

Achieving Reform of Australian Asylum Seeker Law and Policy

Introduction

Australia is a party to international treaties which oblige it, in certain circumstances, to refrain from returning a non-citizen to their country of nationality, if their basic human rights are likely to be seriously violated in that country.² Persons seeking to invoke Australia's protection obligations under these treaties are known as on-shore asylum seekers. Their situation is provided for within general immigration law and policy. This is not surprising, given that successive Australian governments have expressed the belief that *most* on-shore asylum seekers are, in reality, engaged in bad faith attempts to circumvent Australia's immigration controls.

As Catherine Dauvergne points out: 'immigration law is made by US but applies to THEM...It does not apply to those within the social contract or those who provide a

mandate for governance through their votes' (1997, p. 332). The tendency of liberal theorists to assume a closed society means that our usual conceptions of the 'rule of law', in fact, place no constraints on our treatment of those who are not citizens (i.e. members). This is why the realm of immigration law and policy in Australia and other liberal democracies appears to have become a realm in which 'political might really does mean right' (Dauvergne 1999, p.31). In Australia's case, the measures directed at preventing abuse of the on-shore protection program are measures that clearly violate the basic human rights of on-shore asylum seekers. The purpose of this article is to explore how those of us who wish to ensure that the human rights of on-shore asylum seekers are protected can most effectively go about achieving that goal.

Identifying power holders

A. Executive government

The executive government has the power to implement its asylum seeker policies through adminis-

trative action, usually without the need for explicit legislative authorisation.³ The point for asylum seeker advocates to note is that the executive government is not a monolithic entity. It has, in practice, two arms: the political arm (the Ministers) and the administrative arm (the public servants) (Rayner 1997, p.108-9). Although there are some who suggest that immigration portfolio policy is 'driven' by the Department of Immigration (Theophanous 2000a; *Weekend Australian* 2000), the present Minister for Immigration denies this (Ruddock 2000). On balance I am inclined to the view that the denial is accurate.⁴ This is not to say, however, that the Minister alone determines immigration policy. The available evidence suggests, in fact, that the Prime Minister and Cabinet have had a great deal to do with many recent immigration policy decisions (Mares 2001, p. 153).⁵ The MPs who are members of the Government's Migration and Ethnic Affairs Policy Committee also have some input into the policy making process (Gallus 2000).

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B. Parliament

In theory, Parliament has the power to legislate to circumscribe Government freedom of action to whatever degree it considers desirable. In practice, of course, it is incapable of passing legislation of which the executive government does not approve. On the other hand, the political party of the executive government has not had in the recent past, and is unlikely to have in the foreseeable future, the numbers to control the Senate. It is, therefore, possible for Bills initiated by the Government to be blocked in the Senate, for Regulations enacted by the Government to be disallowed by the Senate, and for inquiries into Government conduct to be initiated by the Senate.

ALP responses to government policies are determined by caucus. What usually happens in practice is that caucus adopts recommendations made by the shadow ministry after those recommendations have been considered, and perhaps amended, by a caucus committee (the Social Policy Committee in the case of immigration policy) (Theophanous 2000; Albanese 2000). The ALP's National Platform seems not to constrain caucus decisions in any way (Theophanous 2000), suggesting that those organisations that attempt to influence the content of the National Platform would be better advised to direct their energy into other channels.

The Australian Democrats presently hold the balance of power in the Senate. Their response to government immigration policy is largely formulated by the immigration spokesperson, though implemented only after party room discussion and with party room approval (Bartlett 2000).

Identifying the factors influencing power holders

A Perceptions of the national interest

Not surprisingly, political parties always claim that their policy positions are primarily determined by consideration of the 'national interest'. Moreover, all sides of politics are agreed that the bypassing of Australia's immigration controls by non-citizens is not in the national interest (Ruddock 2000; Sciacca 2000; Bartlett 2000). They differ only in the details of their response to the problem. These differences in details are, in part, a reflection of differences in the political ideas of the different parties that lead them to different views about other aspects of the national interest.

For example, the Coalition government recently announced that, in the future, UN treaty committees would not be able to count on Australia's co-operation. Among other things, Australia would be rejecting 'unwarranted requests from treaty committees to delay removal of unsuccessful asylum seekers from Australia' (Downer et al 2000). The announcement was perfectly in keeping with the narrow 'realist' understanding that the Coalition parties presently have of the national interest. However, the ALP described the announcement as a 'disgraceful performance', pointing out that Australia's reputation as a good international citizen would be greatly damaged (Brereton 2000). The now dominant ALP view is that in a 'globalised world' it is in the national interest to be seen to be a 'good international citizen' (Evans 1998, p. 14; Burchill 1991, pp. 28-34). The Australian Democrats also

referred to the damage that the government's announcement would cause to Australia's international standing (Bourne 2000), but this was not their main concern. The Australian Democrats' assessment of the national interest is based on strong principles of social justice, which they regard as applying no less to the situation of on-shore asylum seekers than other marginalised groups. They espouse the adoption and application of international human rights law in Australia because it is an important means of furthering their social justice agenda. The government's announcement was greeted with strong opposition from the Australian Democrats, primarily because it represented a set back for those involved in the struggle for social justice (Bourne 2000a; Ridgeway 2000; Greig 2000).

