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ROLE OF THE AUSTRALIAN LAW REFORM COMMISSION AND NATIVE TITLE REFORMS

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Introduction

On 4 June 2015, The Australian Law Reform Commission (ALRC) released the report of its inquiry into the native title system. Titled ‘Connections to Country: Review of the Native Title Act 1993 (Cth)’, the report contains numerous recommendations about how to improve the native title system. This article will outline the role of the ALRC and provide some context for the need for native title reform. It will then summarise the inquiry, the main recommendations and what might lie ahead.

Role of the ALRC

History and background

The ALRC was established in 1975 by the Law Reform Commission Act 1973 (Cth).1 Although its establishment drew upon the institutional experiences of other existing law reform bodies in Australia and overseas, it incorporated a number of unique features that contributed to its ongoing success.2 These included a focus on gathering empirical evidence, and widespread community and stakeholder consultation.3 Following a parliamentary inquiry in 1993-94, the ALRC was reconstituted in 1996 by the Australian Law Reform Commission Act 1996 (Cth).4

Functions and membership

The ALRC ‘conducts inquiries into areas of law at the request of the Attorney-General.’5 Within this mandate, it ‘reviews Commonwealth laws … for the purposes of systematically developing and reforming the law’6, and considers proposals for:

• making or consolidating laws
• repealing obsolete or unnecessary laws
• achieving uniformity between state and territory laws
• producing complementary Commonwealth and state and territory laws.7

Its membership is drawn from the judiciary, the legal profession, legal academics and others with appropriate qualifications, training or experience.8 The ALRC’s inaugural chairman (now called president) was Michael Kirby, who was later appointed to the High Court.

How it operates

The ALRC reports to the Commonwealth Government and makes non-binding recommendations. It does not decide what laws or legal issue it will investigate – inquiries are referred to it by the Attorney-General. It is, however, able to make suggestions to the Attorney-General about potential areas for inquiry.9

The ALRC is independent from government so it can undertake research and make recommendations on an impartial basis. It is, however, funded by the Commonwealth Government, and there have been various occasions when the government has significantly cut its funding.10 Nonetheless, its reputation as a non-political, non-partisan, independent entity has to date ensured its ongoing existence.11

The ALRC is clear about what it does not do. It ‘does not offer legal advice or handle complaints. It cannot intervene in individual cases and does not act as a ‘watch-dog’ for the legal system or the legal profession.’12 So in that respect it is not like an ombudsman.

It is also different to other independent statutory entities entrusted with investigating important legal issues, for example, royal commissions, and the Australian Human Rights Commission (AHRC). Royal commissions are set up on a case by case basis under the Royal Commissions Act 1902 (Cth) to look into a particular legal issue. One of the most significant royal commissions relating to Indigenous issues was the 1991 Royal Commission into Aboriginal Deaths in Custody. The AHRC, although a permanent statutory body like the ALRC, is limited in its mandate to matters involving

Questions

1. What are two unique features of the ALRC?
2. What are the main functions of the ALRC?
3. Who was the inaugural chairman (president) of the ALRC?
4. Is the ALRC able to choose which issues it will investigate? Explain.
5. As a statutory entity funded by the government, do you think that the ALRC is truly independent? Discuss.
6. What kinds of topics do you think are suitable topics for ALRC inquiries, what kinds of topics might not be suitable, and why?
7. How does the ALRC differ from royal commissions?
8. Explain the role of the AHRC.

Inquiry process

The process is initiated by the Attorney-General referring an inquiry to the ALRC by way of terms of reference. The terms of reference identify the subject matter of the inquiry and set the boundaries for what the ALRC can and cannot investigate.

The ALRC then conducts consultations with relevant stakeholders, including ‘people who have expertise and experience in the laws under review, as well as people likely to be affected by the laws in question.’ This can involve setting up an advisory committee or expert panel.

Following consultations, the ALRC will usually produce an issues paper, which provides ‘a preliminary look at issues surrounding the inquiry and often suggests or outlines principles that could guide proposals for reform.’ It will also seek submissions from the community on the issues set out in the paper.

The next step is the release of a discussion paper, which is more detailed than an issues paper. A discussion paper sets out the ALRC’s research, summarises the submissions, and puts forward some draft reform proposals. Additional consultations are then undertaken, and further submissions sought. If the time frame for the inquiry is quite short, the ALRC may sometimes go straight to the discussion paper.

