NSW COUNCIL FOR CIVIL LIBERTIES

Statement on Refugees and Asylum Seekers

By Sol Encel

The NSW Council for Civil Liberties has, for the 40 years of its existence, been concerned to defend human rights and to criticise infringement or denial of these rights, principally by governments and by the police. During 2000 and 2001, the CCL became increasingly concerned with the denial of human rights to refugees from persecution who have attempted to reach Australia as 'asylum seekers'.

It has been common practice to denigrate such people as 'queue jumpers' and 'illegal immigrants'. These terms have been given credence by the actions of the Commonwealth Government, and are repeatedly used in the mass media and by the 'shock jocks' of talkback radio.

The purpose of this publication is to dispel the propaganda which stigmatises asylum seekers and to set out, in simple language, the true nature of the refugee situation and the rights of refugees under the law. Whereas there has been much criticism of the Government's refugee policy on such grounds as expense and political manipulation, our focus is on the issue of human rights and obligations under international law.

GENERAL

The CCL recognises that Australia, as a developed and civilised country, has an obligation to contribute its fair share to the settlement of genuine refugees. While reasonable limits must apply to the number of refugees who can be admitted, the numbers admitted by Australia since 1990 have been quite small and could readily be increased in the light of changing circumstances.

As we point out, Australia has traditionally followed the provisions of the United Nations Refugee Convention of 1951, which aims to protect persons who have good reason to fear persecution in their countries of origin. However, the current Australian Government appears anxious to back away from the Convention, arguing that it no longer reflects current reality. Civil libertarians are strongly opposed to any such move.

In particular, the CCL finds the following aspects of current government policy to be repugnant:

- The pretence that there is a 'flood' of refugees which must be prevented in the interests of national security;
- The division of refugees into 'good' and 'bad' through the distinction between 'offshore' and 'onshore' applicants for refugee status;
- The criminalisation of refugees, as though endeavouring to settle in Australia is a criminal offence;
- The mandatory detention of onshore asylum seekers;
- The creation of a mythical category of 'queue jumpers';
- Manipulation of borders to prevent refugees reaching Australian territory;
- Flouting of the protections contained in United Nations conventions and declarations;
- Denial of information to asylum seekers concerning their rights and the appeal procedures available to them;
- Refusal to consider procedures adopted by other countries, coupled with inaction on the recommendations of a Senate committee in 2000;
- Maltreatment of children which infringes the UN Convention on the Rights of the Child;
- Shutting out the media from detention centres.

SOME ISSUES EXAMINED IN DETAIL

1. What is a Refugee? The standard legal definition of a refugee is to be found in the United Nations Convention Relating to the Status of Refugees, adopted in 1951, to which Australia is a signatory. Article 1A of the Convention defines a refugee as 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'.

The 1951 Convention was amplified in 1967 by the Protocol Relating to the Status of Refugees, to which Australia is also a signatory.

2. What is an Asylum Seeker? This term, which is not embodied in the international conventions, came into use in the 1990s. Generally speaking, it applies to a person who is seeking protection under the 1951 Convention, but whose application for refugee status has not been decided by the UN High Commissioner for Refugees, or by the government of the country which he/she is attempting to enter. Asylum seekers have also invoked other international agreements, including the Convention Against Torture, the Convention on the Rights of the Child, or the International Covenant on Civil and Political Rights.

3. How Many Refugees do we Take? The annual intake provided for under our refugee program is 12,000 (down from 20,000 in 1990). These are divided into 'onshore' and 'offshore' cases. Offshore refugees are those who apply to come to Australia from overseas. They have either been sponsored by friends or relatives, or identified by the UNHCR as people requiring resettlement in a safe country. They may be living in refugee camps or other temporary shelters. Onshore refugees are those who reach Australia through their own efforts and apply to stay permanently. 'Legal' entrants are those who arrive with valid travel documents, and are usually allowed to live freely in the community. They can apply for
refugee status within 45 days of arrival and payment of the prescribed fee. If approved, they can then apply for a work permit.

Despite the publicity given to 'boat people', many asylum seekers arrive by air. The majority are refused entry. In 1998-99, 1457 people were refused entry at airports, and deported within 72 hours.

4. Legal and illegal immigrants The Government has laid great stress on the distinction between legal and illegal immigrants. The mass media have encouraged the notion that legal refugees are 'good' and illegal refugees are 'bad', rather like the notorious distinction between the deserving and undeserving poor. Apart from the fact that the distinction is both arbitrary and morally dubious, it appears to contravene international law. Article 31(1) of the 1951 Convention provides that '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 would be threatened, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

In addition, Article 31(2) places clear restrictions on the detention of 'illegal' refugees. It provides that '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 to another country'. In 1997, the UN Human Rights Committee found that Australia's policy of mandatory detention was in breach of our obligations under the 1951 Convention, and also in breach of the International Covenant of Civil and Political Rights, which states that 'no one shall be subjected to arbitrary arrest and detention'.