B. Perceptions of public opinion

Politicians do not live by political ideas alone. Election is the goal that the politicians of every democratic state, including Australia, pursue. A government's policy choices and opposition parties' responses to them tend to be considerably influenced by their understanding of how the positions taken will impact on voting at the next election. And one thing that all politicians understand very well is that policy positions that are too far out of step with public opinion will usually be punished by voter backlash (Etzioni 1968, p.163).

The Australian Democrats, the ALP and the Coalition Government all perceive public opinion as being, on the whole, quite hostile toward illegal immigration and on-shore asylum seekers (Bartlett 2000; Sciacca 2000; Albanese 2000; Ruddock 2000). The perception is partly poll-derived and partly derived from

monitoring talk-back radio and taking note of the volume of negative letters, phone calls and so on received from constituents in parliamentarians' electorates (Albanese 2000; Thomson 2000; Baird 2000; Mason 2000). In any event, the crucial One Nation constituency,⁷ is generally regarded to be in favour of tough immigration control measures.

The Australian Democrats and the ALP accuse the Coalition Government of catering to hostile public opinion and even of courting the One Nation constituency (Bartlett 2000; Sciacca 2000). Independent commentators tend to agree (McGregor 1999; Mares 2001, pp.155-6; Cope 2000), although the Government denies the charge (Ruddock 2000). Of course, in responding to government policy, ALP politicians are far from being uninfluenced by their perception of public opinion (Sciacca 2000; Albanese 2000). There is a significant overlap between the traditional ALP constituency and the One Nation constituency, and the ALP appears keen to ensure that that constituency is not wooed away from them (Adams 1999; Cope 2000). Certainly, the government has managed to pressure the ALP into allowing several of its immigration control measures to survive the Senate, by the simple expedient of taking active steps to generate visible community support for those measures. The introduction of the temporary protection visa was a good example of this dynamic at work. In late 1999, the Government amended the Migration Regulations to provide that an on-shore asylum seeker, who was not immigration cleared at the time of making a protection visa application, could only be granted a temporary protection visa of three years duration in the

first instance.⁸ The Australian Democrats moved a motion to disallow the new measure in the Senate. The ALP's immigration spokesperson, Con Sciacca, was not 'personally in favour' of the measure and wished to support the motion of disallowance (Sciacca 2000; McGregor & Balogh 1999). The Government, however, made a plethora of public statements to the effect that 10,000 boat people from the Middle-East were preparing to come to Australia and that the three year temporary protection visa was the most important of the Government's deterrence measures (McGregor 1999a).

ALP parliamentarians received 'literally hundreds of letters and phone calls from people saying if you don't agree with that what you are doing is you are acquiescing to illegal immigrants coming into this country' (Sciacca 2000). Counter-mobilisation by the churches and other civil society organisations supportive of asylum seekers was relatively strong (McGregor, 1999a), but nowhere near as impressive (Sciacca 2000). Kim Beazley and the shadow cabinet decided to recommend to caucus that ALP Senators join the Coalition Senators in opposing the Australian Democrats' disallowance motion (Adams 1999; Albanese 2000). About 20 per cent of caucus members expressed unhappiness with the recommendation (Theophanous 2000).⁹ However, the ultimate caucus decision was to accept shadow cabinet's recommendation in order not to give the Government a win in the propaganda war (Mares 2001, p. 27). Con Sciacca himself justifies the about-face that was forced on him in the following terms:

[I]t is stupid of me, for instance, as the shadow

minister to be out there nailing our hide on a petard, if you like, saying we support [refugees] and as far as we are concerned we'll go to the wall for them and all the rest of it, when all that does is stops us getting into government when we can actually do something about it (Sciacca 2000).

Achieving short-term law and policy reform objectives

A. Influencing executive government

By working in partnership with the Department of Immigration and Multicultural Affairs (for example, participating in regular consultative forums with DIMA), civil society organisations may well be able to achieve the rectification of inadvertent maladministration and such like (Harris 2000; DIMA 1999). However, if major policy or law reform is sought, it is necessary to engage with the political arm of the executive government. The present Minister for Immigration claims to consult widely in relation to policy (Ruddock 2000). In one sense this is true. In another it is not. The complaint of civil society organisations is not that the Minister refuses to listen, but rather that he is not open to persuasion in relation to key aspects of asylum seeker policy (Heuft 2000; Piper 2000; Clutterbuck 2000). The complaint appears to be an entirely valid one. As many political communication theorists have pointed out, the usual reason for this kind of non-responsiveness to interest group or social movement pressure is that the government is completely confident that prevailing public opinion is on its side (Burstein 1999, pp. 9-10).

B. Influencing parliament

1 Lobbying individual parliamentarians

It cannot be assumed that parliamentarians will always be sufficiently well informed about proposed government measures as to realise for themselves, and be able to articulate for others, which measures ought to be opposed and why. The contrary is often true (Rodan & Anderson 2000; Curran 2000). Non-government parliamentarians, in particular, may well lack necessary information. Not only do they have limited access to governmental information, they are also unlikely to have enough staff and other resources to research measures for themselves (Rayner 1997, pp. 91-2; Cooney 2000).

On any given issue, parliamentarians are as open as the rest of us to being persuaded of the position they should adopt by argument and evidence. Independents and members of minor parties such as the Australian Democrats are the most likely publicly to espouse the positions to which reason and conscience lead them, and to cast their parliamentary vote accordingly (Stock 1997, p. 209). Liberal, National and ALP politicians, however, risk their careers if they do the same (Summers 1997, p. 25). The objective in lobbying individual parliamentarians is not to persuade them to take public action, but rather to persuade them to do what they can behind the scenes.

