

Refugee policy:
is there a way out of this mess?

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The nature of the mess

Australians' love of the comic has found great amusement in the Abbott and Costello combination in the Government. It seems to me, however, that Laurel and Hardy are a far more apt comic duo for our times. I'm old enough to remember Laurel and Hardy in funny, black and white skits shown on TV. They would always get into trouble and Hardy would always blame the hapless Laurel. He'd say to Laurel, "Well, here's another fine mess you've got me into". That's the charge we're entitled to direct to our national political leaders, both Government and Opposition. Here's another fine mess you've got us into.

Australian law, policy and practice in relation to asylum seekers and refugees are in a mess. The bipartisan policies of successive governments since 1989, both Coalition and Labor, under three Prime Ministers have got us into this mess. Only the Australian Democrats, the Greens, independents Brian Harradine and Peter Andren and a handful of members from the major parties have struggled to extricate us from the mess. They have struggled against the odds and so far they have not been successful. While responsibility falls on both major parties, the present government, under Prime Minister Howard and Immigration Minister Ruddock, has taken us and the mess to the murkiest, nastiest depths.

My purpose today is to discuss how we might extricate ourselves from this mess. I am not going to spend the time analysing its nature in detail yet again but I must sketch briefly the dimensions of the situation. Law, policy and practice are in a mess for many important reasons.

First and foremost, they produce gross violations of the most fundamental human rights. They violate the commitments Australia has made under important international treaties:

- article 9 of the *International Covenant on Civil and Political Rights* and article 37 of the *Convention on the Rights of the Child*, which prohibit arbitrary detention
- article 10 of the *International Covenant on Civil and Political Rights* and article 37 of the *Convention on the Rights of the Child*, which require that detained persons be treated with humanity and respect for human dignity
- article 37 of the *Convention on the Rights of the Child* which prohibits detention of children except as a last resort and for the shortest appropriate period of time
- article 9 of the *International Covenant on Civil and Political Rights* and article 37 of the *Convention on the Rights of the Child*, which recognise a right to take legal proceedings to challenge detention
- article 2 of the *International Covenant on Civil and Political Rights* and article 2 of the *International Covenant on Economic, Social and Cultural Rights*, which prohibit all discrimination on the basis of status in the enjoyment of human rights
- article 23 of the *International Covenant on Civil and Political Rights*, article 10 of the *International Covenant on Economic, Social and Cultural Rights* and article 18 of the *Convention on the Rights of the Child*, which protect the right of parents to found a family, the right of families to state care and support and the right of children to the care of their parents
- article 22 of the *Convention on the Rights of the Child*, which requires the state to provide appropriate protection and humanitarian assistance to refugee and asylum seeker children, especially in relation to family reunion
- articles 13 and 15 of the *International Covenant on Economic, Social and Cultural Rights* and article 28 of the *Convention on the Rights of the Child*, which recognise children's right to education.

In addition to this catalogue of clear violations there are questions whether other human rights obligations have been breached, especially in relation to:

- article 6 of the *International Covenant on Civil and Political Rights*, article 37 of the *Convention on the Rights of the Child* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which prohibit torture and all cruel, inhuman and degrading treatment and punishment and
- article 2 of the *International Covenant on Civil and Political Rights* and article 2 of the *International Covenant on Economic, Social and Cultural Rights*, which prohibit all discrimination on the basis of religion and race in the enjoyment of human rights and the *Convention on the Elimination of All Forms of Racial Discrimination*.

These violations of human rights are serious. There is not a trivial matter among them. They are the first and foremost element in the mess Australian governments have produced.

