ASYLUM, BORDER CONTROL AND DETENTION[1]

Senator Jim McKiernan

Boat people who arrive in Australia and request refugee status are detained while their claims are evaluated. Most objections to this practice concern the length of detention, not the policy itself. Since early 1992, requests have usually been evaluated within five weeks. But many unsuccessful applicants then appeal. Appeals from detainees to the Refugee Review Tribunal (RRT) are given priority but, if applicants go to the Federal Court, long delays are inevitable. We need to ensure that primary decisions and the work of the RRT are of high quality, and we need to limit appeals to the Federal Court.

The report, *Asylum, Border Control and Detention*,[2] prepared by my committee (the Joint Standing Committee on Migration) was presented to Parliament some twelve months ago. It was more than 200 pages long and contained 19 recommendations, based on 112 submissions and 983 pages of evidence taken over a period of nine months. Most of the report's critics have not read the 983 pages of evidence.

Events move so quickly in this area that to restrict my remarks to the inquiry would be to present a somewhat dated picture of policy and its application. Time has proved that policy must remain flexible, and Government must have the capacity to respond to changing conditions, as we have seen in its response to the series of arrivals from southern China, and earlier from Galang Island, which occurred after the report was completed.

However, I will refer to some of the key concerns which initially prompted the Senate to request the inquiry, look at how they have been addressed, and suggest that in this particular field of migration policy, public perception often lags far behind the facts.

I would reiterate at the same time that domestic policy developments must always be presented in their proper international context. We must acknowledge the global phenomenon of illegal mass movements of people, and the intricate interrelationships between on-shore assessment of asylum claims, our international humanitarian obligations, and the need to protect the integrity of our on-going humanitarian and migration programs and ultimately the success of our multicultural society.

Anyone relying on the mass media for their understanding of the boat-people issue could be excused for thinking little has changed. For many months, for example, I have been scanning the letters page of the *Sydney Morning Herald* for a response to an article by Paddy McGuinness, headed 'Boat people and the law', which appeared in November 1994. McGuinness' claims were typical of those which had currency a couple of years ago. The impression he gave was of a stubborn, even paranoid, bureaucracy doing battle for the sake of it with an army of amateurish lawyers in an atmosphere of mutual loathing and common self interest.

Sadly, the response of the Refugee Council of Australia faxed off to the *Sydney Morning Herald* the next day has not yet appeared. It is worth placing on record today the following comments from its Executive Director, Margaret Piper. She wrote:

> Readers would be forgiven for thinking that he [Paddy McGuinness] has followed recent developments in this sensitive area. Nothing could be further from the truth.
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> The picture he paints is a distorted and anachronistic situation, far removed from current reality. Driven by bias and misinformation, he ignores both the complexity of the situation and the major developments that have taken place in the last two years.
>
> It is true to say that there were major problems with the Department of Immigration's handling of refugee status determination two yeas ago but not so today. To call them Policeman Plods and accuse them of insensitivity to the issues is ignoring the major and hard won advances that have taken place.
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> Determination procedures have been made fairer and more rigorous and major advances have been made in the area of access to welfare and medical assistance.

Ms Piper goes on to explain the role of refugee advocates in the process, and points out that:

> Two years ago, this brought them into regular conflict with the government, but here too things have changed because there is widespread recognition amongst advocates that things are changing for the better.

So how are things changing? How have they changed since my committee embarked on its inquiry? What is planned for the future, and are we equipped to deal with future arrivals?

If there was one issue which drove the Joint Standing Committee inquiry, it was that of the length of detention. The public was rightly concerned that there were people in immigration custody in Australia who had been in detention for over three years. That concern was shared by Government, and action was taken in 1992 to ensure the speedy and thorough processing of claims.

In early 1992 the Government introduced streamlined administrative arrangements for boat arrivals seeking refugee protection, including the provision of independent legal advisers to provide assistance in preparing applications for refugee status at no cost to the applicant.

Processing arrangements are now designed to provide for the thorough and objective evaluation of claims while also guaranteeing opportunities for applicants to present fully, and elaborate on, their claims.

The effect on the primary decision-making time has been dramatic. The average processing time by delegates of the Immigration Department is now only five weeks from the date of application for refugee status. The longest period since 1992 was 10 weeks, when the claims raised by asylum seekers required the collection and assessment of additional in-country information. Since the independent Refugee Review Tribunal replaced the Refugee Status Review Committee on 1 July, 1993, review applications from people held in detention have been dealt with as a priority, as recommended by my committee.

