Individuals

Immigration. Basic principles of Australian immigration policy

In the House of Representatives on 7 June 1978, the Minister for Immigration and Ethnic Affairs, Mr MacKellar, made a major statement on Australian Immigration policy. At the outset of the statement, the Minister informed Parliament of the basic principles on which the policy was based (HR Deb 1978, Vol 109, 3154–5):

> It is important that, as a nation, we clearly state the basis on which our immigration policies will operate. Accordingly, the Government has adopted a set of nine principles upon which we will act. In so doing, we hope to secure wide understanding both by Australians and by the peoples and governments of other countries of the goals, obligations and constraints of our policies. The principles are:
>
> 1. It is fundamental to national sovereignty that the Australian Government alone should determine who will be admitted to Australia. No person other than an Australian citizen, or a constituent member of the Australian community, has a basic right to enter Australia.
> 2. Apart from people admitted as refugees and for family reunion, migrant entry criteria should be developed on the basis of benefit to the Australian community, and the social, economic and related requirements within Australia. As a general rule, Australia will not admit for settlement people who would represent an economic burden to Australia through inordinate claims on welfare, health or other resources, who would endanger the community by criminal or other anti-social activities, or whose entry would be to their own detriment.
> 3. The size and composition of migrant intakes should not jeopardise social cohesiveness and harmony within the Australian community.
> 4. Immigration policy should be applied on a basis which is non-discriminatory. There are external restraints on the extent to which Australia can apply a non-discriminatory policy. Some countries will not allow advertising for migration purposes, others will not allow immigration offices to be established within their territories, or allow immigration officers to operate within their territories. In addition, there are varying degrees of interest in migration to Australia in particular areas. The principle of non-discrimination means that policy will be applied consistently to all applicants regardless of their race, colour, nationality, descent, national or ethnic origin or sex.
> 5. Applicants should be considered for migration as individuals or individual family units, not as community groups. An exception will be refugees in designated refugee situations, although even in such circumstances the criteria for selection will be related to the characteristics of individual applicants.

6. Eligibility and suitability for migrants should reflect Australian social mores and Australian law. Polygamous unions will not be accepted, or the entry of child fiances. The concept of immediate family, for eligibility purposes, will be derived from the Australian norm, that is, the unit consisting of husband, wife and minor unmarried children.
7. Migration to Australia should be for permanent settlement although there should be no barrier preventing the departure of persons wishing to leave. The guest-worker migration flow until recently popular in the industrialised countries of Western Europe will not be adopted for Australia.
8. While migrants will have the same rights as other Australian residents to choose their place of residence individually or collectively, enclave settlement will not be encouraged. Immigration policy will not consider communities for mass movement to Australia in situations where enclave settlement would occur.
9. Policies governing entry and settlement should be based on the premise that immigrants should integrate into Australian society. Migrants will be given every opportunity, consistent with this premise, to preserve and disseminate their ethnic heritage.

These nine principles have a common basis: The interests of Australia and its people, together with compassion and international responsibility.

Immigration. Entry of Rhodesians. Australian practice

On 29 September 1978 the Minister for Immigration and Ethnic Affairs, Mr MacKellar, issued a statement part of which is as follows (Comm Rec 1978, 1299):

> Australia is conscientiously honouring its obligations under the UN resolution concerning the travel of Rhodesians. This obligation is to refuse entry to Australia of anyone who has furthered or encouraged the illegal regime the Minister for Immigration and Ethnic Affairs, the Hon. MJR MacKellar, said today.
>
> Applications for entry to Australia from Rhodesia are processed by immigration officials in the Australian Embassy in Pretoria. In every case, applications are carefully screened for information which would indicate that the person concerned has encouraged or furthered the illegal regime. In all cases applicants are required to sign an affirmation that they have not furthered or encouraged the regime.

Immigration. Definition of "illegal immigrant". Status of refugees distinguished

On 23 November 1979 the Minister for Immigration and Ethnic Affairs wrote in part in answer to a question (Sen Deb 1979, Vol 83, 2958):

> By the term 'illegal immigrant' it is assumed that the honourable senator means prohibited immigrant, the term referred to in the

Migration Act 1958. A person is a prohibited immigrant if he comes within the provisions of sub-section (1) of Section 6, sub-section (3) of section 7, sub-section (3) of Section 8 or sub-section (1) of Section 16 of the Migration Act 1958.

Refugees who are permitted entry to Australia are not prohibited immigrants for the purposes of the Migration Act. After thorough medical and quarantine screening they are allowed to enter Australia legally on temporary entry permits in accordance with the appropriate provisions of the Act.

Australia's obligations as a party to the Convention and Protocol Relating to the Status of Refugees require us to consider the claims of persons arriving in Australia who seek refugee status.

Aliens. Discrimination in employment. Remedies

On 12 October 1978 the Minister for Employment and Industrial Relations, Mr Street, wrote in answer to a question concerning reports that some employers and companies refused to employ persons who had come to Australia from particular countries even though they were Australian citizens (HR Deb 1978, Vol 111, 1884):

There have been occasional such reports from the Commonwealth Employment Service, as well as complaints to the National and/or State Committees on Discrimination in Employment and Occupation. The latter Committees have been established as part of the machinery to give effect to Australia's ratification of ILO Convention No. 111 — Discrimination (Employment and Occupation), 1958.

With its ratification (in 1973) of this ILO Convention, the Government is committed to eliminating discrimination in employment and occupation on the grounds of, inter alia, race or national extraction. The Employment Discrimination Committees are available to receive, and take remedial action on, complaints of employment discrimination on such grounds. In this connection I refer the honourable member to the most recent (Fourth) Annual Report of the National Committee for 1976–77 which I tabled in the House on 2nd June last.

