

# LEGAL STUDIES

## Legal Speech – Human Rights –Asylum Seekers and Refugees

---

Every day people leave their homes, communities and countries. Some leave because they are afraid. They are afraid of their lives, and for the lives of their children and loved ones. Others leave – compelled by their social or economic situation.

Refugees, asylum-seekers, migrants and internally displaced people, like everyone else, have human rights. They all have the right not to suffer discrimination.

Whether in purpose-built camps, in settlements or in urban areas, people on the move often have to live in squalid conditions. They are vulnerable to abuse and exploitation.

Yet, all over the world, governments and the media continue to portray people on the move as a problem rather than people fleeing human rights abuses or seeking a measure of economic security for their families. Highly charged debates pay little regard to the political or human rights crises people have left. Nations adopt sophisticated immigration controls to prevent them stepping foot on their territories.

You may wonder that asylum seekers is not a specific listed human right, however in our contemporary context the issue of asylum seekers and refugees in regards to human rights has become a significant one. This is due to two reasons. Firstly refugees and asylum seekers are the result of a government's failure to protect human rights. And secondly is in regards to their treatment when they arrive on foreign shores, which endanger their human rights.

So really what are these human rights? Human rights are "basic rights and freedoms to which all humans are entitled. Such as the right to life and liberty, freedom of expression, and equality before the law.

These fundamental rights are publicized and protected through the universal declaration of human rights, developed by the general assembly of United Nations in 1948. Since its adoption in 1948, the declaration has been and continues to be a source of inspiration for national and international efforts to promote and protect human rights and fundamental freedoms.

First we must establish the inextricable link between the issue of asylum seekers and the notion of human rights. In revealing this link, we do not have to look abroad but can clearly identify it on our shores, in Australia, among us.

An asylum seeker is someone who has fled their own country and applies to the government of another country for protection as a refugee. According to the United Nations Convention and Protocol relating to the Status of Refugees (the Refugee Convention), a refugee is someone who is outside their own country and cannot return due to a well-founded fear of persecution because of their race, religion, nationality, membership of a social group or political opinion.

Australia has obligations to protect the human rights of all asylum seekers and refugees who arrive in Australia, regardless of how or where they arrive, and whether they arrive with or without a visa. The right to seek and enjoy asylum from persecution is enshrined in Article 14 of the Universal Declaration of Human Rights. Article 14.(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

As a party to the Refugee Convention, Australia has agreed to ensure that people who meet the definition of refugee under the Convention are not sent back to a country where their life or freedom would be threatened. This is known as the principle of non-refoulement.

In addition, Australia has obligations not to return people who face a real risk of violation of their human rights under the International Covenant on Civil and Political Rights, and Convention Against Torture (article 3). The Convention on the Rights of the Child also requires Australia to provide special protection and assistance to refugee children and children seeking asylum in Australia.

Discussing Australia's breach of human rights in regards to asylum seekers is focused during John Howards prime minister ship. Our treatment of asylum seekers has to some extent improved since then. So how did Australia seem to breach its human right obligations in its treatment of asylum seekers. Well it was the issue of detaining them as soon as they entered our shores – called mandatory detention.

Human rights law, including Article 9 of the Covenant on Civil and Political Rights, prohibits arbitrary detention, requiring that any detention must be in accord with procedures established by law. Detention should normally be avoided. Detention is allowed if prescribed by law to verify identity; to determine the elements of which the claim to refugee status or asylum is based; or to protect national security or public order.

The conditions of detentions and conditions must be must be "humane," When it is necessary and on grounds prescribed by law, detention of asylum seekers is allowed. However, international standards are clear that detention of asylum seekers is understood to be the exception, not the rule.

Under the Migration Act 1958 (Cth) (the Migration Act), asylum seekers who arrive on the Australian mainland, without a valid visa, must be held in immigration detention until they are granted a visa or removed from Australia.

Under the Migration Act, asylum seekers who arrive in excised offshore places such as Christmas Island were also detained. The current policy of the Australian Government is that all unauthorised boat arrivals in excised offshore places will be subject to mandatory detention on Christmas Island.