The ALRC then considers all of the material it has before it in order to formulate recommendations. The ALRC is required by the Act to ensure that its recommendations include suggestions for updating the law, removing defects in the law, simplifying the law, adopting more effective methods to administer the law and providing improved access to justice.

The ALRC must also make sure that its recommendations do not trespass unduly on personal rights and liberties, and are consistent with Australia’s international obligations. In addition, the ALRC must have regard to the effects that the recommendations may have on the costs of access to justice, and on persons or businesses affected by the recommendations (including economic effects).

The ALRC then produces a final report containing the recommendations. The final report is provided to the Attorney-General and then tabled in the Commonwealth Parliament. A summary report is also produced. Both the final report and the summary report are made available to the public, along with any submissions, on the ALRC’s website.

Finally, the government considers whether or not it will implement the recommendations.

Around 86 per cent of the ALRC’s reports have been either substantially or partially implemented. But even if its reports are not implemented, they are still considered to be of much value. The Federal Court, for example, has noted that ‘[m]ore often than not, an ALRC Report contains the best statement or source of the current law on a
complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC’s recommendations are subsequently implemented ... In this way, the ALRC’s reports have assisted the Court in the tasks of ascertaining the law, interpreting statutes and developing the common law.’ 19

Questions

9. How is an investigation initiated?
10. Describe two methods used by the ALRC during their investigations.
11. What is an issues paper? How does it differ from a discussion paper?
12. Explain four things that the ALRC must ensure it covers in its recommendations.
13. How are economic effects considered by the ALRC?
14. Explain how the public can have an influence on the content of the final report.
15. What is the next step once the final report has been completed and tabled in the Commonwealth Parliament?
16. To what extent do you think a final report of the ALRC is effective in law-making?

Past ALRC inquiries

ALRC inquiries cover a wide range of issues, a number of which have touched on Indigenous issues. These include its very first report relating to complaints against police and official misconduct affecting Indigenous people. One of the most accessed of all ALRC reports is its 1986 report on the Recognition of Indigenous Customary Laws. 20 And, as noted earlier, a recent ALRC inquiry involved a review of the Native Title Act 1993 (Cth). What prompted this particular inquiry?

The ALRC and native title Reforms

Brief overview of native title

In 1992, the High Court handed down its landmark decision in Mabo v. Queensland [No 2] (Mabo [No 2]). 21 In Mabo [No 2], the legal fiction that Australia was ‘terra nullius’ (land belonging to no-one) was finally put to rest. With the rejection of the terra nullius doctrine came the recognition that Australia’s Indigenous peoples were the prior owners of this country, and that any rights and interests that survived British sovereignty could be recognised by the common law.

Mabo [No 2] was a direct challenge to conventional understandings of Australia’s land management and property rights’ regimes, the very existence of which had been based on the assumption that there were no Indigenous rights to land. It was, therefore, imperative that a mechanism be put in place to deal with native title claims, and with activities occurring on land on which native title exists or may be found to exist in the future. Accordingly, the government enacted the Native Title Act 1993 (Cth) (NTA).

Reform of the Native Title Act

Following a change in government and the High Court decision in Wik v Queensland 22, the NTA was the subject of major amendments in 1998. The amendments were highly controversial, particularly for Indigenous Australians, because they were seen as winding back some of the important gains of the NTA, and of favouring non-Indigenous interests. 23

Since 1998, there have been further reforms to the NTA and the native title system, none of which were as controversial as the 1998 amendments. These include reforms which relate to the tax treatment of native title payments, clarifying that such payments are not subject to income tax. 24 There were also institutional reforms that streamlined the relationship between the Federal Court and the National Native Title Tribunal. 25

However these reforms merely tinkered at the margins. Ongoing problems with the native title system meant that there was a need for further law reform. Despite an increasing number of native title determinations across Australia, claims are still taking a long time to resolve, and costs remain high for all parties involved. In Victoria, for example, the Gunai/Kurnai consent determination took from April 1997, when the claim was first lodged, until October 2010 for the final determination to be reached. The system is also complex and technical, allowing little scope for the evolution and adaptation of traditional laws and customs over time. Further, many Indigenous groups have been effectively locked out of the current system because they have been dispossessed of their traditional lands and therefore have trouble proving connection to that land. The unsuccessful Yorta Yorta High Court
decision in 2002, is a clear illustration of these difficulties. In that case, the trial judge famously said ‘[t]he tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs.’ This case was pivotal in making proof of connection more difficult in the years to follow.