Persons who consider they have been discriminated against in their employment on grounds of race or national or ethnic origin may, alternatively or additionally, lodge a complaint with the Commissioner for Community Relations under the provisions of the Racial Discrimination Act 1975.

Finally, such persons who reside in New South Wales or South Australia, may seek redress under the provisions of the NSW Anti-Discrimination Act 1977, or the SA Racial Discrimination Act 1976, respectively.

Aliens. Deportation. Powers of Minister to deport. Circumstances in which power is exercised

On 15 November 1978 the Minister for Immigration and Ethnic Affairs, Mr MacKellar, wrote in answer to a question (HR Deb 1978, Vol 112, 2887–8):

The Migration Act 1958 confers in Sections 12, 13 and 14 power to the

Minister of State for Immigration and Ethnic Affairs to order the deportation of 'aliens' and 'immigrants' provided certain defined pre-conditions exist. Those sections may be invoked in the following circumstances:

(i) Section 12 confers upon the Minister the power to order the deportation of an alien who in Australia has been convicted of a crime of violence or of extortion, or of an attempt to commit such a crime, or of any other offence for which he has been sentenced to imprisonment for one year or longer. That power may be exercised upon the expiration of, or during, the term of imprisonment served or being served by the alien in respect of the offence.

(ii) Section 13 of the Act confers upon the Minister the power to order the deportation of an immigrant who in Australia has been convicted of an offence punishable by death or by imprisonment for one year or longer and of an immigrant who in Australia has been convicted of an offence by reason of being a prostitute, having lived on or received earnings of prostitution or having procured persons for the purpose of prostitution provided that the offence was committed within five years after any entry into Australia by the immigrant. Section 13 of the Act also confers upon the Minister the power to order the deportation of an immigrant who, within five years after any entry by him into Australia, is an inmate of a mental hospital or public charitable institution.

(iii) Section 14 of the Act confers upon the Minister the power to order the deportation of an alien if it appears to him that the conduct of the alien, whether in Australia or elsewhere, has been such that he should not be allowed to remain in Australia. Section 14 of the Act also confers upon the Minister the power to order the deportation of an immigrant who entered Australia not more than five years previously if it appears to him either that the conduct of the immigrant, whether in Australia or elsewhere, has been such that he should not be allowed to remain in Australia or that the immigrant is a person who advocates the overthrow by force or violence of government or the unlawful destruction of property.

No action may be taken by the Minister to make an order under Section 14 of the Act unless he has given to the proposed deportee a notice of his intention to make such an order and of the grounds upon which he proposes to act and unless either the proposed deportee does not request that his case be considered by a Commissioner appointed under the Section or does not when summonsed appear before such a Commissioner or a Commissioner reports after having made a thorough investigation that the ground specified in the notice has been established.

Every case is decided upon the basis of its individual circumstances after consideration of all the material facts. Actually the following matters are taken into account whenever applicable:

The nature of the offence;

The circumstances of the commission of the offence;

The view of the offence expressed by the Court before which the offender appeared;

> The nature of the penalty;
> The extent of rehabilitation of the offender;
> The prospects of recidivism;
> The necessity to prevent or inhibit the commission of like offences by other persons;
> The previous criminal history of the offender;
> The public interest;
> The circumstances of the offender;
> The circumstances of the family or of other persons having a relationship with the offender;
> The obligations of the Commonwealth under the Convention Relating to the Status of Refugees . . .
>
> People whose deportation is ordered pursuant to either Section 12 or 13 of the Migration Act, are eligible to apply to the Administrative Appeals Tribunal to have the decision of the Minister reviewed by the Tribunal provided their continued presence in Australia is not subject to any limitation as to time imposed by law . . .
>
> Section 14 of the Migration Act provides for review by a Commissioner at the option of the prospective deportee.
>
> Apart from the foregoing, deportees are of course at liberty to take action to challenge in the Courts the validity of orders made for their deportation.

Aliens. Deportation of convicted persons. Australian policy

On 31 January 1980 the Minister for Immigration and Ethnic Affairs, Mr Macphee, announced the policy of the Government relating to the deportation of persons convicted of criminal offences, as follows (Comm Rec 1980, 97–8):

> The policy of the Government relating to the deportation of persons convicted of criminal offences was released today by the Minister for Immigration and Ethnic Affairs, the Hon. Ian Macphee. The policy is as follows:
>
> 1. The Commonwealth of Australia is entitled to determine who is to be permitted to remain in Australia and to receive the benefits of acquiring or continuing membership of the community. This is recognised in domestic law as it is in international law.
>
> 2. In sections 12 and 13 of the *Migration Act* 1958, the Parliament has prescribed circumstances where the Minister for Immigration and Ethnic Affairs is given responsibility for determining whether the privilege of being permitted to remain in Australia should be withdrawn. Section 12 applies principally to persons who are not British subjects or Irish citizens. Section 13 applies to persons who are not Australian citizens and who commit certain offences within five years of entering Australia. Persons whose interests are affected by deportation and who have been granted permanent residence in Australia can apply to the Administrative Appeals Tribunal for review of the Minister's decision.
>
> 3. In considering whether a person convicted of a criminal offence should be deported, the basic question which is determined is whether in

all the circumstances of the particular case it is in the public interest that the person be deported. The interests of the potential deportee and those of persons whose interests are affected by deportation (within the meaning of the Administrative Appeals Tribunal Act) are weighed against the the public interest. Whether the interests of the community in effecting deportation outweigh the interests of the offender and other persons whose interests are affected by deportation, or vice versa, will depend on the individual circumstances of each case. The following provides a guide to the range of considerations taken into account when making decisions:

- the nature of the offence
- the circumstances of the commission of the offence
- the view of the offence expressed by the court before which the offender appeared
- the nature of the penalty
- the extent of rehabilitation of the offender
- the prospects of the commission of further offences
- the necessity to prevent or inhibit the commission of likely offences by other persons
- the previous general record and conduct of the offender
- the circumstances of the offender
- the circumstances of other persons whose interests would be affected by deportation
- the obligations of the Commonwealth under the Convention and Protocol Relating to the Status of Refugees.