The Government maintains that its actions are not arbitrary and that it is observing the provisions of Article 31. However, its actions are in sharp contrast to the actions of other countries which have adopted quite different methods of dealing with illegal refugees, other than mandatory detention. In the view of the CCL, the distinction between legal and illegal refugees and asylum seekers has the effect of treating illegal entrants as though they were criminals, which is both legally and morally unsustainable.

5. Is there a Difference Between Detention Centres and Jails?

The Government vigorously denies suggestions that 'detention centres' are in effect jails. It is true that conditions in the centres are not identical with prison regimes, especially in relation to families, but effectively they have become jails, particularly for people who have been there for more than a year (about one-sixth of the total detention centre population). In one respect they are worse than jails, where prisoners have been charged and convicted and know the length of their sentences. Detention, on the other hand, is indeterminate. The effective use of detention centres as jails is a denial of human rights. Again, in jail, a prisoner can complain about ill-treatment to a visiting magistrate, but no such recourse is available to detention centre inmates. The most they can hope for is a visit from the Human Rights and Equal Opportunity Commission, or an occasional inspection by an official committee. The head of a special UN delegation has been reported as describing the Howard Government's policy of locking up asylum seekers for long periods as a gross abuse of human rights,(SMH 6/06/02).

However, the Government is under no obligation to accept the recommendations of visiting bodies, and frequently rejects their criticisms. A recent example was the report by welfare officers of the South Australian State government, which described the treatment of children at the Woomera detention centre as 'intolerable'. The criticism was immediately rejected by the Minister for Immigration, Philip Ruddock. Mr Ruddock had previously been the subject of an injunction relating to an 18-year-old inmate who had been admitted to a psychiatric hospital following several attempts at suicide. When he was discharged from hospital, the Minister ordered his return to Woomera,

but was prevented by an injunction obtained by the South Australian Public Advocate.

6. What Rights do Refugees and Asylum Seekers Have? The rights of refugees and asylum seekers are spelt out in a UN document, The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly in 1988. Principle 13 states that 'any person shall at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights'.

Principle 17 adds to this by providing that a detainee is entitled to legal counsel and 'shall be informed of his right by the competent authority promptly after his arrest'. The principle is breached by the Migration Act of 1958, where Section 193 removes any obligation on the part of Commonwealth officials to inform detainees of their legal rights if they have not successfully cleared immigration formalities. Since 1994, it has been the established practice not to advise asylum seekers of their right to see a lawyer, or to apply for refugee status.

Section 417 of the Migration Act provides for decisions in favour of asylum seekers to be made at the discretion of the Minister for Immigration. In practice, this avenue is hedged about with difficulties, especially because there is no guarantee that the persons concerned will not be deported before the appeal procedure has been completed. Many asylum seekers are actually unaware that this avenue exists, since immigration officials do not inform them. The unsatisfactory nature of this situation led to the bizarre case of a Chinese woman in the last stages of pregnancy who was deported in 1997. Ms Z, as she is described in the official records, complained to the Department of Immigration and Multicultural Affairs that, if returned to China, she would be forced to undergo an abortion. At that stage, she was 5 months pregnant. She repeated the complaints over a period of three months, but was never advised to put the complaint in writing and the matter was not brought to the attention of the Minister. Ms Z was duly deported and forced to undergo an abortion at eight months.

Her case came to the attention of the Senate Committee on Legal and Constitutional References, which reported in 1999, and concluded that the actions of the Department involved a breach of Australia's obligations under the Convention Against Torture.

7. Limitations on Rights The case of Ms Z prompted the establishment of a Senate subcommittee on human rights which reported in 2000. It criticised the policy of restricting access to legal services, and recommended a number of improvements. These include a recommendation that Legal Aid Commissions should be able to offer advice to detainees, and that there should be improved interpreting and translating services. The report also recommended greater independence for the Refugee Review Tribunal.

The Senate subcommittee report notes the restrictions imposed on refugees who qualify for temporary protection visas (which are valid for three years). Many immigrants seek assistance from the Commonwealth-funded Migrant Resource Centres which exist around Australia. The Centres are barred from using Commonwealth funds to assist holders of these visas. The Minister for Immigration has also warned other community groups not to use Commonwealth funds to assists visa holders. In addition, temporary visa holders do not qualify for benefits from Centrelink, which also means that they cannot obtain other concession cards. Hence, they do not qualify for a range of benefits which require the production of a Health Care Card.

