REFUGEE CONFERENCE
KEYNOTE ADDRESS

The Hon David K Malcolm AC[*]

I am delighted to have been asked to present the keynote address to this inaugural *Refugee Conference* and I join in welcoming you all to what I am sure will be a most successful convention.

You will have noted on the cover of the conference programme, a statement by the United Nations High Commissioner for Refugees which reads; "the road of the refugee is as long as you make it". Unfortunately, recent reports suggest that for the majority of unauthorised arrivals in Australia, this road is a very long one indeed. This morning I would like to speak to you not so much as Chief Justice, but as a longstanding member of the International Commission of Jurists and Chair of the Western Australian Branch (as well as an Ambassador) of the Red Cross with a particular focus on international humanitarian law. Both organisations have a history in relation to issues relating to refugees.

As you are aware, Australia has been a signatory to the *United Nations Convention Relating to the Status of Refugees* since its inception some 46 years ago. In committing to this convention, and its 1967 protocol, Australia has undertaken to protect and assist those that wish to pursue a claim for refugee status in Australia. The term 'refugee' is defined in Article 1A(2) of the convention as applying to 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 is unable, or owing to such fear, unwilling to return to it.

In essence this means that a refugee is a person who, for one reason or another, is denied the land of their ancestors. The mass dislocations caused by the expulsion of the Jews and the Moors from Spain in the 15th century were the first incidents of refugees in recorded history. However, it wasn't until after World War I that international bodies, such as the League of Nations, created organisations to give assistance to those persons who were dislocated from their homelands. Following World War II, the United Nations Relief and Rehabilitation Administration undertook the responsibility of caring for over 8 million displaced persons. Subsequent conflicts in Korea and throughout Asia and Africa have produced over 23.7 million refugees from the 1956 Hungarian Revolution to the 1971 India-Pakistan war. The beginning of 1999 saw the world refugee population at about 16 million in countries across Europe, Africa and Asia, not including approximately 30 million persons displaced within the boundaries of their own countries.

In recent years the number of people arriving without permission and seeking asylum in Australia has increased. Many of these asylum seekers arrive by boat - a fact perhaps not too surprising for a country which, as our national anthem reminds us, is 'girt by sea'. These people are often branded as "queue-jumpers". It is a familiar refrain and one which is repeated frequently in the press and on talk-back radio. But let us just

---

[*] *Chief Justice of Western Australia.*

take a moment to analyse this view. Australia's current humanitarian program offers 12,000 places per annum to refugees.[1] Of these 12,000 places, only 2,000 are available for those arriving in Australia illegally and who are subsequently found to satisfy the definition of 'refugee'. Clearly, the current program favours offshore applicants. This is the 'queue' to which I just referred. Of the 10,000 places available to offshore applicants, priority is placed upon applications from the former Yugoslav Republic, the Middle East and Africa.[2] Yet a significant number of our boat arrivals hail from countries within Asia, including Indonesia, Cambodia, Vietnam and China. In these cases, and indeed in cases where there is evidence of a 'reign of terror', access to the 'queue' may well be inhibited. For some, there may appear to be no choice but to seek refuge by unauthorised arrival in this or some other country.

For those that make the difficult decision to leave their country and denounce their citizenship, the hostile connotation of the term 'queue jumper' and the public ill-feeling toward refugees that it generates is simply one more burden they must bear. Of the many other burdens, consider the following.

Many, if not all, of these people have suffered or have reason to fear persecution in their own countries. They have been driven by fear for their lives or liberty to seek asylum in a far away and isolated land. They have often paid large sums of money — which for some represent their entire life savings — to individuals that promise them a better life. They have endured a long journey fraught with unknown peril. They have either been met in territorial waters by naval or patrol vessels or they have arrived upon our shores and been left to fend for themselves in an unknown and sometimes hostile environment. Eventually they have been arrested, and pursuant to our immigration laws, they have been transferred directly to an isolated detention centre. Here they suffer the physical and mental stress that accompanies such detention in the short-term. After prolonged detention they may get used to the often inadequate conditions but are faced with greater concerns for their future as time passes with little word about the status or progress of their applications. Because of the isolation of their detention, they have limited access to legal advice, inadequate facilities for the observance of their religious or cultural practices and restricted specialist medical services. The organisations that try to help them have inadequate resources and frequently do not receive the full co-operation of the authorities. This has certainly been the experience of the International Commission of Jurists of which I am a member.

While the description by one writer of Australia's refugee policy as "the most draconian in the world"[3] may seem emotive, that policy is both restrictive and apparently insensitive by comparison to those of other countries, such as Canada.

