Law Council
OF AUSTRALIA

The Balance Between Migration, International Security, Rule of Law and Terrorism - What Bar Associations can do to facilitate this conversation

Speech delivered by Fiona McLeod SC, President, Law Council of Australia at the International Bar Association Conference, Bar Issues Committee Showcase, Sydney.

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639 • *Email* mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

The Australian Narrative

In opening this conference on Sunday the Attorney-General, Senator the Honourable George Brandis QC noted:

In protecting our people from terrorism … we must be careful to ensure that our legislative and policing response is at all times consistent with our values and obedient to the rule of law, even if, on occasions, that may constrain what our law enforcement authorities can do. That is the price we pay for being democracies; but our very character as human rights-respecting democracies is itself a source of greater strength…

Nevertheless we, as lawyers must always be alert to ensure that due process is always observed, that the right of access to the courts is never denied, that the role of lawyers in representing their clients is always respected, that judicial power is not subordinated to executive discretion, and that Ministers and officials always respect the rule of law and the authority of the courts as the ultimate arbiters of the rights of citizens.[1]

Unfortunately, in Australia, despite our relative prosperity and stability as a nation, we have fled from these principles in our treatment of asylum seekers in the name of preserving national security.

Both major parties have pursued harsh laws and practices for more than a decade.

Polling of Australians suggests that most citizen's accept a necessary link between:

- Terrorism and migration/asylum seekers;
- Terrorism and citizenship;
- Terrorism and the need to continually extend coercive powers to keep us safer.

The connections are accepted without question. Such is the level of acceptance that we are now speaking about locking up children as young as 10 without charge for a period of up to two weeks in the name of national security.

Now it is true that global terrorism and the events of the last decade or more since 9/11 have scared us witless and that governments have an obligation to do all they can to protect us from harm.

Nevertheless we have accepted, because we are told that it is the case, three contestable narratives expressed one way or another:

1. That outsiders are the enemy;
2. That by treating some harshly we serve a greater good; and
3. That our peace and security depends on expansive and coercive defence, police and border control powers.

Despite the relatively small numbers of those seeking asylum and arriving by sea in Australia, and despite the findings that the majority of those so arriving meet the test for protection under the Refugee Convention, it is and remains the case that these three

[1] See https://www.attorneygeneral.gov.au/Speeches/Pages/2017/FourthQuarter/Address-at-the-Opening-of-the-International-Bar-Association-annual-Conference-Sydney-Australia.aspx

narratives are impenetrable and that those seeking to extend executive powers have seized the moral and political high ground.

In Australia, we have accepted: asylum seeker ‘pushbacks’; the use of Defence resources to fulfil border patrol duties; the establishment of regional or offshore processing and indefinite detention at a cost of billions of dollars; the separation of families; separation by cost, distance and bureaucracy from legal advisers; the pretence that the Australian government is not in control and the creation of coastal and land ‘exclusion’ zones meaning the whole Australian territory is now excluded from the operation of the Refugee Convention.

We have accepted the harsh treatment with paralysis or wilful blindness even when a child gives her name as a naval designation.

We have accepted departures from international law, including treaties and conventions to which Australia is a party, and erosions of the rule of law, especially the principles that –

- Access to the court should be available to all;
- All are equal before the law;
- No person held in conditions of detention which amount to cruel, inhuman or degrading treatment; and
- States should comply with their international legal obligations including the promotion and protection of human rights.

Recent History

We need to go back a little to understand the context in Australia.

In August 2001 hundreds of asylum seekers were rescued by the Dutch freight ship MV Tampa. The captain of the Tampa attempted to bring the asylum seekers to Australia and was prevented from docking by Australian authorities.

The Australian Government’s response to this incident was ultimately developed into a new model for handling large scale movement of asylum seekers by boat. In essence, small boats were ‘pushed back’ and turned - out of sight, out of mind - to the nearest landmass, in most cases, Indonesia. Turnbacks were coupled with offshore detention of new boat arrivals where those detained arriving from developing countries had limited access to media, lawyers, health and education and other professional social services.

The model has been refined many times since then.

Globally we are now seeing a humanitarian crisis on an unprecedented scale.

The Australian model for responding to asylum seekers is now being given serious consideration around the world, notably in the Mediterranean.

It is a politically popular model but problematic from the perspective of rule of law and respect for fundamental rights.

It deliberately muddles the language of migration, international security, rule of law and terrorism to limit public debate.

It uses terms such as ‘queue jumpers’, ‘illegals’ and ‘economic refugees’ in place of a clear explanation of basic legal issues involved with asylum seeking and the test of fear of persecution.

From the perspective of international law it is never illegal to seek asylum and it follows that the right to seek asylum is not predicated on waiting one’s turn in an orderly queue.

So how did we get here? After the Tampa incident, former Australian Prime Minister John Howard launched his Federal Election campaign on 28 October 2001. These were his words:

National security is therefore about a proper response to terrorism.

It’s also about having a far sighted, strong, well thought out defence policy.