Second, the situation in the camps in Australia, euphemistically called Immigration Reception and Processing Centres, is appalling. Between 1995 and 2000 I visited each camp at least once a year. In some cases conditions were worse than I had found in any Australian prison. And I understand that they have deteriorated badly since then. The disturbances and the riots are expected and entirely predictable. There is a long and continuing history of self harm in the camps and hunger strikes have become common place. The detainees are frustrated, alienated and fearful. They are exposed to routine violence and severe mental health episodes. The camps are particularly awful for children. The disturbances in the camps over the last year have been provoked, consciously or unconsciously I don't know, by deliberate policy and administrative decisions, like the suspension of processing of protection applications from Afghani detainees last November. The pattern of the past decade indicates that disturbances will continue and worsen and that lives, both of detainees and of the centre officers, will be at risk. Current policies ensure that the government and its contractors are powerless to prevent it.

Third, what the Government calls the Pacific Solution is no solution at all. On the contrary it involves Australia in what the government is loudest in condemning, people trafficking. It involves the apprehension and forcible transfer of people across national boundaries for profit. Desperate people are being dumped in desperately poor island states. These states are paid large bribes to accept people Australia does not want. The people dumped in this way have no guarantee of protection. Indeed one of the states involved, Nauru, is not even a party to the Refugee Convention and so has no obligation under that Convention not to return them to their country of persecution.

The so-called Pacific Solution is also troubling because it runs the risk of distorting the Australian Official Development Assistance program away from its developmental priorities.¹ It encourages the use of aid as an incentive to poor states to take Australia's problem off our hands and as a penalty against those that do not.

Fourth, the policies and practices are costing Australian taxpayers a fortune. The total cost of the so-called Pacific Solution has been estimated to be greater than \$500 million. On-shore detention adds hundreds of millions of dollars more to the bill. The government has spent six years slashing public expenditure and as a result essential public services. But no price is too high to pursue these policies against refugees and asylum seekers.

Fifth, the role of the Australian Defence Forces, especially the Royal Australian Navy, has been politicised and corrupted. The ADF has been diverted from its proper role of the defence of the nation, protecting Australia from armed attack. Instead Navy ships are sent out to intercept decrepit vessels carrying unarmed civilians seeking to exercise their rights under international and domestic law to apply for asylum. In the course of this unpleasant and unwanted duty, Navy vessels have been involved in terrible incidents and defence personnel dragged into public political controversy, as we have seen this week. I cannot recall a time when the ADF has been used so shamelessly for naked political advantage.

Finally, our international reputation is mud. Over the past six months I have seen article after article in international media, in North America, Asia and Europe, justly criticising Australia, portraying us as racist, hard hearted violators of international law and morality. Our friends are confused, wondering what has happened to a country that once was at the forefront of every international effort to promote human rights. Our opponents gloat that we are now in no position to criticise their human rights performance when ours is so bad, that our past criticisms have been shown to be motivated by self interest rather than a genuine commitment to human rights and that their suspicions that we had not altered our racist attitudes and ways have been confirmed. We have done ourselves and the international human rights cause a grave disservice.

These are but six of the elements of the mess we are in. Certainly they are six serious ones but there are others too, such as the deep divisions carved into the Australian community and the ill-feeling generated towards Australian citizens and permanent residents of Muslim or West Asian background. The simple fact is that we have a lot of work to do to retrieve the situation. Is it too late? Where do we start?

There are three starting points. We must establish a mechanism to find the truth about three recent incidents that

¹Oxfam Community Aid Abroad *Adrift in the Pacific: The implications of Australia's Pacific refugee solution* February 2002.

are of particular concern. We must develop and agree on basic principles to underpin good refugee policy. And we must introduce alternatives to the present system of indefinite mandatory detention of virtually all asylum seekers. These three areas for urgent action require some detailed discussion.

Addressing three current issues

Three current issues require urgent and thorough attention as the first step. We have to clear up what has happened in recent months as well as move forward. The three incidents are

- the claims that in October 2001 asylum seekers threw their children overboard
- the circumstances in which two women asylum seekers died in November 2001 in a boat off Ashmore Reef near Australian Navy and Customs vessels
- the claims that in January 2002 asylum seeker parents at Woomera detention centre sewed their children's lips together as part of a hunger strike and protest activity.