Potentially the most objectionable element of current Australian refugee law is that which dictates the mandatory detention of all unauthorised arrivals. In a 1998 report, the Human Rights and Equal Opportunity Commission (HREOC) concluded that the mandatory detention policy is in breach of recognised international human rights standards[4] - an observation repeated by many of the learned commentators writing in the area. Of the case studies described in this report, I have selected one which I

---

1 Department of Immigration and Multicultural Affairs Factsheet No. 1, *Immigration: the Background,* at 3.

2 Ibid.

3 Russell, Stuart "A Failure of Democracy" (1995) 20(2) *Alternative Law Journal* 96 at 96.

4 Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas,* AGPS, 1998 at iv.

believe serves best to illustrate the enormity of the task ahead if we are to seek a more humane approach to our treatment of refugees.

This case study describes the plight of two Cambodian brothers who arrived in Australia by boat in 1990 as unaccompanied minors. The brothers spent a total of five years in detention at Port Hedland before being granted bridging visas. During this prolonged detention they suffered daily the effects of ennui, depression, sleeplessness and frustration, with one of the brothers eventually developing a dependence upon anti-depressant medication and sleeping pills. The boys were concerned for their own mental health and worried that they had no knowledge of or control over their future. They had little information regarding the status of their application and apparently no access to independent legal advice. Only following the institution of legal proceedings by the Indochina Refugee Association were the bridging visas granted. At the time of publication of the report in 1998, the boys were still awaiting the result of their applications for protection visas.[5]

This case study conveniently encapsulates several aspects of our current refugee regime which attract criticism.

First, as with all cases of prolonged detention, this raises the question of the value we place upon the fundamental right to liberty. This right is one which, although it does not appear in our Constitution, enjoys the protection of the common law and is one of the foundation stones of democracy. Certainly there are instances where such a right may be circumscribed and many such instances are provided for in the criminal laws of all Australian jurisdictions. However there are clear limits pertaining to the restriction of the right to liberty, some of which the current mandatory detention regime offends. Perhaps the most obvious of these limits is that which says that the detention of a person should not be arbitrary. The freedom from arbitrary arrest or detention has been entrenched in international law in Articles 9 & 10 of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory. Whilst the United Nations acknowledges that there may be situations of public emergency where a state will be granted the right to derogate from this principle, it is recognised that the courts are the appropriate place for a determination as to the detention of an individual.[6] This is demonstrated by the frequent use of writs of *habeas corpus* in Hong Kong in relation to detained Vietnamese refugees in the 1980s and 1990s. Clearly, a mandatory policy of detention militates against the type of considered adjudication envisaged here.[7]

More particularly, the case study highlights the special plight of child refugees, and it is in this circumstance that Australia is at risk of breaching another UN convention – the *Convention on the Rights of the Child*. In instances concerning the detention of children, it is widely acknowledged that an order for detention should only be made as a matter of last resort.[8] Many of the children arriving on our shores as refugees have been traumatised by experiences of war or totalitarian regimes. These children are recognised as being especially vulnerable to psychological and emotional suffering, yet there is little provision of specialist services to assist them in coping with the additional trauma of their confinement. These legitimate concerns in the detention of child refugees are further aggravated in cases where, as with the one just described, children arrive in Australia unaccompanied.

---

5 Ibid, at 218-219.

6 Hathaway, James C. *The Law of Refugee Status,* Butterworths, Toronto, 1991 at 109.

7 This is noted in the strongest terms by the United Nations High Commission of Refugees in their electronically published handbook. See: http://www.unhcr.ch/un&ref/who/whois.htm.

8 *Convention on the Rights of the Child.,* Article 37 (b).

The case study also points to the significant and often enduring effects of prolonged mandatory detention upon refugees. There is a great deal of evidence of the mental distress caused to detainees in Australian refugee detention facilities. Clinical depression is one of several recurring disorders in long term detainees, in some cases leading to actions of self mutilation and suicide. The lack of information about applying for refugee status, the limited access to independent legal advice and the tardiness of reports on the progress of applications before the Department of Immigration and Multicultural Affairs are a few of the many identified causes of this mental distress. Others pertain to the condition of our detention centres, particularly that of the Port Hedland Detention Centre which currently houses many of Australia's boat arrivals. Whilst the centre is considered acceptable for temporary detention and processing, it is ill- equipped to cater to the needs of long term detainees, particularly in situations where it is filled to over capacity.

In 1998, HREOC noted an identifiable lack of educational and vocational training facilities within detention centres.[9] In isolated centres such as that in Port Hedland, there is very little with which the detainees can productively occupy their time. The effects of this lack of language and skills training are reflected in both the immediate and future existence of a refugee. Apart from adding to the general ennui and mental distress of a refugee applicant during detention, it also has a negative effect on the eventual resettlement of refugees. The difficulties experienced by many resettled refugees in finding employment and properly integrating with their communities is a clear cause for concern.

Many initiatives have been proposed by various parties to overcome some of the problems arising from the prolonged detention of refugees. Some of the more practical solutions offered pertain to the institution of programmes aimed at providing comprehensive information to applicants for refugee status. It is hoped that such programmes would aid in the abolition of ignorance as to refugee application processes and the concomitant negative effects on mental health. More frequent updates on the progress of applications for refugee status may also relieve some of the mental anguish and frustration experienced by detainee applicants.