Questions
17. What were the main outcomes of Mabo [No 2]?
18. What occurred in 1998 that affected native title interests?
19. Explain one major problem with native title claims.
20. How has the Yorta Yorta High Court decision in 2002 affected subsequent native title claims?

The native title inquiry
In light of these ongoing difficulties, in June 2013, the Attorney General initiated an inquiry into the native title system by releasing for public comment draft terms of reference. The terms of reference were finalised in August 2013 and related to two specific areas of ongoing difficulties, namely:

• connection requirements relating to the recognition and scope of native title rights and interests
• any barriers imposed by the authorisation and joinder provisions of the Native Title Act 1993 (Cth) (NTA) to claimants’, potential claimants’ and respondents’ access to justice.

The ALRC then released an issues paper in March 2014, followed by a discussion paper on October 2014. As part of this process, the ALRC conducted 162 consultations and received 72 written submissions. A wide range of stakeholders were consulted during the process. These included representatives of Commonwealth, state, territory and local governments, Federal Court judges, Indigenous leaders and traditional owners, Indigenous organisations, industry peak bodies representing the agriculture, pastoral, fisheries, and minerals and energy resources industries, the National Native Title Tribunal, and a number of anthropologists and academics.

The final report makes 30 recommendations, with arguably the most significant being in relation to connection requirements. Those recommendations include that:

• there be explicit acknowledgement in the NTA that traditional laws and customs may adapt and evolve
• the definition of native title be amended to make clear that it is not necessary to establish uninterrupted acknowledgement and observance of traditional laws and customs by each generation since sovereignty, and that the society has continued in existence since sovereignty
• proof of connection does not require proof of ‘traditional physical connection’
• the NTA be amended to expressly include the right to trade, and claimed rights be for any purpose, including commercial purposes.

The ALRC recommendations in relation to authorisation and joinder were more procedural in nature. Nonetheless, these additional recommendations, if implemented, would contribute to a procedurally fairer system.

Conclusion
Reform of the native title system is well overdue. The ALRC has recommended numerous changes to the NTA that will not only benefit Australia’s Indigenous peoples who want to have traditional ownership of their lands recognised, but will also provide more clarity to people who have existing interests on land where native title may be recognised. These recommendations are now under consideration by the government. Implementation of ALRC reports is currently running at 86 percent, so there is a real likelihood that at least some of the recommendations will be implemented.
Questions

21. Explain what steps were taken in 2013 and 2014 in relation to the NTA.
22. Explain three of the main recommendations of the investigation into the NTA.
23. The ALRC is very highly regarded, why do you think this might be the case?
24. Why might the ALRC be better suited to conducting an inquiry into law reform than a government department?
25. What are some of the problems with the current native title system?
26. Can you think of any barriers that might prevent the government from implementing the ALRC’s recommendations?
27. The AHRC also conducts national inquiries involving law reform. Do you think the AHRC could have conducted the native title inquiry rather than the ALRC?

References

3. Ibid 60.
7. Ibid s 21(1)(b)-(e).
8. Ibid s 7.
9. Ibid s 20(1).
11. Kirby elaborates on 10 elements which have contributed to the success of the ALRC, see Kirby, above n 2.
14. Ibid.
16. Ibid.
17. Ibid s 24(2).
20. Michael Kirby, ‘Forty Years On – Lessons of the ALRC’ (Speech delivered at the 40th anniversary celebration of the ALRC, Federal Court of Australia, Sydney, 23 October 2015).
REGULATING ASYLUM SEEKER BEHAVIOUR

Elyse Methven and Anthea Vogl

Definitions

**Asylum seeker:** An asylum seeker is a person who has left their own country because of a fear of persecution, and who intends to seek, or has applied for, protection as a refugee in another country.

**Refugee:** A refugee is an asylum seeker who has been granted refugee status. The *Convention relating to the Status of Refugees* defines a refugee as a person who is outside of their home country and is unable or unwilling to return because she or he has a well-founded fear of being persecuted because of their:

- race
- religion
- nationality
- membership of a particular social group or
- political opinion.

As a party to the *Convention relating to the Status of Refugees*, Australia has committed to provide refugees with protection and to ensure that asylum seekers, with a well-founded fear of persecution, are not sent back to a place where they will be persecuted. Australia has incorporated its own version of this definition in the *Migration Act 1958* (Commonwealth).

**Bridging visa:** A bridging visa is a temporary visa given to migrants while their main visa application is being decided by the Government. Bridging visas often bridge a person’s migration status from one kind of visa to another. Asylum seekers who have not get been granted refugee status may be given a bridging visa. Bridging visas allow asylum seekers to live in the community while their claims are being processed.