2. Making submissions to inquiries

The purpose of a parliamentary inquiry is to give a parliamentary committee the opportunity to investigate an important matter for itself (with, of course, a lot of assistance from the committee's secretariat). It should be noted, though, that where the executive government has had an inquiry

forced upon it, it may well be able to stymie the inquiry by denying it access to governmental information (Gallus 2000; SLCRC 2000, p. xxvii). The Australian Democrats probably enter inquiries with the greatest openness to testing their pre-existing views against the evidence and arguments presented (Cooney 2000). By contrast, many committee members belonging to the main political parties use inquiries as just another opportunity for political point scoring. However, other committee members from the main political parties do make a good faith attempt to think through the issues on the basis of the evidence and the arguments, and may well end up putting their name to a report which varies from their own party's official position (Cooney 2000; Gallus 2000; Bartlett 2000).

3. What can be achieved in the short-term?

(a) Blocking government measures

Civil society organisations have occasionally been able to convince opposition parliamentarians to block government immigration control measures. Recent success stories have been the blocking of an attempt to oust judicial review of immigration decisions and the blocking of an attempt to prevent class actions in the immigration jurisdiction (Clutterbuck 2000; Graydon 2000; Rodan & Anderson 2000; McKiernan 2000).

In 1992, the then ALP Government procured the passage of Part 8 of the *Migration Act 1958* (Cth). Part 8 restricts the grounds on which the Federal Court of Australia is able to conduct judicial review of RRT decisions to fewer than those available in respect of most administrative decisions. However, there is no restriction placed

on the grounds of review available in the High Court of Australia.¹⁰

In its first term in office, the Coalition Government attempted to go further than the ALP. It attempted to eliminate judicial review in the migration jurisdiction to the extent constitutionally possible by use of a privative clause. The main rationale given was that of preventing the judicial review process from being abused by bogus asylum seekers trying to delay their removal from Australia. The initial reaction of both the ALP and the Australian Democrats was negative, and the Bill containing the clause, *Migration Legislation Amendment Bill (No. 5) 1997*, was referred to the Senate Legal and Constitutional Legislation Committee (SLCLC) for consideration. The Committee reported in October 1997. The whole of the Committee expressed serious concerns about the Bill, though only a minority (the ALP and Australian Democrat members) concluded that the Bill ought to be rejected (SLCRC 1997). The Bill renamed *Migration Legislation Amendment (Judicial Review) Bill 1998* was reintroduced in the Coalition Government's second term in office. The SLCLC conducted an inquiry into the renamed Bill. In its April 1999 report, the whole of the Committee again expressed concerns about the substance of the Bill though again only the ALP and Australian Democrat members concluded that these concerns warranted rejection of the Bill (SLCLC 1999). The Coalition Government has not yet put the *Migration Legislation Amendment (Judicial Review) Bill 1998* to a vote in the Senate, but often refers to it as a very important immigration control measure that ought not to be opposed by anyone having the national interest at heart. The ALP's decision to stand firm against pas-

sage of the Bill, despite the opportunity that it gives the Government for political point scoring, is probably attributable to the mobilisation against it over the course of the two Senate inquiries. Powerful interest groups such as the Law Council of Australia, together with many significant organisations from the church and community sector, lobbied against the Bill not only in the public arena of the inquiries but also in private. Their combined efforts gave the ALP the comfort of knowing that there was an existing constituency in favor of opposition, as well as the ammunition (in the form of cogent arguments for opposition) to hold their own against the Government in the ensuing propaganda war. Of course, if there was a threat of the Bill becoming an election issue in itself (for example, attempted use of it as a double dissolution trigger), the political calculation would be entirely different and ALP opposition to it could no longer be relied upon (Sciaccia 2000).

On 14 March 2000, the Coalition Government introduced *Migration Legislation Amendment Bill (No 2) 2000* into the House of Representatives. The Bill's purpose was to prevent asylum seeker initiated class actions in the migration jurisdiction and to impose other severe restrictions on the practical availability of judicial review. As in the case of the privative clause Bills, the main rationale given was that of preventing bogus asylum seekers from abusing the judicial review process. The Law Council of Australia made its opposition to the Bill known to all sides of politics, and managed to secure an inquiry into the Bill by the Joint Standing Committee on Migration (Rodan & Anderson 2000). At the least, the inquiry process played a

part in ensuring that initial adverse reaction by opposition parties was maintained. According to Senator Bartlett:

Even though I had a position before hand it still helps to try and get the evidence out there. If the Government and Department in particular had clearer evidence of abuse – a bit more and clearer evidence of attempts to do something about it in other areas before going down this path – their case would have been a lot stronger. And you know through the virtue of that not being there I think it provides the mechanism for us and Labor to pressure them to do more in other areas first (Bartlett 2000).

The Joint Standing Committee on Migration reported in October 2000. The majority report by Coalition members recommended passage of the entire Bill. The ALP and Australian Democrat members dissented from the majority report, but only to the extent of recommending rejection of the anti-class provisions of the Bill. Moreover, those dissenting made a point of expressing willingness to reconsider their rejection if presented with more compelling arguments for the anti-class action provisions than had been presented in the course of the inquiry. Upon second reading of the Bill in the House of Representatives on 6 February 2001, the ALP indicated that it would, in fact, oppose the Bill *in toto* (Sciaccia 2001). The Bill, renamed *Migration Legislation Amendment Bill (No.1) 2001*, is now before the Senate, but debate has been adjourned.