In 1993-94, 12.83 per cent of people who pursued claims for refugee protection in Australia, at the primary stage, were found to be refugees (1,346 applicants). In addition, 15.09 per cent (384) of those applicants who were unsuccessful at the primary stage and who went on to receive a review decision were successful. Approvals at the primary stage accounted for 78.5 per cent of all approvals in that year.

An issue of central concern to the committee, which recognised the reforms at the primary level, was the time expended in pursuing the review of applications where refugee status had been refused, including the time involved in court challenges.

A great deal of evidence was taken on this particular issue. The committee acknowledged that it is Government policy not to take removal action against persons who are pursuing challenges through the courts, even though asylum seekers who choose to challenge decisions through the courts have already received determinations of their claims to refugee protection and therefore our Convention protection obligations are not engaged. (The committee was aware that asylum seekers are free to leave Australia at any time and that decisions to remain fall within their own control.)

The committee acknowledged the importance of the appeal systems to rectify errors in determination of refugee status. But it also acknowledged that the increased trend to litigation in the migration field can be used and is used to buy time in Australia, the only benefit to the appellant being prolonged detention.

We recommended that the Administrative Decisions Judicial Review Act of 1977 (the ADJR Act) and the Judiciary Act of 1903 be amended to specify that the Migration Reform Act of 1992 and its predecessors are enactments to which the previous Acts do not apply, and that applicants challenging decisions under the Migration Act of 1958 be required to obtain leave in order to apply for Federal Court review.

These recommendations are under consideration by the Government, which will respond in the light of experience of the Migration Reform Act, which came in to force on the first of September last year. (The Migration Reform Act states that disappointed applicants for migration to Australia may not use the ADJR Act to appeal to the Federal Court. The ADJR Act protects the subjects of administrative decisions from procedural unfairness, unreasonable decisions and breaches of natural justice. The Migration Reform Act spells out the meaning of these concepts in migration decisions. This, together with the existence

of the Review Tribunals, should obviate the need for the ADJR Act in such decisions.)

Early in the Joint Standing Committee's inquiry it quickly became evident that concerns relating to the conditions at the detention centres at Port Hedland and Villawood related not so much to the food, the standard of accommodation, or the quality of the staff from the Immigration Department or the Australian Protective Services, but represented broader objections to the policy of detention itself.

There was particular concern for the welfare of children in detention. By the time our recommendations relating to children were tabled in February 1994, the Government had already enacted regulations enabling the Minister to release children from detention where it was considered to be in their best interests. The fact remains, of course, that for the vast majority of children, it is not in their best interests to be separated from their parents, a principle enshrined in the UN Convention on the Rights of the Child.

On the first of September 1994 the Government enacted further regulations enabling unauthorised arrivals to be released at any time (without the need to wait six months) on compassionate grounds, including not only age, but also ill health and previous experience of torture and trauma. Another recommendation that children have the opportunity to attend local schools has had a positive response from the Government, with the Immigration Department also agreeing to consider Saturday schools in the child's native language.

A number of submissions to the inquiry proposed that the Government abandon detention policy in favour of a bond system. While a number of community organisations expressed their willingness to assist detainees released in to the community, many of these groups argued against the imposition of bonds as a mechanism for release because of difficulty in raising the required funds. The committee also formed the opinion that the assistance offered by community groups would generally be of a short-term nature as they did not have the resources to respond to the long-term needs of asylum seekers.

Some community groups which indicated their willingness to offer support also rejected any responsibility to ensure that asylum seekers released into the community presented themselves for removal from Australia if their applications to remain were unsuccessful. The committee therefore formed the opinion that absconding would occur if unauthorised border arrivals were released in to the community.

At the time of the committee's report, numbers at Port Hedland had dropped to around 200 and considerable thought was given to decommissioning it, should numbers fall to the extent that it was no longer viable. The Government agreed with this recommendation, as it did with the recommendation to establish an Immigration Detention Centres Advisory Committee. Rather than establish one central committee, the Government has now established separate committees to oversee issues particular to each detention centre, comprising the centre Manager, the relevant State compliance manager, the Australian Protective Service centre commander, and representatives of a community-based service provider, a local community organisation and the detainee community.