This list is not exhaustive. If considered relevant other factors not mentioned may be taken into account in individual cases.

4. Before a decision is taken officers of the Department of Immigration and Ethnic Affairs investigate each case fully and present to the Minister for Immigration and Ethnic Affairs a report which covers all material facts and circumstances known to the Department.

5. These reports include details of the circumstances of the offences committed by the potential deportees. Where known, details of the potential deportees' prior criminal records, their occupational and residential records and the circumstances of the members of their families, both in Australia and abroad, are provided. If relevant and available, medical and psychiatric reports and the opinions of prison and parole officers regarding the offenders' likely conduct if permitted to remain in Australia are included in the report.

Convention Relating to the Status of Refugees

6. An Interdepartmental Committee considers the cases of persons who seek recognition as 'Convention' refugees. This Committee, known as the Determination of Refugee Status (DORS) Committee, undertakes appropriate investigations and recommends to the Minister whether the persons concerned should be recognised as refugees for the purpose of the Convention and Protocol and whether they are entitled to the protection of the Convention.

7. Whenever potential deportees allege that they would be likely to suffer persecution if deported to their homelands, additional factors arise for consideration. These include:
   - the situations in the countries to which they would normally be deported
   - whether the Australian Government should make an official approach to deport an offender to a country other than his or her homeland
   - the consequences of a decision to deport to a particular country
   - the possible fate of the persons if deported to certain countries
   - whether Australia would be seen to be fulfilling obligations and commitments arising out of the Convention and Protocol Relating to the Status of Refugees.

The remainder of the policy statement concerned offences related to the production, importation, distribution or trafficking of illicit drugs and to deportation arrangements.

Aliens. Deportation of aliens under the Migration Act 1958. Convention on the Status of Refugees, Article 32, paragraph 2. Meaning of "due process"

On 13 November 1979 the Full Court of the Federal Court of Australia (Smithers, St John and Northrop JJ) handed down its decision in *Ceskovic v Minister for Immigration and Ethnic Affairs* (27 ALR 423), part of which is reported as follows (at 424–6):

> By an order dated 17 February 1977, Ivan de Mirko Ceskovic, also known as John Ivan Ceskovic, was ordered to be deported by the Honourable The Minister for Immigration and Ethnic Affairs, such order being expressed to be in pursuance of the power conferred by s 12 of the Migration Act 1958. An application for an order of review was made to and heard by the Administrative Appeals Tribunal, the Deputy President of which was Mr Justice Davies. The learned Deputy President affirmed, on 27 March 1979, the decision of the Minister that the applicant be deported. From that decision the plaintiff Ceskovic appeals to this court.
>
> In his notice of appeal, as amended, the questions to be raised in this court were stated as follows:—
>
> 3. (a) The Tribunal misdirected itself on the significance of the Declaration of the United Nations High Commissioner for Refugees that the plaintiff had the status as a political refugee.
>
> (b) The decision was in breach of Art 33 of the convention relating to the status of refugees.
>
> (c) That the decision was also in breach of Art 32 of that convention in that, the plaintiff being at present time in prison, he does not constitute a threat to public order or national security . . .
>
> Section 12 of the Migration Act 1958 (the Act), so far as is relevant, is in the following terms:—
>
> 12. Where an alien has been convicted in Australia of a crime of violence against the person . . . for which he has been sentenced to

imprisonment for one year or longer, the Minister may . . . order the deportation of that alien.
Section 14 of the Act provides that if it appears to the Minister that the conduct of an alien has been such that he should not be allowed to remain in Australia, the Minister may, subject to the section, order the deportation of that alien . . .
The Minister stated that he took into account in exercising his powers to deport a United Nations Convention on the status of refugees, Art 32, para 2 of which provides:—
"The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."
On the plaintiff's behalf, he having been accepted as a refugee by the Minister, it was submitted that "due process" had been denied, and certain definitions formulated in the United States of America as to the meaning of those words were referred to. We accept the submission of counsel for the Minister that the definition of "due process" would appear to be in accordance with the rest of the paragraph quoted, and in those circumstances "due process" was accorded the plaintiff.
It is apparent from the evidence before the Tribunal that the plaintiff is amply qualified for deportation because of his convictions, the most serious of which was malicious shooting with intent to do grievous bodily harm for which he was convicted in the District Court, Sydney, on 18 February 1975, and for which a sentence of six years' penal servitude was imposed. In addition he has convictions for other crimes of violence and, as the learned Deputy President put it, the plaintiff "demonstrated a propensity to become involved in disputes which led to violence and in which persons other than the applicant (plaintiff) were injured". On two occasions the plaintiff shot human beings, one fatally . . .
The appeal is dismissed with costs.