(b) Getting non-government proposals on the agenda

In November 1998, a Somali asylum seeker (Mr Elmi), who

faced removal from Australia after rejection by domestic tribunals, complained (via his lawyer) to the United Nations Committee Against Torture alleging that removal would place Australia in breach of Article 3 of the Convention Against Torture. The Committee requested that the Australian Government refrain from removing Mr Elmi from Australia while the Committee was considering his complaint. The Government complied with the request.¹¹

Mr Elmi's lawyers, and the civil society organisations involved in the effort to protect the interests of Mr Elmi and similarly situated asylum seekers, sought and received a great deal of media coverage of the case. In addition, Amnesty International Australia (AIA), the Law Council of Australia and the International Commission of Jurists took the opportunity jointly to call upon the Minister for Immigration to institute a parliamentary inquiry into Australia's refugee status determination system. These organisations and others also directed their call for an inquiry to opposition parties in the Senate. The call was rejected by the Government (Carruthers 1998) but received the support of the Australian Democrats.

On 4 May 1999, Senator Brian Harradine, a staunch Catholic, was presented with a videotape in which a Chinese woman, who had been removed from Australia in July 1997 while over eight months pregnant, stated that she had been subjected to a forced abortion by Chinese authorities. Senator Harradine brought the matter up in Parliament that day. It excited much media interest, and was the final impetus needed for the Senate to establish the wide-ranging parliamentary inquiry that civil society organisations had been

seeking since December 1998.

The Senate Legal and Constitutional Reference Committee (SLCRC) Inquiry into the Operation of Australia's Refugee and Humanitarian Program commenced in May 1999. Broadly speaking, the terms of reference of the inquiry were to consider whether Australia's processes for dealing with on-shore asylum claims were adequate to the task of ensuring that Australia met all its international protection obligations, taking particular account of the cases of Mr Elmi and the pregnant Chinese woman.

In June 2000, 82 written submissions, 17 public hearings, nine *in camera* hearings and many days of behind the scenes work later, the Committee tabled a unanimous report containing 46 recommendations. The vast majority of these recommendations were implicitly critical of Australia's existing processes for dealing with on-shore asylum claims. Unfortunately, the report did not receive much attention from a media preoccupied at the time with the imminent introduction of the Goods and Services Tax (Mares 2001, p. 115). It was nevertheless a significant report. At the time of tabling, Senator Bartlett said:

'[I]f I had written this report solely I would have been stronger and harder in some of the recommendations... Through the conduct of the inquiry, we did look for common ground where possible.

I am very pleased that we have produced a report that is pretty close to unanimous, except for one or two areas. I hope that the government takes note of the fact that it is cross-party and has the overall support of all the senators on the

committee, as well as participating senators such as Senator Harradine, which should give emphasis to the government about the weight and strength of the views of the committee' (Bartlett 2000a).

Senator Bartlett hoped in vain. The Committee's recommendations were brushed aside by the Coalition government.

Civil society organisations that push for the institution of parliamentary inquiries and make submissions to them hope, of course, that the inquiry will result in the making and implementation of the recommendations that they seek. However, they realise that an inquiry that fails in these terms may still be counted a success. A Committee report that is ignored by the Government to which it is presented, still remains on the public record influencing all those who read it (and if taken up by the media, perhaps even those who do not) (Cooney 2000). It may not change the policies of today, but it may well play a part in changing the policies of tomorrow (Harris 2000). Similarly, lobbying of individual parliamentarians may not lead to dramatic crossings of the floor, but may at least cause those parliamentarians to take the issues raised seriously into account in their political calculations and to persuade others to do the same.

Changing the political environment

A. The challenge

Since power holders are considerably influenced in their actions by their perception of prevailing public opinion, it follows that an indirect way of influencing those actions is to change public opinion.

Those seeking to change public opinion can choose one of two paths. They can try to change public preferences within existing frames of reference or they can try to procure the abandonment of existing frames of reference and the institutionalisation of new frames of reference (Burstein 1999, p. 14). In an article that is a companion to this one, I have explained my reasons for believing that asylum seeker advocates need to embark upon the latter project (Taylor 2001). More particularly, asylum seeker advocates need to embark upon the project of persuading the Australian public to use human rights principles, rather than their hostility towards illegal immigration, as the relevant frame of reference for thinking about the treatment of asylum seekers (*ibid.*). I take as my starting point the assumption that those to whom human rights principles are explained, and whose fears of invasion by alien hordes are allayed by presentation of the facts, will be convinced to form their judgments on asylum seeker issues on the basis of the former. The assumption is not an unreasonable one, given that the human rights idea has proved its power in many different contexts (Risse et al. 1999). The problem then becomes one of communicating with an audience of several million ordinary Australians getting on with their own lives, not paying too much attention to matters that do not directly concern them.

B. Media work

The obvious way of communicating with 'the public' is, of course, to use the mass media. Although members of the public do not necessarily adopt wholesale the prevailing media framing of a particular issue (Neuman et al.