The bare facts surrounding the claims that asylum seekers threw their children overboard are now well known. We know the allegations made by the Prime Minister, the Immigration Minister and the Defence Minister between 7 October and 10 November 2001. We now know that these allegations were false. We do not know who knew or suspected that the allegations were false, when each person acquired that knowledge or suspicion, who each person told of his or her knowledge or suspicion and what was done about it. The Prime Minister says that he did not know or suspect during the critical period. Certainly senior people in his department and his office knew and suspected. We do not know whether the Prime Minister is lying. We do know that this incident was about truth overboard, not children overboard.

The two internal reports released this month by the Government present the best picture possible for the Government. They are the best face it can put on the situation. Yet these reports themselves permit only three options. Either the Prime Minister was lying when he said he did not know or he was telling the truth. If he did not know either he was wilfully ignorant or he was not informed by his most senior ministers, officers and advisers. There are no other possibilities. Clearly Australians are entitled to know which of these possibilities is true. But whichever is true the implications are serious for human rights and government accountability.

The allegations vilified, defamed, innocent people in a most serious and debasing way. These were people who were subsequently forcibly transferred to Papua New Guinea, kept away from media, lawyers, anyone who could check the accuracy of the outrageous lies told against them. The allegations were attacks on the honour and reputation of the asylum seekers, in violation of article 17 of the *International Covenant on Civil and Political Rights*. They may have had the purpose or effect of lessening their chances of receiving protection as refugees, in violation of the *Refugee Convention* and of article 14 of the *Universal Declaration of Human Rights*.

The allegations were made and repeatedly made during an election campaign in which the protection of the borders and the treatment of asylum seekers were critical issues. They were seen to advantage one political party and disadvantage another. They may have distorted the results of the election, in violation of article 25 of the *International Covenant on Civil and Political Rights*. They certainly resulted in the electorate being misled.

Regardless of whether the Prime Minister personally knew, the situation also raises important issues about accountability and transparency in government. Under the Westminster system of ministerial responsibility, ministers are responsible for the acts and omissions of their officers and advisers, even to resigning if their failings are of a high degree of seriousness. These basic principles of our constitutional system are at stake in this affair.

The additional photographs of the sinking boat and rescue released this week point to the professionalism of the Navy in rescuing the occupants of the boat without loss of life. But was any earlier attempt made to evacuate people from an obviously overcrowded boat? All that is known to date is that the Navy ship fired warning shots on several occasions in front of the boatload of people who must already have been terrified and traumatised. Reports suggest the boat was boarded but for what purpose? - to send it back out to sea as other boats have been sent back to sea? The Prime Minister himself has said that such an approach would be inhumane.²

²*Sydney Morning Herald* 8 December 2001.

The second incident of concern has received far less publicity than the first and the third. It concerns the deaths of two women asylum seekers near Ashmore Reef in November 2001. The Prime Minister announced the women's deaths on the John Laws radio program on November 9. This was the day after the release of the video of the incident at the centre of the child throwing allegations and the day before the election. Suspicions about the validity of the claims of child throwing were growing. The Prime Minister quoted from a Navy log to demonstrate, as I recall his words, that he sought to hide nothing. He said the women had died in a fire deliberately lit by the asylum seekers. He appeared to be using the women's deaths to bolster the credibility of the earlier claims and to damn asylum seekers further for their violent and extreme behaviour. Later comments from the Immigration Minister cast doubt on the actual cause of death, which may have been drowning. There were two Australian Navy ships and a Customs ship nearby at the time.

The Human Rights Council of Australia has been vigorously pursuing a full public inquiry into these deaths. It has approached the State Coroner of Western Australia and written to federal and state officials. It sought the release of the full Navy log from which the Prime Minister had read only a part on air. It also sought from the Prime Minister, the Immigration Department, the Customs Service, the Navy and the ADF further information about what happened, where and when to cause the deaths. The Prime Minister has still not replied or provided any further information about the circumstances of the deaths he was so quick to bring to public attention the day before the election. Others to whom the Council wrote referred the Council back to the Coroner pending a decision on whether an inquest would be held.