Citizenship. Nature of allegiance owed by Australian citizens to the Queen

On 11 March 1980 McLelland J handed down his judgment in the New South Wales Supreme Court in *McM* v *C (No 2)* [1980] 1 NSWLR 27, part of which is as follows (at 43–44):

The Supreme Court and Allegiance in Australia and New South Wales:
(42) The Supreme Court of New South Wales was established on 17th May, 1824, upon the promulgation of the Charter of Justice of 13th October, 1823, and has thereafter continued with its identity unchanged until the present day: see eg *Supreme Court Act,* s 22. The Court's jurisdiction in equity, confirmed by s 11 of the *Australian Courts Act,* 1828, had been vested in the Court from its inception (by virtue of s 9 of the *New South Wales Act,* 1823). During the period of these events, a common allegiance was owed to the Crown of the United Kingdom of

Great Britain and Ireland by all British subjects and all aliens within British territory . . .

(45) Since that time the position has altered, in that Australia has, by an evolutionary process, attained the status of an independent sovereign nation, which status has been recognised or implemented, although not effected, by legislation such as the *Statute of Westminster,* 1931 (Imp), the *Statute of Westminster Adoption Act* 1924 (Cth), the *Australian Citizenship Act* 1948 (Cth), the *Diplomatic Immunities* Act 1952 (Cth) and the *Royal Style and Titles* Act 1953 (Cth), replaced by the *Royal Style and Titles Act* 1973 (Cth). The courts take judicial notice of this development, and the common law adjusts to accommodate it. As in other matters of this kind, "the law followed the facts at a respectful distance": RTE Latham's 'The Law and the Commonwealth' in *Survey of British Commonwealth Affairs* (1937) vol 1, at p 515, and see *Bonser* v *La Macchia*[40], per Windeyer J. It is an example of "the adaptability of the common law (of which the prerogative of the Crown forms a part) to new circumstances and conditions": *Jolley v Mainka*[41] per Evatt J. Recognition of the effect upon Australian domestic law of the attainment of national sovereign status is illustrated by such cases as *Bonser v La Macchia*[42], *Barton v Commonwealth*[43] and *New South Wales v Commonwealth*[44] and is referred to in *China Ocean Shipping Co v South Australia.*[45]

(46) The aspect of this development which is of present significance is that, for the purposes of Australian law, allegiance to the Crown of the United Kingdom has been superseded by allegiance to the Queen in her capacity as Queen of Australia, at least to the extent that allegiance connotes the correlative duty of protection by the Crown. In this respect the dilemma in relation to "Australian nationals" discussed by Latham CJ in *R v Burgess; Ex parte Henry*[46] has been resolved by the provisions of the *Australian Citizenship Act* 1948 (Cth). The form of oath of allegiance prescribed by s 15(1)(a) of that Act is not without significance in the present context. It is as follows: "I, AB, renouncing all other allegiance, swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Elizabeth the Second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfil my duties as an Australian citizen."

Citizenship. Dual nationals. Status outside Australia.

In the House of Representatives on 26 May 1978, the Minister for Foreign Affairs, Mr Peacock, in the course of a statement on consular services

40. (1969) 122 CLR 177, 223.
41. (1933) 49 CLR 242, 281.
42. 122 CLR at 189, 223, 234.
43. (1974) 131 CLR 477.
44. (1975) 135 CLR 337.
45. (1979) 27 ALR 1.
46. (1936) 55 CLR 608, 647–651.

provided for Australians overseas touched upon the problems of dual nationals overseas, as follows (HR Deb 1978, Vol 109, 2595–6):

> I mention next the problems of dual nationality. Many migrants who are naturalised Australians, or in some cases their children who are natural born Australians, may be regarded by their country of birth, or their parents birth, still to be citizens of those countries. Such dual nationals can be subject to laws of the country of their first citizenship, who may claim jurisdiction over them in such matters as military service or taxation. My Department, and the Department of Immigration and Ethnic Affairs, attempt to make dual nationals aware of the problems they might encounter on return to their country of birth.
>
> Assistance to dual nationals, however, necessarily becomes a growing part of consular work as more foreign born Australians return to visit their former homes. The problems of dual nationals cannot be overcome by citizens simply asserting that they do not accept their other citizenship. In some cases formal acts of renunciation are possible, but in other countries, no such provisions exist; the requirements should be carefully established in advance. It is for the individual to ascertain and bear the consequences of coming within the jurisdiction of another country which claims his or her citizenship, whether the individual, or the Australian Government, recognises that claim or not. Our consular officers can advise, but beyond a strict limit, they cannot assist when, in these circumstances, the jurisdiction of another country is being asserted.

On 17 October 1979 the Minister for Foreign Affairs, Mr Peacock, made a statement in the House of Representatives on the subject of dual nationality, part of which is as follows (HR Deb 1979, Vol 116, 2103):

> On 14 October 1976 the honourable member for Prospect (Dr Klugman) presented to the House on behalf of the Joint Parliamentary Committee on Foreign Affairs and Defence the Committee's report on 'The International Legal and Diplomatic Aspects of the Situation of Australians Possessing Dual or Plural Nationality'. This is a short statement on this matter . . .
>
> The long-standing policy of the Australian Government of avoiding wherever possible the creation by its legislation of instances of dual nationality, while at the same time giving recognition to such status wherever it occurs, has been reaffirmed. The Government thus accepts the over-riding conclusion and recommendation of the committee.