**Immigration detention centres:** Places where governments incarcerate people who have either breached the conditions of their visas or who do not have permission to remain lawfully within the country. In Australia, all asylum seekers who arrive unlawfully may be mandatorily detained in an immigration detention centre.

Questions

1. Explain the difference between an asylum seeker and a refugee.
2. What reason may an asylum seeker state for seeking refugee status?
3. What obligations does Australia have to refugees and asylum seekers?
4. Explain the purpose of a bridging visa.
5. What may happen to people who have breached the terms of their visa or who come to Australia unlawfully?

Background

In December 2013, the Commonwealth Government introduced a Code of Behaviour (the Code) for asylum seekers living in Australia. The Code was introduced under the *Migration Amendment (Bridging Visas – Code of Behaviour)* Regulation 2013. Adult asylum seekers, labelled *illegal maritime arrivals* by the Code, must sign the Code in order to apply for or renew a bridging visa. They are therefore bound by its list of expectations that govern the behaviour of asylum seekers at all times while in Australia. The signing and adhering to the terms of the Code is a precondition for an asylum seeker either to be released from detention or to remain in the community.
The Code was introduced in February 2013, approximately ten months after Scott Morrison, while Shadow Minister for Immigration, floated the idea of a behaviour protocol for asylum seekers on Ray Hadley’s 2GB radio show. During the radio interview, Morrison argued that:

‘There should be a behaviour protocol that anyone released in the community has to adhere to. There should be a complaints’ mechanism ... for people who are concerned about things to be able to report [them] ... I mean there are no checks and balances here .... They just dump people in the community because they can’t control the borders’.

What are these expectations?
The Code is prefaced with the following sweeping statement:

‘The code does not contain all the conditions and duties under Australian law of people granted a bridging visa. By signing the code you agree to behave according to values that are important to the Australian community while working towards the resolution of your immigration status.’

The Code does not explicitly elaborate on what these important ‘values’ are. It does, however, note that Australia is ‘a free and democratic country where men and women are equal’ and that ‘[p]eople are expected to show respect for one another and not to abuse or threaten others’.

The Code then details a list of expectations regarding how asylum seekers must behave at all times while in Australia. The list of expectations is separated into what asylum seekers must do, and what they must not do.

The Code’s expectations include that asylum seekers must not:

- disobey any Australian laws
- make sexual contact with another person without that person’s consent
- take part in, or get involved in any kind of criminal behaviour in Australia
- lie to a government official
- harass, intimidate or bully any other person or group of people
- engage in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community.

Asylum seekers subject to the Code must also co-operate with all reasonable requests of the Department and all lawful requests of police and government officials.

The Code defines anti-social activities as actions that are ‘against the order of society’, and may include spitting or swearing in public, or other actions that people might find offensive. Bullying is defined as including anything from attacking someone verbally or physically, to spreading rumours, or excluding someone from a group or place on purpose. Many of these behavioral standards do not apply to the community at large.

In a Human Rights Compatibility Statement, the Commonwealth Government recognised that banning swearing, spreading rumours or being inconsiderate could restrict asylum seekers’ rights to freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights. The Commonwealth Government found, however, that the restrictions were nonetheless justified on the grounds of national security, public order, public safety, public morals and the protection of the human rights of others.

The Code’s vague terms, such as the requirement that asylum seekers must not ‘harass, intimidate or bully any other person or group of people or engage in any anti-social or disruptive activities’, resemble public order crimes that already exist throughout Australia, including offensive language and offensive conduct crimes (see, for example, ss 4 and 4A of the Summary Offences Act 1988 (NSW)). Legal academics have criticised broad public order crimes for their vague wording, presumption of a community standard, and criminalisation of mundane behaviour.
Questions

6. What is the Code? Who does the Code apply to, and why must these people sign the Code?

7. When was the idea of having a code of this nature first floated? When was the Code first introduced?

8. Do you agree with the Code's expectations listed in this article? Discuss.

9. Are members of the Australian community allowed to spit and swear in public, or bully people? What about asylum seekers on bridging visas?

10. Do you think it is fair that asylum seekers have to abide by behavioural standards that do not, in general, apply to the community at large? Discuss.


12. Do you think broad public order crimes are necessary for a peaceful community? Discuss.

Outcomes for breaching the Code

The outcomes for breaching the Code are punitive and extend beyond the criminal law. Prior to the Code’s introduction, an asylum seeker in the community charged with a criminal offence was returned to detention, while Australian criminal courts determined the matter.