The lack of attention to or interest in these deaths seems to reflect the dehumanising treatment of refugees. These women are entitled to have their deaths properly investigated. The cause and circumstances of their deaths must be established. Both women were accompanied by family members, a husband and sons, who have a right under Australian law to be represented in any inquest. The Government must take the necessary steps to enable them to be represented properly without fear for their asylum applications. They should be granted residency on humanitarian and compassionate grounds.

This incident and the first one I have discussed lead me to conclude that the procedures of Australian Navy and Customs vessels in relation to boats carrying asylum seekers must be reviewed and, where deficiencies are identified, improved to prevent future fatalities. The Head of Army, General Peter Cosgrove, has been reported as saying, "We don't always get it right".³ The State Coroner of Western Australia has received a report of an investigation into the deaths conducted by the Australian Federal Police. He is now considering whether to conduct an inquest. The Human Rights Council considers a full public inquiry into the deaths essential.

The claims that asylum seeker parents at Woomera detention centre sewed their children's lips together raise similar issues again. Here again the most senior ministers made allegations of extreme misconduct by asylum seekers in the lead up to an election, in this case the South Australian state election. Yet independent statutory investigators, the Human Rights and Equal Opportunity Commission and the South Australian welfare department, found no evidence whatsoever to substantiate the claims.

These incidents raise serious concern that human rights have been violated, that the well-being of desperate people was put at risk and their vulnerability exploited for political advantage. Anyone who has done this, whether a minister or other political leader or a public servant, should resign. Unfortunately our system of government seems unable to prevent the exploitation of xenophobia for partisan advantage. The conduct of senior ministers in relation to these incidents seems to breach article 6 of the Federal Parliamentarians' Code of Race Ethics which provides a commitment "[t]o speak and write in a manner which provides factual commentary on a foundation of truth about all issues being debated in the community and the parliament". Unfortunately the Prime Minister and his cabinet have not signed the Code.

The issue here is one of accountability for human rights violations. Australian political culture seems to be as committed to impunity for human rights violators as the political culture of states with the worst human rights records. Those responsible for these incidents must be identified, held accountable and required at the very least to resign.

³The Australian 19 February 2002.

In fact a full, credible, independent, public inquiry into all three incidents is required. Proposals for an inquiry by a parliamentary committee are commendable but already the Prime Minister has been reported denouncing the committee as a political sham. Unfortunately a parliamentary committee will not succeed in producing a report generally accepted as independent and non-partisan. An inquiry should be established comparable to a judicial inquiry or Royal Commission, though with clear terms of reference and a schedule that enables it to conduct a short, well focused investigation. It should examine the issues I have raised today. It should have power to require the attendance of all relevant witnesses and the production of all relevant documents. There should be a bipartisan commitment from the Government and the Opposition to accept the recommendations of the inquiry, including any recommendations relating to findings of responsibility on the part of ministers and officials. Indeed an important complementary role for a Senate Committee could be the examination of ways to improve ministerial accountability and to eliminate impunity in cases of human rights violation.

In the meantime the asylum seekers who were the victims of these incidents are entitled to more sympathetic treatment in recognition of what has happened. They should be brought to Australia from the Pacific camps and granted permanent residence. Without this they will find it difficult to assist the inquiry as the inquiry will require. They have suffered enough from events in which they were defamed, vilified and held up to contempt. Many have experienced the deaths of close family members. They are entitled to an apology and to a speedy grant of residency.

Twelve principles for good refugee policy

Australian refugee policy suffers a lack of principle in its basis and formulation. Present policy is reactive, piecemeal and ad hoc without any clear foundation in law or ethics, grounded in public fear and government manipulation. Before attempting to devise a new, better approach to the treatment of asylum seekers we need to articulate clear principles based on human rights and the best Australian values of decency, compassion, hospitality and fairness. We need to provide a sound moral basis for whatever laws, policies and processes we adopt. There are twelve fundamental principles that I suggest should found our policies in this area, twelve principles on which, in my view, all fair minded Australians should be able to reach agreement.