Restrictions on the right of appeal have received unfavourable attention in the courts. In a case before the High Court in 1999, Justice McHugh pointed out that the Migration Act places undue burdens on the Court, so that it was compelled to place refugee issues at the bottom of its caseload. He noted that nowhere else in the world was an appellate court required to act as a tribunal of first instance. This had resulted from the actions of the Government in restricting the jurisdiction of the Federal Court, which had previously dealt with refugee appeals. The Government's response has been to introduce legislation which would completely abolish the right of the Federal Court to deal with refugee issues (so far, these attempts have been blocked in the Senate).

Justice Nicholson, in the Federal Court in 1996, suggested that the policy of restricting access to legal remedies may be contrary to Australia's international obligations. In addition, it violates procedural fairness. 'Parliament', he observed, 'has negated the possibility of common law concepts of procedural fairness applying in favour of the non-citizen applicants'.

8. The Unsatisfactory Nature of Temporary Protection Visas (TPVs) Since October 1999, asylum seekers who are granted refugee status have been granted TPVs, which last for three years. Unlike refugees with valid documents, they have only limited access to government benefits and services. They are not offered assistance with accommodation, receive no English language tuition, receive no employment assistance, and no help in finding bond money. Although they have some rights, government policy is not to inform them of these rights (see item 7 above). They are mainly assisted by non-government welfare bodies, which are stretched to the limit because the Government bars them from using Commonwealth funds. After three years, they are again required to apply for refugee status, and the onus is placed upon them to prove that conditions in their country of origin have not changed sufficiently to permit them to return. A report by Amnesty International stresses the inequity of a two-class refugee system created by the use of TPVs.

9. The Obligation of 'Non-Refoulement' Non-refoulement is the legal term defining the right of refugees not to be returned to a country where their

lives or freedom are threatened. The principle of non-refoulement is stated in Article 33(1) of the 1951 Convention, which provides that 'no contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

The actions of the Australian Government in 'excising' territories such as Christmas Island from its 'migration zone' have the effect of withdrawing these areas from the obligation of refoulement, to which we are committed because of our adherence to the 1951 Convention. By closing our borders, the Government is placing refugees at risk of being returned to countries where their lives are seriously threatened.

One of the recommendations of the Senate subcommittee called on the Government to examine the most appropriate means by which Australia's laws could be amended in order to incorporate the non-refoulement obligations of the Convention Against Torture and the International Covenant on Civil and Political Rights. This recommendation, like the other recommendations of the subcommittee, has been ignored by the Government.

10. Should Illegal Immigrants be Described as 'Queue Jumpers'? The concept of a 'queue jumper' implies that there is an orderly line of persons waiting to enter Australia, whose situation is prejudiced by the arrival of illegal entrants arriving out of turn. Within the annual intake of 12,000 refugees, there are separate quotas for entrants who qualify under the 1951 Convention and for those who have experienced 'gross violation of human rights' which makes them eligible for admission under the 'special humanitarian program'. However, applicants under this program must demonstrate 'some connection' with Australia, which effectively removes most would-be entrants from the queue. The queue is further reduced by the fact that, in practice, preference is given to refugees who can speak English and have special skills. This rules out many of the possible entrants from Africa, Asia and the Middle East, even though the Minister for Immigration, Philip Ruddock, denies that there is any policy of discrimination against them.

The concept of a queue applies particularly to the 'offshore' applicants, and would be valid if Australian posts overseas had an orderly line of would-be entrants waiting their turn. In reality, Australian consular and diplomatic posts do not act as though they were bus stations. In some of the countries producing the greatest number of refugees (e.g. Iraq) there is no representation, and no queue can form. In Pakistan, inquiries are referred to the Australian embassy in Bangkok, where they are greeted by an answering service, which in turn refers them to the UNHCR which may grant them refugee status.

The implication that refugees should wait in line denies the emergency nature of their situation, which was in fact recognised when the Government agreed to accept refugees from Kosovo. In an emergency, the most serious cases are treated first, and the concept of a queue is inappropriate.

11. The Treatment of Children Australia is a signatory to the Convention on the Rights of the Child. There is, unfortunately, considerable evidence that the rights of children in detention centres are not being observed. The rules laid down by the Department of Immigration and Multicultural Affairs specify that detainees must be treated with 'respect and dignity', and also that education of children is a right. There are now numerous accounts by former detainees, by journalists, and by official visitors that indicate gross violations of dignity. For example, officers of Australian Correctional Management , which runs the detention centres under contract to the Government, have the right to strip-search anyone over the age of 10 (which, of course, includes children of primary school age). Children have been locked in cells without proper toilet facilities, and there have been instances of children being handcuffed. Reports by teachers who have worked in detention centres indicate that educational facilities are frequently inadequate or non-existent.