Now, if the Code (including any Australian law) is deemed to be breached, an asylum seeker’s income support may be reduced or cancelled. Further, their existing bridging visa may be cancelled and an asylum seeker may be either detained in an onshore detention centre, or transferred to an offshore detention centre. These offshore detention centers, such as the Manus Island detention centre in Papua New Guinea, have been exposed as having intolerable conditions.

The Explanatory Statement to the Code has identified that an identified outcome for breaching the Code could be the separation of the family unit. In other words, if a family member refuses to sign the Code, that family member will be held in detention while other members of the person’s family who have signed the Code, or who are under 18 years of age, will be granted bridging visas. The Commonwealth Government has acknowledged that this might breach the human rights of security of the person, freedom from arbitrary detention, and respect for the family and children.

It is entirely up to the Minister’s discretion as to whether he will separate children from family members who refuse to sign the Code.

Of course, asylum seekers are already bound by Australian law, including the criminal law. But by including this in the Code, asylum seekers may be punished for alleged criminal law breaches before they are found guilty in an Australian court; or by punishments in addition to those provided under by Australian criminal justice system. As breaches are adjudicated in a manner distinct from the processes of the criminal justice system, it is unclear what effect an asylum seeker’s breach of the Code will have on any related criminal proceedings.

Policing the Code

The Code, and the regulation under which it was introduced, are silent on who can report on, police or arbitrate breaches of the Code. The Department has stated that it expects to receive allegations through a range of sources, including members of the public, service providers, police services and other government agencies. Accordingly, the Code renders asylum seekers subject to the constant surveillance, discipline and control of Australian citizens and the state. Essentially anyone can implicate their asylum seeker neighbours, employees or co-workers for bullying, spitting or swearing.
How are breaches of the Code determined?

The Code provides almost no procedural safeguards, and as decisions are made at a Departmental level, without public scrutiny, we may never know what legal principles, if any, are followed in determining breaches of the Code.

There has been no indication as to whether the Department of Immigration and Border Protection officials will rely on legal precedent to interpret terms such as ‘anti-social’ or ‘offensive’. The Code is also silent on whether it will uphold a fundamental principle of criminal liability that, in addition to proving the relevant conduct element for an offence (the actus reus), the prosecution must prove that the mental element (mens rea) existed at the time of the relevant conduct. While the Code’s expectations are not offences as such, given the breadth of the Code, and the seriousness of its sanctions – including visa cancellation, and sending offenders to offshore detention centres – it would be unfair for asylum seekers to be so severely punished for unwitting breaches of its provisions.

The Department of Immigration and Border Protection has stated that, where it determines a breach has occurred, ‘the visa holder will be provided with the opportunity to show that the breach did not in fact occur, or provide reasons why their visa should not be cancelled’. Thus it appears that the burden is on asylum seekers to prove their innocence to an unspecified standard of proof, with no apparent access to basic internal or external merits review.

Separating ‘us’ from ‘them’

An important aspect of the Code is that, through its language, it creates two distinct categories: adult illegal maritime arrivals and the Australian community. The Code stipulates, ‘[t]he Australian Government and the community expect non-citizens to abide by the law [and] respect Australian values’. This message is reiterated in the Explanatory Statement to the Code, which states:

‘The Government has become increasingly concerned about non-citizens who engage in conduct that is not in line with the expectations of the Australian community. The Australian community expects that non-citizens being released into the community on Bridging E (Class WE) visas ... follow the laws and values considered important in Australian society.’

Thus the Commonwealth Government, through the Code, depicts the Australian community as under threat from adult illegal maritime arrivals. It creates a picture of a harmonious law-abiding, courteous, and homogenous Australian Community, sharing a uniform set of desirable values. Meanwhile, illegal maritime arrivals are depicted as potentially anti-social, criminal deviants, who threaten the Australian community, and must be educated, warned and controlled.

Although the Code has been enforced in a limited fashion, asylum seekers in the community must necessarily contend with the threat of enforcement and surveillance by all members of the Australian community. Given the severe consequences of a breach, including income reduction and re-incarceration, the Code potentially has extreme material effects and worsens the difficulties already experienced by those on bridging visas. The Code’s construction of asylum seekers as dangerous pre-criminals inverts the reality that refugees seeking asylum, not the Australian people, are in need of protection, and overlooks the fact that it is the Commonwealth Government that is responsible for putting onshore and offshore asylum seekers in places where they are likely to suffer mental and physical harm.