When the Port Hedland committee met for the first time in January 1995, I had the pleasure to be present. At that time the numbers at Port Hedland had reached the 800 mark. The idea of decommissioning the centre had been put on hold and an Immigration Task Force was established to identify additional facilities should the need arise.

The influx of boats in recent months has made it clear that the illegal mass movement of people is not a problem which is going to go away. Australia has to be sure that its response to this phenomenon, globally, regionally and domestically, is fair and consistent, striking the right balance between refuge and control. We must maintain our proud record as a sanctuary for those who have no choice but to flee political persecution, with an off-shore Humanitarian Program which is second to none. At the same time, we owe it to all Australians to protect our borders and ensure that those who have no right to be here are returned quickly, in safety and dignity, to whence they came.

It is in the international interest that these two principles are reconciled in Australian law. The on-going reforms of recent years have gone a long way towards achieving this reconciliation.

References
1 Edited address by Senator McKiernan to the Bureau of Immigration, Population and Multicultural Research National Outlook Conference, Adelaide, 23 February 1995
2 Joint Standing Committee on Migration (chairman, Senator Jim McKiernan), the Parliament of the Commonwealth of Australia, *Asylum, Border Control and Detention*, Australian Government Publishing Service (AGPS), Canberra, 1994, Catalogue no. 93 2591 4

(Editors' note: copies of this report are available from the AGPS for A$16.95. Overseas readers can order from the AGPS at GPO Box 84, Canberra, ACT 2601, Australia, or by fax: 616 295 4888. Surface mail is included in the price. Ask for a quote for air mail.)

THE LAW AND THE MANAGEMENT OF AUSTRALIAN IMMIGRATION

Katharine Betts

Two new reports document the growing role of migration advisers, lawyers and the courts in Australian immigration, as well as the conflict between the judiciary and the executive over immigration control. One consequence of this conflict is that some foreigners now have a legal right to immigrate. Foreigners continue to be able to draw on legal aid to enforce this right and the Attorney General's Department does not record the costs.

Two government-sponsored reports were launched in February this year dealing with the considerable changes which have taken place in Australia's immigration procedures since 1989: Sean Cooney, *The Transformation of Migration Law* and Jonathon Duignan and Frances Staden, *Free and Independent Immigration Advice*, both published by the Australian Government Publishing Service. They help describe these changes and, in themselves, provide further evidence of them.

Cooney's title is to the point; immigration law has indeed been transformed. First, review procedures have altered. In the 1980s there were internal review panels which made recommendations to the Minister, but disappointed applicants often moved on from these to appeal to the Federal Court under the Administrative Decisions Judicial Review (ADJR) Act. Over the last six years the internal panels have been replaced by the Immigration and Refugee Review Tribunals. The tribunals are independent, statutory bodies. They provide merits review and produce, not recommendations, but determinative judgements in a setting which should be less formal, legalistic and expensive than the courts.[1]

As a corollary, under the Migration Reform Act of 1992, disappointed applicants are no longer able to use the ADJR Act to appeal to the Federal Court. This portion of the Reform Act came into effect in September 1994. However, there is still a large back-log of cases before the Federal Court which predates this change, and applicants who can no longer seek judicial review in the Federal Court may resort to the High Court, using common law rights rather than the ADJR Act. Access to the High Court is guaranteed in the Constitution.[2]

In a second set of changes, migration policy has been codified into legally binding regulations. Since the Migration Amendment Act was implemented in December 1989, these regulations have, in most circumstances, eliminated the power of the Minister or his delegates to use discretion in individual cases. In principle, an applicant either meets the criteria spelled out in the regulations, and has a legal right to immigrate,[3] or he or she does not. (The right of foreigners to immigrate can, however, be modified by executive decisions to suspend processing in one or more sub-categories of the program.[4])

The codification of policy and the curtailment of Ministerial discretion were intended to decrease the possibility of legal challenges and to make the system fairer. Under the new system there would be less scope both for personal interpretations of the rules by selection officers and for lobbying on behalf of well-connected individuals. Irrespective of the predispositions of migration officers, or the outcome of deals between Ministers, back-benchers and pressure groups, similar applicants should now receive similar decisions.

Cooney writes from a particular point of view, as all commentators must. This is a book written from the perspective of