- Australia is entitled to protect its borders and its territorial integrity in ways that are consistent with its domestic and international legal obligations, including its human rights obligations. It is entitled to regulate or prevent the entry of aliens into Australia provided that it does not violate its domestic and international legal obligations in doing so.
- Australia will accord to refugees and asylum seekers all their rights and entitlements under relevant international law, including under the *Refugee Convention*, the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child* and the *Torture Convention*.
- No refugee or asylum seeker will be subjected to punishment, mistreatment or other human rights violation to deter others from seeking asylum in Australia.
- Refugees and asylum seekers who are intercepted on their way to Australia will be treated with respect for their dignity and not be subjected to physical violence or threats of physical violence.
- Refugees and asylum seekers who are intercepted on their way to Australia will not be diverted forcibly to a third country but brought to Australia to have their claims processed in accordance with international law. Under no circumstances will a refugee or asylum seeker be diverted forcibly to a country that is not a party to the Refugee Convention or to the major human rights treaties.
- Conditions will not be attached to Australian aid funds to require or encourage countries to intercept refugees and asylum seekers on the way to Australia or to accept refugees and asylum seekers from Australia for detention or processing. Australian aid funds will not be diverted from development projects to underpin the detention and processing of refugees and asylum seekers in other countries.
- Refugees and asylum seekers will not be detained arbitrarily. In particular, there will be no indefinite mandatory detention of refugees or asylum seekers. No refugee or asylum seeker should be detained beyond an initial processing period unless individually assessed, subject to judicial review, as requiring to

be detained on grounds of public health, public safety or public security.

- No refugee or asylum seeker child will be detained except as a last resort and then for the shortest possible period of time. The parents and siblings of a child, or in their absence other family members who may be with the child, will ordinarily be released with the child to provide for the child's care and wellbeing, unless their release would raise significant risks in relation to public health, public safety or public security.
- In all decisions affecting a child the best interests of the individual child shall be a paramount consideration. Children are entitled to have their views heard and taken into account, according to their ages and maturity, in all decisions affecting them.
- Any refugee or asylum seeker in detention is entitled to be treated humanely with respect for his or her human dignity. The standards applicable in detention will be at least no less than those to which convicted prisoners are entitled.
- Asylum seekers who are accepted as refugees within the Refugees Convention are entitled to family reunion. Family reunion entitlements will extend at least to spouses and children and to parents and siblings who are dependent on the refugee. In the case of a refugee child, family reunion will extend without qualification to the child's parents or, if the child has no parent, then to adult family members or others who might have responsibility for the care of the child.
- Asylum seekers accepted as refugees will be accepted for permanent re-settlement. They will be entitled to all the benefits to which permanent residents are entitled.

The present system of indefinite mandatory detention in inhumane conditions of virtually all asylum seekers who reach the Australian mainland and of forced international transfer and off-shore detention of those who attempt to do so breaches these twelve basic principles. The principles enable us to develop an alternative approach, a better policy for refugees and asylum seekers.

An alternative to the present system

Developing a better approach is not an impossible or even a difficult task. Indeed every western country except Australia has managed to do it. The Prime Minister says he is unhappy with having to detain children, women and men seeking asylum, most of whom are refugees, and he says he does so only because he has to. The fact, however, is that he does not have to, that these detentions are the result of the deliberate policies of successive governments that have ignored or dismissed the many workable alternatives proposed over the years.

As early as 1994 a number of refugee and human rights non-government organisations and the Human Rights and Equal Opportunity Commission endorsed a *Charter of Minimum Requirements for Legislation Relating to the Detention of Asylum Seekers*.⁴ The *Charter* provided general principles and an outline of a system to implement those principles.