On 21 November 1979 the Australian representative, Mr Crick, spoke at a meeting the Sixth Committee of the United Nations General Assembly, and part of his speech is reported as follows (A/C.6/34/SR.47, 11):

> 41. His Government recognised the general principle that each State was free to determine for itself and by virtue of its domestic laws whom it would regard as its nationals and under what conditions citizenship might be acquired or lost. However, dual nationality resulted in both advantages and disadvantages, and Australia was concerned about the possibility that the recent surge in international tourism might create

> friction between States having conflicting claims of citizenship, particularly in the areas of military service and diplomatic protection . . .
> . . . there was a deep divergence in the views of members of the Commission. Although Australia understood the reasons for that divergence and the difficulties involved in any attempt to reconcile different systems of nationality and the individual sociological and political interests of States, it felt that many of those difficulties could be solved if States would adopt equitable and flexible procedures when settling individual cases.
> 43. In addition, States should facilitate the loss or renunciation of citizenship, although, admittedly, such procedures were particularly cumbersome in many countries.

Citizenship. Deprivation of Australian citizenship

In the Senate on 23 May 1980, the Minister for Immigration and Ethnic Affairs, Mr Macphee, provided the following in part answer to a question (Sen Deb 1980, Vol 85, 2881):

> Deprivation of Australian citizenship can only occur under section 21 of the Australian Citizenship Act 1948 as amended following a conviction of a person for an offence under section 50 of that Act, in that he knowingly made a false representation or statement, or concealed a material circumstance in connection with the grant of Australian citizenship to him, and the Minister is satisfied that it would be contrary to the public interest for that person to continue to be an Australian citizen.

Discrimination. Women. Australian participation in international conventions

On 28 February 1978 the Prime Minister, Mr Fraser, presented the Final Report of the Royal Commission on Human Relationships to Parliament: HR Deb 1978, Vol 108, 206. Following is an extract from the Report (Vol 5, 53–4):

> 290. Australia's record in regard to the ILO and the United Nations' initiatives is as follows:
> (a) United Nations Declarations relating to discrimination on the grounds of sex or marital status which Australia has supported:
> Australia voted in favour of UN General Assembly resolution 217A(III) of 10 December 1948, which adopted and proclaimed the Universal Declaration of Human Rights.
> Australia voted in favour of UN General Assembly resolution 2263(XXII) of 7 November 1967, which adopted the Declaration on the Elimination of Discrimination against Women.
> (b) United Nations, ILO and UNESCO Covenants and Conventions relating to discrimination on the grounds of sex or marital status which Australia has ratified or acceded to:

Ratified in

1957 The UN Convention on the Nationality of Married Women[47]
1974 The UN Convention on the Political Rights of Women[48]
ILO Convention No 100 (Equal Remuneration)[49]
1975 The UN International Covenant on Economic, Social and Cultural Rights[50]
1966 The UNESCO Convention against Discrimination in Education[51]
1974 The Protocol relating to it[52]
1969 ILO Convention No 122 (Employment Policy)[53]
1973 ILO Convention No 111 (Discrimination in Respect of Employment and Occupation)[54]

291. The ratification of Conventions is the responsibility of the Commonwealth government, though in practice the subject matter of a Convention may fall wholly or partly within the jurisdiction of the States, and their agreement may be needed for ratification.

Discrimination. Women. Employment. International Labour Organisation Convention No 111 — Discrimination in respect of Employment and Occupation

On 24 April 1978 the Australian Conciliation and Arbitration Commission (Moore J, President, Gaudron J, and Mansini Commissioner) handed down its decision in *Re Municipal Officers (Queensland) Consolidated Award 1973* [1978] Ind Arb Serv Cur Rev 145.

In August 1977 the Rockhamptom City Council in Queensland terminated the employment of a female officer, Mrs Janine Marshall, who had joined the council as a junior when aged 15. When she married at the age of 19 her employment was terminated. The Municipal Officers' Association of Australia (the "M.O.A.") then applied under the Commonwealth Conciliation and Arbitration Act 1904 for, among other things, a variation of the Municipal Officers (Queensland) Consolidated Award, 1975. Part of the judgment was as follows (at 146–8):

> The claim arose out of the dismissal by the Council of the City of Rockhampton of a female officer in implementation of a policy pursued by that council for "the last hundred years" and by some eleven other local government authorities respondent to the subject award not to employ married women . . .
>
> The right to terminate the employment of female officers upon marriage was supported by the Queensland Confederation of Industry, the Local

47. Aust TS 1961 No 4.
48. Aust TS 1975 No 14.
49. Aust TS 1975 No 45.
50. Aust TS 1976 No 5.
51. Aust TS 1966 No 20.
52. Aust TS 1974 No 28.
53. Aust TS 1970 No 19.
54. Aust TS 1974 No 12.

> Government Electricity Association of South Australia and the Local Government Electricity Association of New South Wales who intervened in the proceedings. The claim of the M.O.A. which was based substantially upon the provisions of International Labour Organisation Convention 111 was supported by the Commonwealth of Australia, the United Nations Association of Australia and the various women's interest groups who were granted leave to intervene . . .
> In May 1973 the Commonwealth Government declared a national policy to eliminate discrimination in employment and occupation in Australia, and in June 1973 ratified ILO Convention 111. Following ratification, the Commonealth Government established State and National Committees on Discrimination in Employment and Occupation which receive complaints of discrimination and attempts to resolve those complaints by conciliation and persuasion . . .
> The Commonwealth, in its submission, put that the policy of the Rockhampton City Council is contrary to the spirit of ILO Convention 111 and the policies pursued by the Commonwealth Government, and emphasised that its concern in the matter was not solely based on the policy of the Rockhampton City Council but with the possibility that the policy might be applied by other councils respondent to the award.
> The principle embodied in ILO Convention 111 has been adopted and translated into legislative effect in the states of New South Wales, Victoria and South Australia. The principle has widespread community support and it is not without significance that the Discrimination Committees comprise representatives of both employers and employees as well as of government. This Commission accepts that it has a role to play in the elimination of discriminatory work practices, and will when occasion demands it, exercise its powers to that end.
> The policy of the Rockhampton City Council and those other councils which adopt a similar policy, is in our view clearly discriminatory . . . and contrary to the avowed aims of the International Labour Organisation and the Federal Government. We are not persuaded that there is any overriding consideration of social or industrial justice which would warrant its condonation by this Commission. It is clear from the manner in which the case was conducted that the problems inherent in the pursuit of such a policy can be overcome only by a variation to the award. We propose that the award should be varied effective from the date of this decision to provide after sub-cl (a) of cl 46 that "A respondent shall not in exercising its powers of termination in this subclause make any distinction, exclusion or preference on the basis of sex, other than a distinction, exclusion or preference based on the inherent requirements of a particular job." The wording of the proposed variation depends heavily on the wording contained in ILO Convention 111.