1992, pp. 76-7), research does indicate that the way that issues are framed in the mass media can have a *significant influence* on the way members of the public frame those issues (e.g. Jacobs and Shapiro 1996; Chong 1993, p. 890). The point to note, however, is that those who seek to influence public opinion through the mass media embark on a task of enormous dimensions and immense difficulty. Members of the public consume a vast amount of media product from news to soaps delivered via a plethora of television and radio stations, popular magazines, newspapers and so on (Ryan 1991, p. 235). In Australia, asylum seeker issues tend to be framed in negative terms across all media, but particularly so in the most popular media. In order to have any chance of being effective, therefore, asylum seeker advocates need a media strategy that embraces not just the quality press (for example, the *Age* and the *Sydney Morning Herald*) and ABC and SBS radio and television, but also commercial radio (especially talk back), commercial television, popular magazines (for example, the *Australian Womens Weekly*) and the tabloid press (ibid; Piper 2000a).

At present, asylum seeker advocates only rarely get their messages into the media products with the greatest audience reach. Simply issuing press releases is not going to change this state of affairs. There is a high media take up of Government press releases directed at reinforcing the immigration control frame, because what the Government says and does is perceived to be intrinsically newsworthy. Under ordinary circumstances, civil society organisations cannot hope to have their countering press releases picked up by the media to the same extent (Theophanous

2000; Cooney 2000; Harris 2000; Ryan 1991, pp. 8-9).

Even when civil society organisations manage to obtain media coverage, they find that attempting to introduce unfamiliar frames puts them at a disadvantage (Ryan 1991, pp. 8-9; Heuft 2000). One danger is that the media may distort the views of asylum seeker advocates to fit the media's pre-existing frames of reference. For example, shortly after the expansion of the Woomera Immigration Detention Centre was commissioned, AIA was, on several occasions, approached by a particular media organisation for comment. According to Des Hogan of AIA:

What's actually happened is that it's taken some of our stories and it's rewritten them in political polemic... and we wouldn't necessarily have said that [or] we would have contextualised the comment... Unfortunately a lot of the media ethos is predicated on the notion of conflict where you have two different views (Hogan 2000).

Another danger is that asylum seeker advocates may be tempted to distort their own views in order to tap into the media's pre-existing frames albeit in an attempt to use them in a positive way (Taylor 2001). However, such temptation needs to be resisted. According to Gamson and Wolfsfeld, 'movements will be most successful in getting their message across when they are both clear and consistent in what issue framing they prefer' (1993, p.121).

When attempting to introduce new framing it is best to concentrate on providing the media with prepackaged products that can be used without alteration (Ibid). One prepackaging strategy is to write letters to the editors of newspapers

– the national and the local, the quality and the tabloid. The Letters to the Editor section of a newspaper is, after the front page, its most read section (Bobo et al. 1996, p.120). Another more labor-intensive pre-packaging strategy is to organise a media event. For example, in 2000, an Education/Advocacy Officer with the National Council of Churches in Australia spent six months organising a festival event for Refugee Sunday.

If you ring them [the media] up and whinge about something they are not interested. But if you have a nice photo opportunity involving kids and old people and balloons and stuff they will report on it (Harris 2000).

Part of the festival event involved the launching of toy boats in a fountain.

That's quite political when you think about it you know showing solidarity for boat people and children in detention... (ibid).

However, the packaging worked.

The print media stuff was pretty good. They explained what the boat launch was about. Why we were doing it (ibid).

Of course, a few successful communication efforts do not a changed political environment make. Since individual learning through the mass media is a 'gradual, incremental process' (Neuman et al. 1992, p. 81), it is necessary to keep doing more of the same for a few decades or more.

C. Grass roots work

Although use of the mass media is the obvious way of communicating with the public, it is not the only way. More important, some would say, is what is often described as

grass roots work. There are many civil society organisations doing grass roots asylum seeker advocacy work all over Australia.¹² Routine grass roots work involves incorporating information about asylum seeker issues in Parish Bulletins and organisation newsletters, distributing campaign letters to community leaders and community members at every appropriate opportunity, and speaking to (or arranging for asylum seekers to speak to) church congregations, schools and other groups. Research into the manner in which new ideas spread suggests that the interpersonal communication involved in the last-named activity is especially vital to the process. Interpersonal communication allows for the person presenting the new idea to do so in an audience-appropriate manner and it allows for the person presented with the new idea to seek clarification and so on. Interpersonal communication is therefore more likely to persuade an individual to form or to change a strongly held attitude than mass communication efforts (Rogers 1983, pp. 17-8, 198). Grass roots work also involves activities such as getting members of the public to sign petitions, sign form letters to politicians, and so on. Petitions and form letters are not particularly effective means of influencing politicians, but they are useful means of educating members of the public, making them feel empowered and hopefully encouraging them to become more actively involved in bringing about social change (Bobo et al. 1996, pp. 37-8).

A more resource-hungry way of educating and empowering at the grass roots level is to organise large turn out events such as Refugee Sunday. At least 200 churches around Australia participated in Refugee Sunday in 2000 and this

participation had a big impact on the church congregations (Harris 2000). The organiser provided the following example:

When the Woomera burning stuff happened the very next day I got all these email statements saying "you know, my first reaction would normally have been to denounce those people, but because we'd been to Refugee Sunday and because I'd spoken to Reverend Govindaraj [a speaker at the event] I felt differently." (ibid).