It’s also about having an uncompromising view about the fundamental right of this country to protect its borders.

… we will decide who comes to this country and the circumstances in which they come.

Mr Howard’s words have proven to be spectacularly successful as a political formulation.

This is clearly a difficult set of circumstances for the legal profession to confront.

The issue has been framed as being about people causing harm rather than trying to escape it.

Role of the Law Council and Australian lawyers

For the Law Council our usual means of influencing policy have been unsuccessful in budging this policy at all. This has included:

- Writing to members of Parliament including the Minister for Immigration and Border Protection;
- Seeking to meet with the Minister and his political staff and departmental officers;
- Presenting at conferences, papers, and seminars;
- Making submissions to consultations and inquiries;
- Statements to the media on the issue.

Nevertheless the politicians have not budged. They know popular opinion is with them. So we must work to shift popular opinion because political will will follow.

Despite the efforts of the Law Council and efforts of NGOs and high profile respected public figures, public opinion is set in stone and MPs are unmoved.

Australian lawyers appear for pro bono refugees before our Tribunals and our Courts and keep turning up to fight the next case.

This has led Australia’s Immigration Minister, Peter Dutton, to agree that lawyers are “un-Australian” for providing legal assistance to asylum seekers.

As I have said publicly and privately to members of the Government, there is nothing more Australia than ensuring people are subject to the rule of law and have their legal rights protected.

I will give an example of how Australian lawyers have impacted the debate through pro bono legal work. Acting apparently in an “un-Australian way”.

Around 24,500 asylum seekers who arrived by boat between 13 August 2012 and 1 January 2014 were prevented from making a claim for refugee status. A pause in processing created a backlog of asylum seeker applications.

In 2015 the Minister for Immigration wrote to members of this group, thousands at a time, inviting them to use a new ‘fast track application process’ to apply for temporary protection visas. The process itself significantly limited the time and ability for those seeking asylum to respond and opportunities to request a merits review of an adverse determination made by the Minister.

At around the same time the government cut most legal funding for asylum seeker applicants. This pushed out waiting times for pro bono legal assistance within community legal centres to over one year.

When the Minister announced in May 2017 that all asylum seekers in this cohort must lodge their application by 1 October 2017 or be permanently barred from applying for an asylum protection visa, there were still around 7,000 people waiting for legal assistance to make their application.

This is a process that many in the group could not complete on their own.

The form is 41 pages long.

It contains 101 questions that must be answered in English, including the statement why the applicant has a well-founded fear of persecution.

A single application takes on average 10 to 15 hours to complete.

The Law Council wrote to the Minister for Immigration this year raising concerns with the process and offering to assist with volunteer legal resources on more than one occasion. Those letters remain unanswered.

Nevertheless, following calls from the Law Societies, Bar Associations and Refugee Advocacy groups the Australian profession pulled together to provide an incredible groundswell of pro bono support to this group.

The Refugee Advice and Casework Services in Sydney increased the number of free advice sessions from 25 to 125 per week, all provided pro bono by the Australian legal profession.

Unfortunately, despite these efforts, as many as 500 people may have failed to make the deadline.

It’s not yet clear what the future holds for this group which includes families with young children and Rohingya asylum seekers from Myanmar.

What is clear is that the profession of law continues to advocate for each and every one of these people.

Another example concerns the largest human rights class action bought in Australia on behalf of 1923 asylum seekers held on Manus Island, PNG between 2012 and 2014.

The class action claimed that the class members suffered physical and psychological injury as a result of the conditions of their detention on Manus Island. Papua New Guinea. They also made claims of false imprisonment, following the PNG Supreme Court ruling last year that declared their ongoing detention breached the PNG Constitution.

The government agreed on a settlement of these claims in June this year for $70 million dollars plus an estimated $20 million dollars in costs, formally approved by the Court in September of this year.

The Immigration Minister said the decision to settle the case was not an admission of liability of wrongdoing but was preferable to a lengthy and expensive trial. In such circumstances, he said, it was a prudent outcome for Australian taxpayers.

One of the members of the group, Ben Moghimi, said:

No amount of money could return back how I suffered in past years by [the] Australian Government in here and I am still suffering. Many of the guys here aren't happy about this but everyone is sick mentally so they had no choice so they had to accept it.

The settlement of the case resolved the issue and those appearing for the class were acting on a no win no fee basis, enabling the class action to proceed.

Conclusion

A further difficulty is that Australia has no constitutional guaranteed protection for human rights.

Governments, both conservative and progressive, have wound back the rights of review of adverse decisions. Courts and tribunals have rejected challenges to adverse decisions because the grounds of review are so restricted it is almost impossible to succeed.

We must continue to press for a national Human Rights Act.

We must make the argument that government action in detaining people offshore indefinitely is harsh and disproportionate.

And we must remind government that the words of the Attorney General in opening this conference are to be respected and observed.

Patrick Pantano

Senior Adviser, Public Affairs

T. 02 6246 3715

E. Patrick.Pantano@lawcouncil.asn.au