Discrimination. Race. Lusaka Declaration on Racism and Racial Prejudice

On 20 November 1979 the Prime Minister, Mr Fraser, in answer to the question: 'Does the Government subscribe unreservedly to the Lusaka

Declaration of the Commonwealth on racism and racial prejudice (7 August 1979)?' wrote 'Yes': HR Deb 1979, Vol 116, 3254.

Discrimination. Race. International Convention on the Suppression and Punishment of the Crime of Apartheid. Reason Australia has not signed Convention

A Note by the Secretary-General of the United Nations dated 17 June 1980, prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities for its Sessional Working Group on the encouragement of universal acceptance of human rights instruments, contained a summary of information submitted by governments on human rights instruments ratified or acceded to and those not ratified and, in the latter case, the reasons for non-ratification. The Note states in respect of Australia in the case of the International Convention on the Suppression and Punishment of the Crime of Apartheid (E/CN.4/Sub.2/452):

> Australia has not signed this Convention. While the Australian Government continues to condemn all forms of racism and remains committed to the eradication of *apartheid* as a cruel and degrading practice, the Convention presents certain legal problems which have prevented Australian ratification. There are, for example, substantial problems of jurisdiction raised by the Convention's requirement that States adopt legislative, judicial and administrative measures to prosecute and punish persons accused of a wide variety of crimes related to *apartheid*. In particular the Australian Government envisages serious difficulties in the extra-territorial application of such measures. Consequently, while confirming its support for the principles underlying the formulation of the Convention, Australia remains unable to ratify it.

Discrimination. Race. Australian Aboriginals. Australia's international obligations

On 5 April 1979 the Minister representing the Minister for Aboriginal Affairs, Mr Viner, tabled in the House of Representatives a submission by the Minister for Aboriginal Affairs, Senator Chaney, to the Queensland Aboriginal and Islanders Commission. Part of the submission dealt with Australia's international obligations with respect to Aboriginals as follows (HR Deb 1979, Vol 113, 1584):

> The Commonwealth has obligations under international covenants and conventions which it has ratified or which it has signed and intends to ratify. The International Convention on the Elimination of All Forms of Racial Discrimination . . . , which should be read in conjunction with the Universal Declaration of Human Rights . . . , give effect to the Declaration by prescribing basic civil, economic, social and cultural rights which should be guaranteed to everyone, without distinction as to race, colour, or national or ethnic origin. It also permits the institution of special measures 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or

> individuals equal enjoyment or exercise of human rights and fundamental freedoms' (Article 1.4). The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights similarly give effect to the Universal Declaration of Human Rights and provide internationally accepted definitions of individual rights and freedoms . . . . Convention 107 of the International Labour Conference, the 'Indigenous and Tribal Populations Convention, 1957' is also relevant . . . .

On 21 August 1979, Senator Chaney provided the following written answer on the matter (HR Deb 1979, Vol 115, 382):

> Australia has ratified the International Convention on the Elimination of all Forms of Racial Discrimination which requires States parties to undertake measures that could be said to be designed to promote inter-cultural communication.
>
> Remedies are available under the Racial Discrimination Act 1975 to persons suffering from any acts of discrimination to which that Act applies. Provisions of the Racial Discrimination Act 1975 and the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 override Queensland legislation which is considered to discriminate against Aboriginals.

On 22 November 1979 the Minister for Foreign Affairs, Mr Peacock, wrote in answer to a question (HR Deb 1979, Vol 116, 3506):

> Australia, as a State Party to the International Convention on the Elimination of All Forms of Racial Discrimination, submits national reports to the Committee established under that Convention whose task it is to consider measures taken to give effect to the Convention. The Second Australian Report, which was prepared in close consultation with my Department, was considered by the Committee at its Twentieth Session in August this year and the Committee found it satisfactory. Australia takes its obligations under the Convention seriously and Departments are fully aware of the Government's determination to ensure that these obligations are met.

The Second Periodic Report of Australia submitted to the Committee on the Elimination of Racial Discrimination ('CERD') dated 9 April 1979 (CERD/C/16/Add.4) was considered by CERD on 6 August 1979 (CERD/C/SR.443, 105–107, and SR.444, 108–122).

Discrimination. Race. Australian Aboriginals. Allegations made to the United Nations Commission on Human Rights

On 31 July 1980 the Australian Government submitted a paper to the Working Group on Slavery of the Sub-Commission on Prevention of Discrimination and Protection in response to a statement which had been made to the United Nations Working Group on Slavery by a Mr Kenneth Liberman, a representative of the Minority Rights Group, concerning the situation of Aboriginals in Australia. Part of the introduction of the paper stated (E/CN.4/Sub.2/AC.2/35, Annex, 1):

> This paper deals with each of Mr Liberman's claims, which form the headings for the remainder of the paper. It points out that Aboriginal Australians share equal rights and benefits with all Australians; that Government activity in the field of Aboriginal Affairs has increased substantially in recent years; and that the disadvantages and poverty of the people are largely legacies from the past, which will, in due course, be overcome with special assistance programmes and a determination on the part of the Aboriginal people themselves to adapt to their choice of lifestyle.

