

Australian Lawyers for Human Rights Refugee Law Kit 2004

(last updated 30 November 2004)

CHAPTER 1 - WHO IS A REFUGEE?

Australian Lawyers for Human Rights <www.alhr.asn.au>

Australian Lawyers for Human Rights Inc (**ALHR**) is a network of Australian lawyers and law-related workers active in furthering awareness, understanding and recognition of human rights in Australia. It was established in 1992, and incorporated as an association in NSW in 1998.

ALHR is a member of the Australian Forum of Human Rights Organisations. It is invited to attend the Commonwealth Attorney General's NGO Forum on Human Rights, and the Minister for Foreign Affairs' Human Rights NGO Consultations.

In 1998 ALHR was the only Australian-based NGO to attend the Diplomatic Conference of Plenipotentiaries in Rome as part of the NGO Coalition for an International Criminal Court. In July 2000 ALHR joined with the New York-based Lawyers Committee for Human Rights in a submission to the UN Human Rights Committee's review of Australia's reports under the International Covenant on Civil and Political Rights.

To help lawyers use human rights remedies in their daily legal work, ALHR runs seminars on human rights in practice, in areas such as family law, tenancy, anti-discrimination, crime, corporations, land and environment, and employment.

The ALHR membership is national. State Committees are currently active in Brisbane, Canberra, Melbourne and Sydney.

Please feel free to e-mail us with ideas, information, suggestions or issues. However, please be aware that we are not in a position to provide personalised responses to questions, or give referrals to legal practitioners. We suggest that anyone with research or referral questions review our links for appropriate sources.

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REFUGEE RIGHTS AND AUSTRALIAN LAW

INTRODUCTION - THE IMPORTANCE OF THE RULE OF LAW AND PROTECTION OF HUMAN RIGHTS

These materials had their genesis in concerns about Australia's performance in protecting the human rights of asylum seekers and refugees and in particular, the extent to which the Rule of Law, as a fundamental pre-requisite for the protection of human rights, is being undermined by lack of accountability on the part of government decision-makers in relation to refugee matters.

The Preamble to the Universal Declaration of Human Rights states that 'human rights should be protected by the Rule of Law if man (sic) is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.'

Implicit in this statement is one of the vital principles of the Rule of Law, namely that the law should apply to, and be observed by, government and its agencies, just as it applies to the ordinary citizen.

Justice Dixon stated in the *Communist Party Case* at 187 that:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.

In the area of refugee law and migration in Australia, there is impassioned debate about the extent to which government administrative power should be subject to judicial oversight to ensure that the Australian Government is complying with the law.

While it is probably fair to say that much of this debate is influenced by broader political motives, it is also a symptom of deeper uncertainty about the respective roles of executive government and the judiciary in contemporary Australia, where each arm of government – legislative, executive and judiciary – exercise mixed, rather than clearly separated, functions.

It is not our purpose to tease out these issues here other than to say that while the boundaries between the three arms of government may be porous in practice, the central concept behind the separation of powers doctrine, that 'power should be checked with power,' is fundamental. Of particular importance, given the increasing convergence between the legislative and executive arms of government, are the place of an

independent judiciary to determine that government action has been taken according to law and access to the courts for people affected by government decision making.

We view the growth of administrative law, and in particular the expansion of judicial review across a wide range of government administration, as a positive and necessary counterbalance to the historical expansion of executive government power – and a critical safeguard of the Rule of Law.

In the case of asylum seekers and refugees – where fundamental rights and liberties are at stake – the importance of government operating under the law is starkly emphasised.

It is implicit in the materials that follow that we believe government action to limit judicial oversight of government decision making in relation to asylum seekers and refugees has exposed people to an exercise of executive power which puts important individual rights at risk.

PURPOSE AND SCOPE

These materials are intended to give the general lawyer an overview of some of the historical and current legal and administrative issues relating to asylum seekers and refugees in Australia. The materials explain the meaning of the term ‘refugee’ and outline the rights of asylum seekers and refugees under international law before examining Australia’s implementation of its international obligations.

The materials are comprised of this main document, which covers the general issues in some detail, and a number of fact sheets which provide greater depth on specific issues.

WHAT IS A REFUGEE

The basic definition

The term refugee was originally applied to the French Huguenots who came to England after the revocation of the Edict of Nantes in 1695 and was used to describe a person who, owing to religious persecution or political troubles, seeks refuge in a foreign country.

This sense is retained in the modern definition of a refugee, which emerged from international cooperation to tackle the mass displacement of people in the aftermath of World War Two.

The *United Nations Convention Relating to the Status of Refugees 1951* (Refugee Convention) and the *Protocol on the Status of Refugees 1967* (Protocol) establish the modern legal basis for refugee protection at international law.

The Refugee Convention and the Protocol define a refugee as someone who:

1. is outside the country of their nationality or habitual residence;
2. has a well founded fear of persecution on the grounds of:
 - race,
 - religion,
 - nationality,
 - membership of a particular social group, or
 - political opinion, and
3. is unable to seek or is fearful of seeking protection in that country or is fearful of returning to their country.

This basic definition has been augmented, refined or narrowed to varying degrees across jurisdictions. One important development internationally is the idea of an imputed political opinion. In these cases, when it is obvious that the government is acting on the basis of what it believes to be a person's political opinion, no evidence of the person's actual opinion is required.