Case Study: Reforming the immigration detention regime

For almost a decade, Australian legislation has provided for the mandatory detention of all unauthorised arrivals (subject to a few fairly useless exceptions). In 1993 the Joint Standing Committee on Migration conducted an Inquiry into Detention Practices. Most of the submissions made to that inquiry opposed mandatory detention. However, the Committee's 1994 majority report, recommended in favor of the continuation of mandatory detention on the basis that no viable alternatives had been suggested.¹³ For a very long time, thereafter, bipartisan support for mandatory detention was firm and seemingly unshakable. The churches and many other civil society organisations continued to oppose the regime vigorously. Moreover, two Commonwealth Government agencies, the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman, were quite vocal in expressing their disquiet about the regime or aspects of it.¹⁴ The problem was that none of these organisations were able to convince Coalition and ALP politicians that an electorally significant propor-

tion of public opinion was on their side. Then, in 2000, a series of incidents at the Woomera IDC generated media interest of unprecedented intensity and duration.¹⁵ This media interest presented civil society organisations with an opportunity to create a favorable political climate in which to press for change.

On 8 June 2000, approximately 500 detainees walked out of Woomera IDC into the town centre and staged a 48-hour protest (Saunders & Spencer 2000).¹⁶ On 28 August 2000, about 80 detainees at Woomera IDC were involved in a riot that resulted in damage to some IDC buildings and injury to several Australasian Correctional Management (ACM) staff (Saunders & Spencer 2000a). AIA, the Refugee Council of Australia (RCOA) and other civil society organisations responded to both the events described above by suggesting that these were the actions of people made desperate by detention policies and practices that were in urgent need of reform (Saunders & Spencer 2000; Saunders & Spencer 2000a). The Minister responded to the calls by publicly and privately discounting the integrity of the organisations making them, and, in the case of RCOA, threatening to withdraw government funding (Haslem & Spencer, 2000). Public reaction to the events (as gauged from letters to politicians and newspapers, calls to talk back radio and so on) was mixed, with most simply condemning the detainees involved.

Then on 13 November 2000, the *Australian* reported allegations that sexual abuse of child detainees by other detainees was 'rampant' at the Woomera IDC (Spencer 2000). In the days that followed, former employees of ACM, and former immigration detainees came for-

ward with further allegations of sexual abuse of children by other detainees and physical abuse and other mistreatment of detainees by ACM employees. Some former ACM employees and immigration detainees made their allegations directly to the media. Others made their allegations to opposition politicians or civil society organisations, such as AIA and Centacare Catholic Family Services, and they in turn made the allegations known to the media (Henderson & Healy 2000; Sciacca 2000a).

While it is not possible to claim that the ensuing sympathetic media coverage caused an immediate sea change in public opinion, it did get the public to take notice, to ask questions and to begin considering the possibility that Australian practices in relation to asylum seekers were wrong (Manne 2000). Various organisations seized this politically propitious moment to call for a full judicial inquiry into abuse allegations,¹⁷ 'a properly empowered, independent or parliamentary inquiry into the operation of detention centres and the mandatory regime itself' (Bitel 2000), and/or consideration of alternatives to the detention of women and children (Taylor & Szego 2000). On 22 November 2000, the Minister for Immigration announced that he would be instituting an inquiry into IDC processes for dealing with allegations of child abuse. The inquiry was to be conducted by Mr Philip Flood AO, a former Secretary of the Department of Foreign Affairs and to be independent vis-à-vis DIMA and ACM.

In February 2001, Mr Flood made his report to the Minister for Immigration. The terms of reference and powers of the Flood inquiry had been too limited to meet with approval from civil society



Image: courtesy of Victorian Foundation for Survivors of Torture/UNHCR*

organisations. However, Mr Flood confounded their cynical expectations by expansively interpreting his terms of reference and producing a quite adverse report containing 16 recommendations for improvement (Flood 2001). The Minister for Immigration tabled the Flood Report in Parliament on 27 February 2001 and indicated that most of its recommendations would be implemented. The Minister also announced two initiatives. One of these was the trial of an alternative to the immigration detention of women and children to be implemented in the Woomera township if that community's support was forthcoming (Ruddock 2001; Ruddock 2001a).¹⁸ Opponents of immigration detention appeared to have achieved a small step forward.

It is worth noting at this juncture that allegations of child abuse within immigration detention centres, and accompanying calls for release of children from detention, could not be described as a new development in the history of the immigration detention regime. For example, on 16 June 2000, two men were remanded in custody pending committal for trial on charges of indecently assaulting two children at Curtin IDC (O'Brien et al. 2000). At the time, Mr Ruddock acknowledged that there were several other instances of suspected abuse within IDCs that had not been prosecuted because the available evidence was insufficient to procure conviction (ibid). However, he was adamant that he would not be yielding to calls for the release of children from immigration detention (O'Brien

2000). What then was responsible for Mr Ruddock's apparent change of heart? As usual in these cases, it was a coming together of several factors.