12. How do we Compare with Other Countries? The Minister for Immigration, Philip Ruddock, regularly claims that Australia is outstandingly generous in its treatment of refugees and that our system of processing claims is the best in the world. He supports his claim by referring to the statistics produced by UNHCR. Thus, in the year 2000, UNHCR found that the average international 'recognition rate' for asylum seekers was 19.9 per cent, whereas the Australian rate was 24.7 per cent. However, compared with Canada (48.6 per cent) and Sweden (40 per cent), the Australian figure is not particularly impressive.

Statistics are, of course, used selectively, and in any case they do not tell the whole story. Other countries treat asylum seekers more humanely and with greater respect for their human rights. In Canada, the Immigration and Refugee Board's guidelines on detention specify that detention of asylum seekers, and especially of children, should be 'rare' and used only as an exceptional measure. If people are detained, their cases are reviewed within 48 hours by an independent adjudicator and reviewed again periodically thereafter. In Germany, detention centres are open, and detainees are allowed to move around in the district where the centre is located. In Denmark, detention centres are run by the Red Cross and similar rules apply. In Britain, where there are approximately 100,000 asylum seekers awaiting decisions on their refugee status, only about 1000 are in detention. Britain receives one refugee per 500 of its population, compared with one in 1600 for Australia.

A number of people have compared Australia with Sweden, which receives a similar number of asylum seekers of whom, as in the case of Australia, a large proportion come from the Middle East. Peter Mares, author of *Borderline*, makes the following points about the Swedish policy regarding detention:

- The four Swedish centres have a capacity of only 120 persons;
- Children may be detained for no more than 6 days;

- Asylum seekers are not treated as though they were criminals;
- The detention centres are open to the media and to non-government welfare bodies;
- The law requires that legal rights should be explained to asylum seekers;
- Detainees are allowed to have mobile phones and access to mail facilities;
- Rather than detain asylum seekers for long periods, the Swedish policy is to release them into supervised community accommodation and require them to report regularly to the authorities.

In spite of the humane character of the Swedish system, the majority of asylum seekers are not given refugee status and are deported. Philip Ruddock has criticised the Swedish approach as being expensive, which is a point admitted by the Swedish government. However, the implication that the Australian system is less expensive is highly dubious. The cost of maintaining detainees is well over $100 per day, and the cost of the so-called 'Pacific solution' is approaching $150 million. It is estimated that the detention centres account for at least 20 per cent of the total cost of the immigration program, so that reducing them to something like the Swedish level would be a significant saving.

13. <u>Official Responses to Criticism</u> On April 5, 2002, the Minister issued a statement which attempts to rebut criticisms of Government policy contained in a pamphlet published by the Edmund Rice Centre for Justice and Community Education on behalf of the Australian Catholic Social Justice Council. The CCL considers this response to be unsatisfactory, on the following grounds :

- The statement avoids the concept of a 'queue', without acknowledging that the label of 'queue jumper' has been propagated by the Government itself.
- The statement repeats the distinction between 'legal' and 'illegal' immigrants, but sidesteps the criticism that illegal immigrants are treated unfairly.
- The statement reiterates the claim that 'Australia is one of the world's leading humanitarian countries', which is rebutted by item 12 above. It also provides no explanation why the refugee intake was reduced by 40 per cent (from 20,000 to 12,000) by the present Government, although the refugee problem has increased.
- The statement asserts that 'no workable alternatives to mandatory detention currently exist'. This is patently not true, as set out in item 12 above.
- The statement contains misleading information about benefits available to holders of temporary protection visas (TPVs), which directly contradicts the evidence contained in items 6 and 7 above.
- The statement makes no reference to the prolonged incarceration of children in detention centres and the lack of proper educational facilities, which the Minister continues to deny in spite of much evidence to the contrary. As pointed out in item 11 above, this is almost certainly contrary to the Convention on the Rights of the Child, to which Australia is a signatory.

14. <u>Can We do Better?</u> A number of commentators have advocated reform of the system so that it produces better outcomes as far as human rights are concerned. The Senate subcommittee on human rights made a number of suggestions which have, so far, been ignored by the Government. The Director of Public Prosecutions in NSW, Mr Nicholas Cowdery, QC, in a speech to a lawyers' convention in March 2002, argued that we should adopt an approach similar to Sweden. Professor James Jupp of the Australian National University, a leading authority on immigration policy, has proposed the following changes:

- An end to mandatory detention;
- Women and children should only be detained for preliminary processing and detention should be reserved for those awaiting deportation, or identified as criminal or security risks;
- Creation of a flexible humanitarian quota for states such as Iraq and Afghanistan with major refugee problems;
- Restoration of the 'migration zone' to include all Australian territory;
- Welfare and employment assistance to be granted to every person granted humanitarian status, whether temporary or permanent;
- Simplification of appeal procedures.