In September 1996 a Detention Reform Co-ordinating Committee established following the endorsement of this Charter submitted a draft alternative detention model to the Minister for Immigration and Multicultural Affairs. Under this model restrictions of the current type on the liberty of Protection Visa applicants are kept to a minimum, usually less than 90 days. After the initial period in closed detention most applicants would move to a more liberal regime appropriate to the individual's circumstances. Regular review of each applicant's detention status

⁴ The Charter was endorsed by the Australian Council of Churches, Australian Council of Social Service, Australian Red Cross, Federation of Ethnic Communities Councils of Australia, Human Rights and Equal Opportunity Commission, Immigration Advice and Rights Centre (NSW & Victoria), International Commission of Jurists, International Social Service, Legal Aid Commission of NSW, Migration Institute of Australia, National Legal Aid, Refugee Advice and Casework Service (NSW & Victoria), Refugee Council of Australia, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (NSW), South Brisbane Immigration and Community Legal Service, St Vincent de Paul Society and Uniya.

is recommended so as to improve the ability to match the restrictions imposed on an applicant's liberty to his or her circumstances.⁵

In 1998 the Human Rights and Equal Opportunity Commission developed that model further in a detailed proposal in its report *Those who've come across the seas: detention of unauthorised arrivals*.⁶ That model remains a viable, effective alternative that is fully consistent with the principles for good policy I have enunciated today.

The events of 2001 led to more work on alternative models. In June 2001 the Conference of Leaders of Religious Institutes (NSW) released a *Policy proposal for adjustments to Australia's asylum seeking process*. Later in 2001 another non-government organisation, Justice for Asylum Seekers, extended this work in proposing the *Transitional Processing and Reception Model*.

All these models are similar. All are consistent with the twelve principles I have proposed. They constitute an acceptable and appropriate framework for a better approach to refugees and asylum seekers. The framework is clear.

First, a period of **initial mandatory detention**, consistent with government and opposition policy, is acceptable. International law and practice recognises that detention is permissible if required by reason of public health, public safety, public security and identification.⁷ What is not acceptable is extending mandatory detention indefinitely, denying individual assessment of the need to detain and prohibiting judicial review of detention beyond the initial period.

Significantly all those participating in the public debate about detention of asylum seekers support speedy determination of status. The present policy of indefinite detention provides no incentive whatsoever to departmental authorities to complete the process within a reasonable period of time. As a result initial processing can extend for many months, sometimes even more than a year. Limiting the period of mandatory detention will provide a powerful and effective incentive to ensure the prompt determination of applications. If departmental officials do not do their job within a reasonable period of acceptable mandatory detention, then the asylum seeker should be entitled to be considered for release, subject to whatever conditions may be determined to be necessary and prudent.

The Human Rights and Equal Opportunity Commission recommended an initial period of detention of thirty days, with two possible extensions of thirty days, making a total period of possible detention of ninety days. These proposals remain acceptable and appropriate.

Second, before the end of the initial period of thirty days each asylum seeker should receive **individual assessment** for release. Not every asylum seeker will be released. There will be some whose continued detention is justified and reasonable and acceptable under international law. The Human Rights and Equal Opportunity Commission identified those

- whose identity cannot be verified
- whose application for a Protection Visa has not been lodged for processing
- who are considered on reasonable grounds to pose a threat to national security or public order or public health or safety
- who are assessed as very likely to abscond or
- who refuse to undertake or fail the health screening.

The critical element is that these assessments are made on an individual, person by person basis and not be general judgements applied to an entire group of asylum seekers or to all asylum seekers.

⁵ Human Rights and Equal Opportunity Commission *Those who've come across the seas: detention of unauthorised arrivals* Sydney 1998 p 250.

⁶ *ibid* p 247-256.

⁷ United Nations High Commissioner for Refugees Executive Committee Conclusion 44.

The Commission also listed those who should be given priority for release:

- children under 18 years of age and close relatives of a child detainee under 18 years of age
- unaccompanied minors
- those older than 75 years of age
- single women
- those requiring specialist medical attention that cannot be provided in detention
- those requiring specialist medical attention due to previous experience of torture or trauma and which cannot be provided appropriately in detention.