The United Nations Human Rights Commission has described conditions in Australia's detention centres as "offensive to human dignity". The United Nations Working Group on Arbitrary Detention has described Australia's detention centres as "worse than prisons" and observed "alarming levels of self-harm". They have found that the detention of asylum seekers in Australia contravenes Article 9 of the International Covenant on Civil and Political Rights, which bans arbitrary detention.

The Delegate of the United Nations Human Rights Commissioner who visited Woomera in 2002 described it as "a great human tragedy". Human Rights Watch and Amnesty International have repeatedly criticised Australia's policy of mandatory detention and the conditions in which people are held in detention.

Even in the 2009 Report on immigration detention by the human rights commission claims that the 'The IDC looks and feels like a prison. The Minister himself acknowledges that it represents a 'maximum security environment.' The security measures are excessive and inappropriate for accommodating asylum seekers'.

This image is a snapshot from SBS TV series 'Woomera 2002' – in this image we see a guard asking one of the detainees at Woomera Detention Centre if he needed food or water as he was on a hunger strike. The man simply replied I need 'freedom'.

In response to this critical issue, various organizations have taken a stand on this issue. Non-legal measure to some extent have been effective in raising this issue and in publicizing it. Amnesty is one organisation that has made significant impact and taken a firm stand regarding the treatment of asylum seekers.

Amnesty International Australia has been campaigning on behalf of refugees in Australia since 1993 when mandatory detention was introduced, and has also been a part of several international refugee campaigns. Amnesty International Australia's refugee campaign is committed to improving both Australia's Onshore and Offshore refugee programs and making sure that the Australian government fulfils its international obligations towards refugee applicants. The campaign works to ensure that all asylum seekers in Australia are treated humanely and with dignity. Amnesty has provided various submissions to the government of Australia regarding the treatment of asylum seekers e.g. in ending the policy of mandatory detention.

The Human Rights Commission has also undertaken a range of activities aimed at ensuring that the immigration detention system complies with Australia's international human rights obligations. One of these activities has been monitoring conditions in immigration detention. The Commission has conducted numerous visits to Australia's immigration detention facilities, including annual inspections of mainland facilities over the last three years. This year the Commission conducted a stand-alone visit to Christmas Island due to the significant number of people being held in immigration detention on the island; the limited access those people have to the Australian legal system; and the lack of publicly available information about the detention operations on the island. The commission has been effective in identifying if the treatment of asylum seekers especially in relation to immigration detention operations complies with internationally accepted human rights standards. However it is limited in the sense that the government does not have to comply with the commissions finding and recommendations.

The legal measures in addressing this issue to some extent can be said be too be 'negative'. Features of The migration act 1958 (CTH) contradicts the treaties that Australia is a signatory of. Under the Migration Act, asylum seekers did not have the right to periodic judicial review of their detention, and the courts generally lack any independent power to order their release.

Also in High courts cases such *Al-Kateb vs Godwin*, High courts have interpreted the ambiguous parts of the migration act that have proved to be negative for the defendant. In this case it was affirmed the legality of indefinite detention of asylum seekers. In such case, the migration act and the constitution was used to support the high court's decision. In the report 'Not at Home' it was said that Australia went against its international obligations in handing down its verdict in this case. This comment is trying to say that Australia cannot use its own domestic law, to explain its reasons in failing to follow its treaty obligations. Therefore, Australia cannot use its Constitution or the migration act as an excuse for violating its duties under the international human rights treaties it has signed.

Finally any positive changes that occur only exist as Department of immigration policies, they are not legislated. I believe that policies should become law, in order to minimize the return of damaging practices such as prolonged detentions. Legislation also should be enacted to set out minimum standards for conditions and treatment of detainees in all of Australia's immigration detention facilities, including those located in excised offshore places. The minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.

Without a doubt, immigration is a complex political issue. Immigration laws must balance competing interest of regulating illegal arrivals, ensuring national security and protecting the rights of all individuals within Australian territory. While acknowledging these competing demands, Australia's international obligations are of great importance and should not be ignored by either courts or the federal government. As Justice Kirby J rightly points out, 'opinions that seek to cut off contemporary Australian law... from the persuasive force of international law are doomed to fail'.