In the report of the Working Group dated 20 August 1980 the Australian paper was referred to as follows (E/CN.4/Sub.2/447, 4):

> The Working Group took note with satisfaction of the response transmitted to the Secretary-General by the Government of Australia to the allegations contained in the statement made by the representative of the Minority Rights Group to the fifth session of the Working Group concerning the condition of Aborigines in Australia.

On 30 September 1980 Mr Jim Hagan, Chairman of the National Aboriginal Conference and a member of the World Council of Indigenous Peoples, addressed the Sub-Commssion on the situation of Aboriginals and is reported as having said in part (E/CN.4/Sub.2/SR.879, 9):

> 56. The Aboriginal people of Australia were therefore appealing to the Sub-Commission to assist them in their struggle for equality and freedom. They asked the Sub-Commission to urge the Australian Government to take appropriate measures to protect the right of the Moonkanbah Aboriginal people to freedom of their religion and to the enjoyment of their culture. They further requested it to undertake a study of discrimination against Aborigines in Australia and, in particular, of the failure of the Australian Government to provide for the right of Aborigines to obtain title to their traditional lands or to compensate them for the loss of such lands, and to make appropriate recommendations, arising out of that study, to the Commission on Human Rights.

Australia's Permanent Representative to the United Nations Office at Geneva, Dr Thompson, responded to Mr Hagan's statement and is reported as having commenced his statement as follows (E/CN.4/Sub.2/SR.879, 15):

> His Government treated with great seriousness any suggestion that international human rights standards were not being upheld in Australia, especially when such criticisms came from within the Australian community itself.

Extradition. Treaty with Israel. Extradition of Israeli nationals

On 25 May 1978 the Minister for Foreign Affairs, Mr Peacock, wrote in answer to a question about extradition arrangements with Israel (HR Deb 1978, Vol 109, 2579–80):

> I understand that the Israel Knesset in January this year passed a law which, when it comes into force, will prohibit the extradition from Israel

of Israeli nationals. This prohibition will not, however, apply when the offence for which extradition of an Israeli national is sought was committed before he became an Israeli national. The law also provides for prosecution in Israel of those nationals not subject to extradition. Moreover under the new law Australia will be able to request that an Israeli national, who has been sentenced in Australia and who then flees to Israel, serve that sentence in Israel.

This law will not strictly affect the Extradition Treaty which has been in force with Israel since 3 January 1976. Article VII of that Treaty provides that either Party may refuse to extradite its own nationals. This discretionary provision accords with international extradition practice whereby many countries refuse extradition of their nationals. Australia does not favour this practice.

Extradition. Extradition of former diplomat

On 23 May 1979 the Attorney-General, Senator Durack, said in answer to a question (Sen Deb 1979, Vol 81, 1983):

> An application has been made to the United States authorities for the extradition of Mr Azurin to face certain charges arising out of alleged breaches of Australian law.
>
> The question of whether he will be extradited to Australia will be determined by the American courts, to which the application is made. It is true that the Philippines Government has waived any claim to diplomatic immunity in relation to the acts of Mr Azurin at the time the offences are alleged to have taken place.

On 12 September 1979 he added in a written answer (HR Deb 1979, Vol 115, 1057):

> On 19 June 1979 a United States District Court Judge found that Mr Azurin was liable to be extradited to Australia pursuant to the Australia/United States Extradition Treaty. His removal from the United States has been deferred, however, pending the hearing of a petition he has filed for habeas corpus.

Passports. Right to travel. Legislation to restrict issue of passports

On 7 March 1979 the Minister for Foreign Affairs, Mr Peacock, introduced the Passport Amendment Bill 1979 into the House of Representatives and in the course of his explanation of the purpose of the Bill said (HR Deb 1979, Vol 113, 707):

> The right to travel — to leave and return to one's own country — is recognised as a basic human right. Australia has signified its recognition of this right by endorsement of the Universal Declaration of Human Rights of 1948. In the not too distant past, it was argued that the need to carry a passport was an infringement of basic rights. Nowadays the withholding of a passport is likely to bring allegations that a basic human right has been denied. A passport or recognised travel document, whilst not essential for overseas travel under Australian law, is now generally necessary for travel abroad. As well as its obligation to provide travel

facilities to its citizens, the Government, as a responsible member of the international community, has an obligation to those countries to which its citizens travel. Australian passports contain a message from the Governor-General requesting other countries to provide free passage, protection and assistance to the bearer. This imposes on the Government a responsibility to ensure, so far as it can, that passports are not issued to persons likely to threaten the national security and public order of another country or the rights and welfare of its citizens. Of particular concern are political extremists and terrorists, drug pedlars, and persons inclined to violent acts as a result of mental illness. This concern is also reflected in the Bill.

Passports. Types

On 5 April 1979, Mr Peacock wrote in answer to a question (HR Deb 1979, Vol 113, 1669):

> There are three types of passports issued in Australia: ordinary, diplomatic and official.
>
> The purpose of all three passports is to identify the bearer and to request other countries to provide free passage, protection and assistance. Additionally, diplomatic and official passports define the status of the bearer.
>
> Unlike ordinary passports which have a set period of validity, diplomatic and official passports are issued to enable the bearer to carry out a particular mission.