It is important to note that people who have committed crimes against peace, a war crime, crimes against humanity or a serious non-political crime outside the country of refuge may be excluded from protection under the Refugee Convention.

Other people not covered by the Refugee Convention include internally displaced persons (people who have fled persecution but remain within their own territory) and serving soldiers.

A note on the history of the Refugee Convention and Protocol and the role of the United National High Commissioner for Refugees

The process of developing a body of international law, conventions and guidelines to protect refugees began in the early part of the 20th century under the League of Nations, the predecessor of the United Nations (UN). It culminated on 28 July 1951, when the UN conference approved the Convention Relating to the Status of Refugees.

Several months before the Refugee Convention's passage the United Nations General Assembly established the United National High Commissioner for Refugees (UNHCR). The Refugee Convention has been the foundation of UNHCR's work in leading and co-ordinating international action to protect refugees and resolve refugee problems worldwide. The Commissioner's primary purpose is to safeguard the rights and well-being of refugees and ensure that everyone can exercise the right to seek asylum and find safe refuge in another State.

The original Refugee Convention was limited to protecting mainly Europeans involved in events occurring before January 1951, but as the problem of displacement spread around the world the need to expand the scope of the Refugee Convention was recognised. The 1967 Protocol removed the geographical and time limitations written into the original Convention.

A total of 140 states have acceded to one or both of the UN instruments, including Australia, which ratified the Refugee Convention in 1954 and the Protocol in 1973.

What a refugee is not

Asylum seeker

This is the correct term for a person seeking official recognition of their status as a refugee under the Refugee Convention.

Economic migrant

Millions of 'economic' and other migrants have taken advantage of improved communications in the last few decades to seek new lives in other, mainly western, countries. However, they should not be confused, as they sometimes are, with *bona fide*

refugees who are fleeing life threatening persecution and not economic hardship. An economic migrant normally leaves a country voluntarily to seek a better life. Should he or she elect to return home they would continue to receive the protection of their government. Refugees flee because of the threat of persecution and cannot return safely to their homes in the circumstances then prevailing.¹

Illegal immigrant

An asylum seeker is not an ‘illegal’ immigrant. The description of a person who arrives in Australia without a visa or travel documents and claims asylum as ‘illegal’ is incorrect. It implies that an asylum seeker is not complying with Australian law whereas every person who seeks asylum has a right to do so in Convention countries, including Australia.

A person seeking asylum is not ‘illegal’ in Australia until the authorities decide that they do not have a right to stay in Australia. This can take some time and an asylum seeker is permitted to stay in Australia until a decision is made about whether they are allowed to stay for a longer period of time.

Queue-jumper

Asylum seekers who arrive in Australia without a visa or travel documents (whether by boat or plane) are often called ‘queue jumpers’. The term ‘queue jumpers’ implies that people who arrive by boat are not complying with our procedures and taking away ‘places’ that have been set aside for refugees waiting in UNHCR camps until they are accepted for resettlement in Australia.

The idea of the ‘queue’ comes from the way in which Australia manages its intake of migrants every year. Australia sets a yearly limit on the number of people it will allow to move here. That number is divided into a *migration* component for people who want to move to Australia to live and a *humanitarian* component which is for refugees and others who, even though they may not fit the Convention definition of a refugee, have other humanitarian needs.

The total number of people who are allowed to come to Australia through the humanitarian program for 2004-2005 is 13,000. This number is further broken down into an *offshore* component and an *onshore* component.

¹ UNHCR, The 1951 Refugee Convention: Questions and Answers, June 2001

The *offshore* component is made up of people who have been given permission and assistance to come to Australia by the Australian government, prior to their arrival. These people are usually waiting for resettlement in UNHCR camps or have been given permission to come to Australia through other officially sanctioned channels.

The *onshore* component is made up of people who apply for refugee protection after they arrive in Australia. The Australian Government has set the number of offshore arrivals at 6400 and the number of onshore arrivals at 6600.

The concept of the 'queue' comes from the fact that the Government has said that for every person who arrives in Australia over the total number of people allowed through the onshore program, one will be subtracted from the offshore program. Thus people claiming protection once they arrive in Australia are seen to be jumping the 'queue' of people in the offshore program.

Calling people who apply for protection whilst in Australia 'queue jumpers' creates the impression that there are rules for seeking asylum which the people in UNHCR camps are following and those arriving onshore are not. There are no such rules and asylum seekers may not always come from countries where there are UNHCR camps set up to process and find countries to resettle them.

Refugees are often forced to leave their countries in such a hurry that they do not have time to organise the appropriate travel documents. Often, refugees are too scared to ask for these documents because it is the government or its agents that are persecuting them and they need to leave secretly. In other cases, where there has been a breakdown of the State, the relevant office or agency may have ceased to exist or be impossible to access.

Indeed, the UNHCR has stated that States should expect that refugees will not have valid travel documentation and must not punish them simply for that fact.

Nor does it matter how refugees arrive in the country in which they seek asylum. A person may still be a genuine refugee whether they arrive by plane, car, train, boat or on foot and there is no requirement to have come through customs or immigration. The Refugee Convention provides that a person claiming refugee status should not be discriminated against on the basis that they are a refugee, their mode of arrival or a lack of genuine documentation.

The next chapter sets out the international legal standards that apply to refugees and asylum seekers and explains the relevance of international law to Australian law.