The Human Rights and Equal Opportunity Commission proposed that the initial decision on release should be made by departmental officers subject to tribunal and judicial review. Those who are not released before the end of 90 days are entitled to a statement of reasons for and judicial review of the decision to continue their detention. The model proposed by Justice for Asylum Seekers takes a different approach. It provides for release or continued detention to be determined by an assessment panel with both departmental and outside members.

Third, those who have not been properly denied release on one of the grounds set out above should be *released* on an appropriate bridging visa subject where necessary to restrictions on movement. The bridging visa may provide certain restrictions on the freedom of movement of the asylum seeker. The Human Rights and Equal Opportunity Commission proposed two types of bridging visa, an open detention bridging visa and a community release bridging visa.

With an open detention bridging visa

- accommodation and daily requirements are provided by the Department
- the visa holder can leave the centre between the hours (for example) 7.00 am and 7.00 pm
- the visa holder must sign out and in to the hostel when departing and returning
- eligibility for permission to work is available on the terms contained in the current Bridging Visa E
- a visa holder who obtains employment must pay a fee for accommodation and board
- a visa holder is eligible for Asylum Seekers' Assistance on the terms currently available to other asylum seekers and, if granted, a fee for accommodation is deducted prior to payment to the visa holder.

With a community release bridging visa

- the visa holder resides at an approved designated address
- the visa holder must notify the Department of any change of address within 48 hours
- the visa holder must report to the Department at regular intervals specified by the case officer
- the visa holder or the nominated close family may be required to pay a bond to the Department or sign a recognisance with the Department
- if called upon to do so, the visa holder shall present to the case officer within 24 hours
- the visa holder is required to sign an undertaking in writing that he or she shall comply with the conditions of the visa and, in the event that a condition of the visa is breached, may be returned to detention
- eligibility for permission to work is available on the terms contained in the current Bridging Visa E
- eligibility for Asylum Seekers' Assistance is on the terms currently available to other asylum seekers.

The Australian criminal justice system already provides a range of release options with varying degrees of supervision for those on bail or parole or probation. The options include reporting to police or other officials, living and remaining in a specified place or district, home detention and electronic monitoring. These same, well tried options could be made available for asylum seekers released from detention. The conditions on the visas proposed by the Human Rights and Equal Opportunity Commission seem unnecessarily restrictive, making the options attached to the visas very narrow. A better approach involves complete flexibility in determining the appropriate conditions to be attached to a visa. No person should be subjected to more restriction of freedom than is necessary.¹ Each person should be individually assessed and, where some restriction is considered

¹ *Refugee Convention* article 31.2.

necessary, for example, for one of the reasons relevant to a decision to continue detention, then it should be the least appropriate restriction necessary for the individual asylum seeker.

Fourth, any asylum seeker who breaches the conditions set for his or her release without good reason may be **returned to detention** and should not be eligible to re-apply for release for a period of 30 days from the time of return to detention. Further if circumstances change so that an asylum seeker who was released comes within one of the five categories of person who may be detained, the person may be returned to detention. Where an asylum seeker is returned to detention, his or her detention must be reviewed before the completion of a 30 day period. In considering release the departmental officer may consider each of the criteria applicable in relation to an initial decision to detain.

Finally, any asylum seeker detained beyond the initial period of 30 days may seek **review** of the decision to continue detention. A departmental officer may review at any time and must do so at least every 30 days. An asylum seeker may also seek independent external review of the necessity of continued detention beyond the 30 day initial period and of the necessity and appropriateness of any restrictions imposed as conditions for release. Where the review is undertaken by a tribunal, the Federal Court should be able to review the decision of the tribunal on a point of law.

