, vol 27, pp 165-170

- Alternative Law Journals give an unconventional view into a range of issues. They also provide more in depth and specific analyses of issues. These journals deal with the issues in a strictly legal sense that directly contrasts to the above books. This allowed for a more in depth examination of the task at hand in the context of the law and it’s functions. However, similarly to the books above, the fact that they were both published six years ago impacts greatly on their content and opinions as a reflection of the government at the time.

Websites

Asylum Seekers and Refugees, 2008. Retrieved 13 November 2008, from http://www.humanrights.gov.au/human_rights/immigration/asylum_seekers.html

Immigration Detention and Human Rights, 2008. Retrieved 13 November, 2008, from

http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html

- This site and the one above were guided by the questions asked of society therefore answered many questions that I myself was asking. They addressed the issue of asylum seekers in direct accordance with Human Rights and therefore were extremely useful sources. Despite being a government website, they addressed the positive and negative approach by the Government.

The Immigration Detention Advisory Group (IDAG), 2008. Retrieved 13 November, 2008, from <http://www.immi.gov.au/managing-australias-borders/detention/regulations/idag.htm>

About the Department of Immigration and Citizenship, 2008. Retrieved 13 November 2008, from <http://www.immi.gov.au/about/department/who-we-are.htm>

- Clear and concise, these sites gave direct and factual information about their government departments. Their validity was enforced by the fact that the Australian Government published it. It contained no bias, as the information was short and succinct.

The 1951 Refugee Convention, 2008. Retrieved 13 November, 2008 from <http://www.unhcr.org/cgi-bin/texis/vtx/home>

- This website provided a wealth of information, not just about the organisation itself but also about others like it. It provided an international perspective on the issue of asylum seekers, which at times was not applicable in Australia. It included media reports, statistics and a plethora of publications from many organisations.

Overall, the use of websites provided much more up to date information, which was an essential factor in addressing the very current issue that is asylum seekers in Australia. However, the use of books and journals provided more in depth information, about international law and the status of refugees.

Although I did encounter some bias, I was able to evaluate its relevance within my report and was capable of editing it out to leave only fact.

As Australian citizens, what are your rights?

You have a right to life, liberty and the security of person, a right to recognition everywhere as a person under the law and the right to not be subjected to arbitrary arrest detention or exile to name a few. These rights, in addition to a large list of others, are inalienable, meaning they cannot be stripped from you. The power of this word is limited as human rights laws are not enforceable. Australia has been faced with many human rights issues creating tension in the international community. A perfect example would be Australia's response, or lack of, to the Right to Asylum. Australia did not react in accordance to international standards or respect the human rights of a minority group. Would a bill of rights alter Australia's commitment to their international obligations?

In order for human rights to be better protected does Australia need a bill of rights? As Australian citizens that is your choice to make. Australia has a democratically elected Parliament whose powers are closely monitored by the Senate and the opposition has many chances to scrutinize and question the government's actions. In addition, our judicature, in accordance with the separation of powers, acts completely separate from Parliament without favour and protects our rights through interpretation of the constitution and common law. It would seem that Australia's legal structure is continually self-reflexive and through robust debate is able to review its response to human rights. In the past year, the newly elected Rudd Government has demonstrated the effectiveness of our government in dealing with these issues. In early 2008 the Pacific Solution was abolished and several asylum seekers were granted refugee status in Australia. This action, enabled by the government, is a significant step in allowing Australia to lift its reputation once again.

The Human Rights and Equal Opportunity Commission is just another initiative set up by the government to assist in upholding human rights for all. The commission promotes and upholds human rights allowing a response from the public, which often shames the government into doing the right thing. The structure of Australia's government, and initiatives put forward, are evidence enough that Australia is more than capable of dealing with human rights issue without the need for a bill of rights.

It is understood that the Australian constitution does already cover many human rights. Is it acceptable to enshrine one right in the constitution but not another? The constitution is a perfect example of how a bill of rights will be looked upon in

years to come. Many ideals present in current society are not included in the 100-year-old Australian Constitution. For example, the issue of equality for women. If we expand our view to the international community, America is currently in debate over whether guns are relevant in today's society.

In the 18th century, when America's bill of rights was introduced, guns were a part of every day life and therefore, are included in Article 2, the right to bear arms. More than 200 years later it is a point of debate which is beginning to divide the country. As societies views inevitably change it is imperative that our human rights remain flexible.

In addition to these points above, a bill of rights would be an extra expense for the government due to the amount of litigation that it would produce.

However, to make a fully informed decision you must consider Australia's pitfalls in protecting our rights.

Many universal rights, such as the controversial Right to Asylum are not recognized in Australian law. This has been an issue that has disgraced Australia in the international community. Article 14(1) of the Universal Declaration states that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. Australia, under the Howard Government, demonstrated how simple it was to challenge international agreements and threw illegal immigrants into detention centres where many were subject to emotional hardships and had their liberties stripped from them. "The department of immigration documented... 'Between July and December 2001, there were 688 major incidents involving 1149 detainees across all detention centres. 174 were self-harm incidents (25 of which involved children)". This treatment defies Australia's international obligations, which is permitted due to Australia's sovereignty. A bill of rights would help Australia to reach its international obligations and expectations.

A bill of rights would recognise and protect universal rights including many that are not currently protected by Australian law. It would empower and bring justice to minority groups such as Refugees, silenced in detention. In turn, this would enhance Australia's democratic attitudes.

The government would be subject to the bill of rights, allowing individual liberties to rise above the decisions of politics. Does Australia need a bill of rights? There are legitimate and strong arguments for and against this issue. As Australian citizens, that is your choice to make.