However, the more serious problem of lack of, or limited access to, independent legal advice is one which requires more costly measures. In its 1998 report, HREOC made recommendations about the relocation of detention centres.[10] It suggested that a location closer to large regional centres or metropolitan cities would greatly benefit detainees by improving access to independent and specialist legal advice, interest groups and resettled ethnic communities, education and vocational training facilities and specialised medical services.

Recently disturbing reports of violence, sexual offences and terms of solitary confinement within Australian detention centres, have brought the need for improvements in our treatment of refugees into sharp relief. There is no doubt that the issues of entrenched ennui and mental distress from prolonged detention, failure to provide activities for productive use of time, lack of adequate facilities and poor access to independent legal advice contribute to the increased incidence of offences within these centres. It is evident that the time has come for a reassessment of our current mandatory detention policy.

---

9 "Recommendations on Education and Training" in Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas,* AGPS, 1998 at xv-xvi.

10 Ibid, at 235.

There are of course detractors of those who call for better conditions for refugees. Indeed, there is a strong body of public opinion in Australia against granting assistance to refugees arriving in Australia by unauthorised means. However, recent experience has shown that public opinion can change, particularly where refugees are given the opportunity to integrate into a community. Public opinion was strongly supportive of Australia recently providing a temporary safe-haven for a very large number of refugees from Kosovo and East Timor. Australians are not without compassion when they are fully informed. The case of the Kosovar safe-haven refugees who were repatriated and then granted permission to return and live within a Tasmanian community is a clear example of public opinion going against the norm in Australia. Indeed the level of public outcry at the deportation of this family was such that the Tasmanian Government agreed to sponsor their return. I suspect that many more individuals would change their opinion of refugees if they were placed in the community whilst their applications were considered instead of being locked like prisoners in remote detention centres.

In making this observation I am mindful of the fact that community based refugee integration policies have been successfully operating in Canada for sometime. Last year, the United Nations High Commission of Rights noted that Canada's refugee status determination procedure was "in many ways a model of fairness and due process".[11] In that country, detention of refugees for a period of more than a few weeks is generally regarded as outrageous.[12] In such circumstances, writs of habeas corpus are often filed and granted. The humanitarian success of refugee policies and procedures in countries such as Canada, where those seeking asylum are more readily permitted to reside within the community, has been widely noted. Even in Canada, however, there remains a stigma attached to unauthorised arrivals who are seen as somehow less deserving than those who have applied for asylum offshore.[13]

I have often heard the call for balance in the consideration of the interests of Australia as against the interests of those people seeking asylum here. Achieving such a balance is a difficult task, particularly where one recognises the strength of refugee claims to fundamental human rights. This is a well known problem in liberal democracies where the tension between the rights of the individual and the interests of the State is a defining feature. At least in theoretical terms such tension can be resolved by resort to the principles of limited government underpinning liberal democratic theory. In the present case, the appropriate theory to call upon is less apparent. However, if I were pressed to decide between the competing interests of refugee and State, I would seek an approach which acknowledged the contribution that international humanitarian law has to offer. Such an approach need not favour one party at the extreme expense of the other – indeed it may afford an opportunity to strike the balance which we have so long strived for.

In following a community-based resettlement model similar to that found in Canada and thereby making Australia's refugee processing system more humane, we would not only underline our commitment to fundamental human rights, the rule of law and our democratic system of governance – but we would also enhance our international human rights record. The cost to government to support applicants for refugee status may well be comparable to that currently required to house detainees in security facilities and the gains to individuals far greater. Savings would flow down the track if

11 Wilkinson, Ray "Give me your Huddled Masses" (2000) 119 *Refugees* 4 at 8.

12 Russell, Stuart "A Failure of Democracy" (1995) 20(2) *Alternative Law Journal* 96 at 96.

13 Wilkinson, op. cit., at 5-6.

refugees were more sensitively handled in the asylum process. For instance, refugees that have been granted bridging visas and integrated into communities in the early stages of their application for asylum are more likely to better adapt to their new surroundings. The ability to access our public education and vocational training systems during this time would further aid in the integration process. It is likely that such persons would be in a more favourable position for employment than those integrated after many years of idle detention.

Conclusion

Finally, the outcome of the case study concerning the two Cambodian brothers which I earlier described, demonstrates the valuable role which independent refugee watchdog associations, and the legal profession as a whole has to play. Without dedicated organisations and dedicated individuals, the hardships of many detainees may extend beyond what can properly be described as humane.

Our challenge is to uphold the fundamental principles of liberty and equal access to justice that underpin our claims to democracy. If we fail to rise to this challenge, we may one day find ourselves subject to some of the same criticisms as those regimes from which our asylum-seekers presently hail.