One significant factor was that Grant Mitchell, Project Co-ordinator of Hotham Mission's Asylum Seeker Project, who had spent 1999 as a caseworker in a Swedish immigration detention centre, pushed for adoption by Australia of the Swedish model of immigration detention at every opportunity that he could seize or create.¹⁹ An aspect of the Swedish model is that children and their mothers are accommodated in group homes instead of being detained, though allowed to maintain contact with their detained fathers/husbands. Another significant factor was that RCOA, Amnesty International Australia, Defence for Children International, and many other civil society organisations gave their public support to this push saying that it was 'a good short term goal for Australia to pursue while there is still bipartisan support for mandatory detention' (Taylor & Szego 2000; Schubert & Wynhausen 2000; Plane 2000; Mitchell 2000). These factors alone, however, would not have done the trick. The most significant additional factor was that the media's sympathetic interest in the plight of immigration detainees had been well and truly engaged by the time the Swedish model was proposed. Caught in the media spotlight, the Minister for Immigration was forced to put on a public show of considering the adoption by Australia of the Swedish model, at least in relation to women and children. He even visited Sweden to examine the model in operation and indicated a willingness to learn from the experience.²⁰ At this critical juncture, Mr Flood produced his

report. The Minister would probably also have had in mind that two extremely unfavourable reports by the Commonwealth Ombudsman were about to be published. Result: the announced trial of a detention alternative. Whether the *Migration Act 1958* (Cth) is actually amended to allow for the implementation of a detention alternative for women and children, however, will depend in great part on whether the media sustains its interest in pursuing immigration detention stories through the 2001 election year. That in turn will depend on how hard asylum seeker advocates work at assisting the media in their pursuit. Already, the Minister is showing signs of retreating from the trial release plan (Saunders 2001).

Some may consider this case study to be cause for despair. The countless hours spent by many, many civil society organisations over nearly a decade in lobbying government and parliament and attempting to educate the public have brought them the closest that they have ever been to winning one small battle in the campaign against mandatory detention. The campaign itself is far from won. Moreover, the campaign against mandatory detention is only one of many campaigns long fought, but yet to be won, by asylum seeker advocates. Nevertheless, assessed against realistic expectations, the case study is a study of success not failure. Helpful precedents to keep in mind in this context are the anti-slavery movement and the women's rights movement.

Intellectual discomfiture with slavery probably has as long a history as the institution itself (Forbes 1998, p. 21). However, determined efforts to overthrow the institution of slavery only commenced in the latter part of the 18th century (Ibid;

Temperley 1998, p. 10). In the United States an end to slavery was achieved only at the price of a civil war (Bennett 2000).²¹ The outlawing of slavery worldwide was achieved only in 1970 ('Life after Abolition' 1989). In some parts of the world the *practice* of slavery continues. The intellectual antecedents of the women's rights movement go back to medieval times, with more practical activism gathering pace in the Western world from the early years of the 19th century (Stansell, 1998). Women throughout the English-speaking world had won the right to vote by 1920 (ibid; Summers 1975, p. 374 n 2). However, battles for other rights were being fought through the 20th Century and are being fought still. In some parts of the non-Western world, of course, the struggle for women's rights has only just begun. The point of both these examples is that many of us now living owe a great deal to those of past generations who were willing to commit themselves to the pursuit of goals that could not be achieved in their lifetime.

Conclusion

In seeking to ensure that Australian law and policy respects the human rights of asylum seekers, we are actually attempting to achieve a transformation in social morality from its present particularist inclination to the full embrace of the universalist morality that underlies the notion of human rights (Taylor 2001). The only proven recipe for achieving social transformation of this kind is that of seizing upon every opportunity for practical political action in pursuit of our goal for as long as it takes, and despite all the odds (Midgley 1999, p. 164; Marsh 1997, p. 328; Maddison 2000). We have to engage in dia-

logue with the political arm of executive government (to the extent that this is possible); lobby individual parliamentarians; make submissions to parliamentary inquiries; and work towards creating a climate of public opinion that favors the change we seek. This last is the most important endeavour of all, but because it is necessarily the work of a few generations it is tempting to let it fall by the wayside in the pursuit of more tangible and immediate 'wins'. Keeping our long-term goal (the achievement of our moral vision) always in our sights can help us to resist this temptation, and in other ways also is the best protection against ultimate failure. Focusing on our long-term goal helps us set our short-term goals; and it helps us regard both our successes and our failures in achieving those short-term goals as opportunities to learn, thus making both alike steps towards achieving social change (Bobo et al. 1996, p. 244).

Postscript

Between the writing of this article and its publication much has happened! As has been well documented, the Coalition Government's response to the asylum seekers rescued by the Tampa in late August 2001 was well received by the Australian public. The terrorist attack on New York and Washington on 11 September 2001 consolidated the Government's position in public opinion. Together these incidents created a political environment that won the Federal Election for the Coalition, but more particularly, and in advance of the election, enabled the Government to obtain passage of *Migration Legislation Amendment Bill (No.1) 2001, Migration Legislation Amendment (Judicial*

Review) Bill 1998 and four other Migration Bills. Very substantial changes have been wrought to Australian asylum seeker law and policy in a very short time and none of it for the better. However, this setback is not permanent unless we fail to learn from it and to persevere in spite of it.

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Notes:

- 1 The author [LLB (Hons) (Melb), B Com (Melb), PhD (Melb), Lecturer, School of Law and Legal Studies, La Trobe University] gratefully acknowledges the funding provided for this research by the School of Law and Legal Studies and the research assistance provided by Dr Francesca Bartlett.
- 2 The treaties in question are the following: *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force for Australia and generally on 22 April 1954); *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force generally on 4 October 1967 and for Australia on 13 December 1973); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, ATS 1989 No. 21 (entered into force generally on 26 June 1987 and for Australia on 7 September 1989); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force generally on 23 March 1976 and for Australia on 13 November 1980).
- 3 For example, much of the administrative process for dealing with unauthorised arrivals has no legislative basis. Unauthorised arrivals are kept in incommunicado detention while screening interviews are conducted by officers of the Department of Immigration and Multicultural Affairs (DIMA). Other DIMA officers read summaries of these interviews and determine whether the claims which have been made prima facie engage Australia's protection obligations. Those who are determined not to have made such claims are removed from Australia without being given the opportunity to apply for a protection visa. It is only if permitted to make an application for a protection visa that asylum seekers, who are unauthorised arrivals, enter the legislatively established process for determining protection claims (Taylor, 1999).
- 4 My assessment concurs with that of others (e.g. McGregor, 2000; Mares, 2001: 154-5). It just happens to be the case that the top ranking public servants in the Department of Immigration are in furious agreement with the political arm of government that Australia needs tough immigration control measures and plenty of them.
- 5 Australia's response to the Kosovar refugees was especially illuminating. In 1999, NATO air strikes triggered events which led to 860 000 ethnic Albanians fleeing from the Kosovo province of Yugoslavia to surrounding countries. Although the Minister for Immigration initially expressed the view that the Kosovo refugees ought to be protected within their own region, Australian public opinion caused the Prime Minister and Cabinet to overrule the Minister and to authorise the evacuation to Australia of approximately 4000 Kosovars (e.g. Shanahan et al, 1999).
- 6 According to Peter Mares, 'Liberal party polling suggests that Philip Ruddock is one of the government's best performing Ministers, admired for his consistent tough line on boat people....' (2001: 160).
- 7 One million people voted for One Nation in the last Federal Election. The manner in which these individuals vote in the next Federal Election could well determine the outcome of that election (Cope, 2000).
- 8 *Migration Regulations* (Cth) sch 2 pt 785. Since 1 November 2000, the Migration Regulations have specified that persons who procure immigration clearance through the use of fraudulent documents are also entitled only to the grant of a temporary protection visa in the first instance.
- 9 Dr Theophanous was still a member of the ALP caucus at the relevant time.
- 10 Under section 75(v) of the *Constitution*, a protection visa applicant has the option of seeking from the High Court of Australia an injunction or a writ of mandamus or prohibition against the relevant decision makers.
- 11 Encouraged by this, several other

- rejected asylum seekers (or more precisely, their advisers) decided to attempt use of the individual complaints mechanisms of the Convention Against Torture and the International Covenant of Civil and Political Rights. This led the Australian Government to express the view that the complaints were being made abusively for the purpose of delaying removal of the rejected asylum seekers from Australia and was a significant factor in the making of the decision announced in the media release entitled *Improving the Effectiveness of United Nations Committees*. While it is to be doubted whether an ALP Government would have taken this particular tack, the tendency to step in – often with retrospective legislation – to close off promising avenues for advancing the legitimate interests of asylum seekers, has been a tendency shared by federal governments of both political persuasions.
- 12 Readers can get a sense of the organisations and their work by perusing recent issues of publications such as the *National Multicultural Support Group Newsletter* and *Migration Action*.
- 13 It should be noted that there was a dissenting report by Senator Christabel Chamarette (WA Greens) and an addendum to the majority report by Senator Barney Cooney, both of which rejected the notion of mandatory detention.
- 14 In addition to making submissions to various parliamentary inquiries and so on, these two agencies released several damning reports on immigration detention practices (e.g. HREOC, 1998; Commonwealth Ombudsman, 1995).
- 15 Though media interest tended to focus on Woomera IDC, allegations made about other IDCs were occasionally reported as well.
- 16 There were ‘copycat breakouts’ from Curtin IDC and Port Hedland IDC the next day (Saunders & Spencer, 2000).
- 17 The call was made by a coalition of church and community groups, led by Amnesty International Australia and was supported by the ALP (Henderson & Healy, 2000; Sciacca, 2000a).
- 18 The second initiative announced was the establishment of an Immigration Detention Advisory Group that would provide the Minister with advice relating to the adequacy of immigration detention accommodation, services and facilities. The Minister said the Group would ‘make regular visits to all the detention centers, would have unfettered access and would consult with staff and detainees to obtain first-hand information on the operation and environment at each centre.’ (Ruddock, 2001b)
- 19 Grant Mitchell publicly raised the model with the Minister for Immigration at a public meeting in Melbourne held on 22 November 2000 as part of the annual national consultations on the migration and humanitarian programs and, after the meeting, forwarded more detailed information about the model to the Minister’s office (Mitchell, 2000). He then assisted the media in running stories on the matter, with the result that ABC radio and TV, SBS TV, the Australian, the Sydney Morning Herald, the Courier Mail and the Age all ran stories sympathetic to the adoption of the model by Australia (Ibid).
- 20 The lessons to be learned from the Swedish model of immigration detention extend far beyond the humane treatment of women and children. However, the Minister has not displayed any inclination to learn those other lessons.
- 21 One observation of Bennett’s that is particularly worth noting is the following:
‘To the extent that they [slaves] were ever “freed”, they were freed by the Thirteenth Amendment, which was authored and pressured into existence not by Lincoln but by the great emancipators nobody knows, the abolitionists and congressional leaders who created the climate and generated the pressure that goaded, prodded, drove, forced Lincoln into glory by associating him with a policy that he adamantly opposed for at least fifty-four years of the fifty-six years of his life.’

*The image used for this article and the cover of this edition of *Just Policy* are courtesy of the Victorian Foundation for Survivors of Torture and the UNHCR. The Victorian Foundation for Survivors of Torture (VFST) has produced a 2002 Calendar which provides facts, figures and information about refugees in Australia and internationally. Copies of the calendar are available from the VFST for a small fee. Telephone: 03 9388 0022