This basic model is a workable alternative to the present system that meets all the principles I have enunciated. It respects the human rights of asylum seekers. It offers appropriate protection to the Australian community. It is also, coincidentally, far less expensive than the present system, a far lesser drain on taxpayers' resources. There is no agreed method for calculating cost but on any basis the cost is great and growing. The Human Rights and Equal Opportunity Commission reported various estimates of the costs of the detention system during the 1990s:

- in 1994, according to a parliamentary committee report, \$55.64 per person per day at Port Hedland, \$58.49 at Villawood and about \$200 at other centres
- in September 1997, according to a ministerial statement to Parliament, \$161.77 per person per day at Port Hedland and \$111.11 at other centres
- in 1998, according to the Australian National Audit Office, \$69 per person per day in 1994-95, increasing by more than 50% in the following year to \$105 per person per day.²

The Conference of Leaders of Religious Institutes (NSW) provided a telling comparison of the costs per person per day of detention and of supervised release in the community, as calculated by a NSW parliamentary committee in June 2000:

Prison	maximum security	\$177.43
	medium security	\$161.35
	minimum security	\$121.09
Community release	parole	\$5.39
	probation	\$3.94
	home detention	\$58.83
	hostel	\$95.89. ³

No immigration detention centre is comparable to a minimum security prison. The cost per person per day would be similar to that in a medium or maximum security prison. The cost of an alternative release option would be more than the costs shown here for the criminal justice system because most convicted persons released under this scheme have their own homes to return to. Asylum seekers would not and so housing costs would be in addition to those shown. Nonetheless, there remains a very significant difference. Community options are far less expensive.

These estimates were calculated before the so-called Pacific Solution was devised and implemented. The cost of

²op cit p 249.

³Conference of Leaders of Religious Institutes (NSW) *Policy proposal for adjustments to Australia's asylum seeking process* 13 June 2001 para 3.8.1.

this approach is unknown but it has been estimated at \$500 million this year, far more than the disclosed cost of the on-shore system. The alternative model offers real savings to taxpayers as a bonus on top of the more ethical, more humane dimensions.

The alternative approach I have described here is similar to the approaches taken successfully in most other western countries.⁴ In Sweden, for example, where this kind of approach has been taken for many years, the average stay in a detention centre is a mere 47 days.⁵ One argument against a release scheme is that it will not deter other asylum seekers. But detention solely as a means to deter others is unacceptable and a violation of the *Refugee Convention* and of human rights law. And in any event there is no evidence that the various deterrent steps taken by Australian governments over the last decade have worked. Another argument is that released asylum seekers will abscond. Careful assessment before release and appropriate reporting requirements after release will minimise the risk of absconding. Experience in the United States, where release of asylum seekers is routine pending determination of status, is that few abscond. Indeed in one pilot monitoring scheme 95 % met every reporting requirement.⁶

Conclusion

The time has come to say enough is enough. Present policies cause gross violations of human rights. They shame us. They are undermining the moral authority of our national leaders and the ethical basis of our commonwealth. We're in a mess. All this and all so unnecessary. The time has come for fundamental change, turning away from the mess we are in and embracing values that all Australians say they hold dear: decency, compassion, hospitality and fairness.

This will require

- accounting for the recent past, learning the truth of who knew what when in relation to the false claims that asylum seekers threw their children overboard, of who knew what when in relation to the false claims that asylum seekers sewed their children's lips together and of what happened when two women asylum seekers died at sea close by Australian Navy and Customs vessels - I have proposed a full, credible, independent, public inquiry as the only satisfactory means of doing this
- articulating and adopting a set of basic principles to found a fair, just and secure approach to asylum seekers - I have proposed twelve principles for good refugee policy as a basis for further discussion and development
- abandoning the current system in favour of one that complies with all our fundamental principles as Australians and as human beings - I have described how an alternative approach would work protecting the interests of Australia and Australians and the human rights of asylum seekers.

Contrary to what is said by many of our national political leaders and many media commentators change towards fairness and decency in refugee policy is possible. It is necessary if we are to restore our integrity in our own eyes and in the eyes of the world.

Enough is enough.

⁴ See A W Nicholas *Protecting refugees: alternatives to a policy of mandatory detention* unpublished 2001.

⁵ Grant Mitchell *Asylum seekers in Sweden* unpublished August 2001.

⁶ A W Nicholas *op cit* p 4.