Questions

13. Do you agree with the likely consequences of breaching the Code’s expectations? Explain.

14. What problems can you see in relation to policing the Code?

15. Do you think precedents should be relied on in court in relation to asylum seekers? Explain.

16. Do you think it is unfair that the burden of proof in some of these matters lies on the shoulders of the asylum seeker and the standard of proof is not specified? Explain.
Questions

17. How might some of the Code’s expectations be inconsistent with international human rights law?

18. Who does the Government depict as potentially under threat from asylum seekers?

19. Highlight three of the most troubling aspects of the Code.

20. What is procedural fairness, and why is it important?

21. What are important Australian values? Should people be legally obliged to comply with these values?

Additional reading


‘Code of Behaviour for Subclass 050 Bridging (General) visa holders’


The court should reverse its decision that allows the government to indefinitely imprison people genuinely seeking asylum.

In the disaster of the detention of asylum seekers, the real cause of the problem is completely overlooked and can be traced to Australia’s High Court. The extent to which the Australian Parliament can pass laws that abridge fundamental freedoms is related to the license extended to it by the High Court, which is the ultimate adjudicator of whether or not laws passed by the federal Parliament are beyond the power conferred upon it by the constitution.

The Australian constitution enshrines the doctrine of the separation of powers of the Legislative, Executive and Judicial branches of government. According to this doctrine, no branch of government can perform the functions of the other branches. This means that judicial functions can only be performed by the judiciary.

By virtue of laws of the Commonwealth Parliament, which have been upheld as valid by the High Court, all detainees in refugee detention centres are illegally in Australia and yet they have not seen the inside of any court. Until they reach Australian territorial waters, they are not in breach of any Australian law.

In the celebrated case involving a refugee named Ahmed al-Kateb (al-Kateb v Godwin), decided that detention requiring a determination of a court only applied when the detention is “punitive”. In other words, for the imprisonment to require the decision of
court, it had to amount to punishment.

The court decided in the al-Kateb case that the detention was “administrative” and therefore could be imposed by the legislature and implemented by the Executive without a court determination.

The result of this is that the High Court has licensed the Australian Parliament to pass laws empowering the executive branch of government to indefinitely imprison (let us scrap the euphemism of “detention”) people genuinely seeking asylum.

The Parliament and the Immigration Department have now taken advantage of this decision to embark upon a policy of inordinately delaying the processing of applications for asylum, resulting in the harshest of detention regimes. This combination of delay and harsh detention is intended to send a message to would-be asylum seekers that if they come to Australia they will be “punished” by indefinite and indecent incarceration.

A dissenting member of the High Court in the al-Kateb case found the detention in that case irreconcilable with previous decisions of the High Court, but it was reaffirmed in a later case by “Heydon J”, as he was then – Justice Dyson Heydon.

He was fixated on the “illegality” of al-Kateb’s entry into Australia – an entry that was supported by international treaty to which Australia is a signatory. However, once again, the High Court has had licensed the Australian Parliament to ignore its and Australia’s obligation under international treaty by deciding that unless treaty obligations are specifically adopted in legislation, they have no effect on Australian law.

Some years ago a boat carrying asylum seekers was detained in international waters by Australian authorities. These asylum seekers were not in breach of Australian law and had the protection of international law. It is reported that it took a few minutes of phone calls for Australian authorities to process applications for asylum and found that none of the people qualified for asylum and were sent back.

In this context, the claim of the Immigration Department that the processing of applications for asylum is a prolonged and lengthy business lacks some credibility, but does tend to lend support to the view that detention of asylum seekers is punitive.

Hopefully, sooner rather than later the High Court will understand the awful consequences of a questionable decision and withdraw the license it has extended to the federal Parliament and the bureaucracy.

At that point, the Australian government will be forced to reconsider its policy of indefinite detention.

Student Activities

1. What role did the High Court play in allowing indefinite detention?
2. How was the High Court able to make the ruling relating to asylum seekers?
3. Why do you think it has been possible to imprison asylum seekers?
4. Explain the decision in the Ahmed al-Kateb case.
5. What has been the consequence of the decision in the Ahmed al Kateb case?
6. What was the dissenting finding in the Ahmed al Katel case?
7. What obligations does Australia have under international treaty?
8. Do you agree with the High Court’s decision to allow indefinite detention and the policy of the Commonwealth Parliament in relation to asylum seekers? Discuss.