Passports. Discretion of Minister to grant or withhold

In the Senate on 6 April 1978, the Minister representing the Minister for Foreign Affairs was asked whether the issue of an Australian passport could be denied to an Australian citizen living in a foreign country. On 30 May 1978, the Minister, Mr Peacock, provided the following answer (Sen Deb 1978, Vol 77, 2109):

> Yes. The Passports Act gives discretion to the Minister for Foreign Affairs to grant or withhold the issue of Australian passports.
>
> The preamble appearing on the inside front cover of every Australian passport in the name of the Governor-General '. . . requests all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford to him or her every assistance and protection of which he or she may stand in need'.
>
> This formal request in an Australian passport to other Governments to furnish protection and assistance to the bearer underlines the responsibility of the Minister for Foreign Affairs and officers delegated by him in the issue of Australian passports to ensure that the Passports Act is administered in accordance with Australia's international interests.
>
> In exercising his discretion, the Minister for Foreign Affairs takes into account the advice of Australian Government authorities which may include matters concerned with peace, order and good government in respect of both international relations and domestic affairs.

The withholding of a passport does not deny a citizen the basic right to travel. The Passports Regulations which are issued under the Passports Act make provision for the grant of a document of identity in lieu of a passport.

Passports. Cancellation. Procedure

On 9 November 1978 the Leader of the Government and the Minister representing the Minister for Foreign Affairs, Senator Carrick, said in answer to a question about the denial of a passport to a particular individual (Sen Deb 1978, Vol 79, 1834):

> . . . section 7(1) of the Passports Act gives discretion to the Minister for Foreign Affairs and authorised officers to determine the issue of Australian passports. In exercising his discretion, the Minister takes into account the advice of Australian Government authorities, which may include matters concerned with peace, order and good government in respect of both international relations and domestic affairs. Whilst it has been the practice of successive Ministers in the exercise of this discretionary power generally not to give reasons in respect of particular cases, it has long been the policy of successive Ministers to withhold passports from persons who are attempting to escape from justice, are the subject of court orders restraining departure, are of unsound mind, are under the age of 17 years and unable to produce the consent of both parents or are the subject of custody or access orders of Australian courts, and those for whom the Minister for Foreign Affairs could not, in the context of Australia's international relations, request other countries to provide free passage, protection and assistance.

Passports. Passports not recognised in Australia

On 5 April 1978 the Minister for Foreign Affairs, Mr Peacock, wrote in answer to a question about Taiwanese visitors to Australia (HR Deb 1979, Vol 108, 1079):

> In line with the policy of successive Australian Governments since recognition of the People's Republic of China on 21 December 1972, passports issued by the regime on Taiwan are not accepted as travel documents. People who present such passports, and whose entry to Australia is approved, are issued with Letters of Authority to enable them to travel to Australia. Eleven of the Taiwanese visitors to the meeting of the International Press Institute travelled on Letters of Authority issued by the Australian Commission in Hong Kong. One Taiwanese visitor travelled on a Hong Kong Certificate of Identity and was issued with a visa by the Australian Commission in Hong Kong.

On 23 November 1979 the Minister for Immigration and Ethnic Affairs provided the following written answer to a question about people entering Australia in possession of passports not recognised in Australia (Sen Deb 1979, Vol 83, 3009):

> (2) In relation to people holding passports not recognised by Australia

the principal areas are China (Taiwan Province) and Zimbabwe-Rhodesia.

Letters of authority are issued also to the holders of the following travel documents:

(i) passports issued by the former Royal Lao Government, prior to 2 February 1976;
(ii) documents issued by the former Khmer Republic, prior to 17 April 1976;
(iii) documents issued by the former Republic of Vietnam, prior to 30 April 1975.

Visas. Refusal of entry to Australia of Ananda Marga members

On 13 January 1978 the Minister for Immigration and Ethnic Affairs, Mr MacKellar, issued a statement (Comm Rec 1978, 8) announcing that

> because of incidents of violence involving members of Ananda Marga and because of Ananda Marga supported Proutist literature published in Australia advocating revolutionary violence, inquiries are being made by appropriate authorities into Ananda Marga-Proutist activities.
>
> Pending the outcome of these inquiries the Government has decided that entry into Australia of Ananda Marga members and people actively involved with it will be suspended unless they are Australian citizens or established Australian residents who have not been involved in acts or planned acts of violence. The cases of people with strong humanitarian claims will be considered on their merits, Mr MacKellar said.

Visas. Representation of Governments not recognised by Australia. Fretilin Government. Taiwan

On 10 May 1978, Mr MacKellar wrote in answer to the question: "Did he refuse Jose Ramos Horta a visa to visit Australia because the Australian Government did not recognise the Fretilin government?" (HR Deb 1978, Vol 109, 2210):

> Yes. Mr Horta's application for a visa was refused because of his position as a senior representative of Fretilin, whose claims to be the government of East Timor are not recognised by the Australian Government.

Mr MacKellar also wrote on the same day in answer to a further question (HR Deb 1978, Vol 109, 2211):

> The Australian Government reserves the right to refuse entry to a person having identifiably close links with the regime of Taiwan. One of the factors taken into account in determining close linkage with that regime is membership of the Kuomintang.
>
> Communist party membership, when known, would not automatically debar a person from receiving a visa to visit Australia. Each such case would be considered on its merits.

Visas. Grounds for denial of a tourist visa

On 5 April 1978, Mr MacKellar wrote in answer to a question asking on what grounds a tourist visa to Australia was denied (HR Deb 1978, Vol 108, 1078):

The general requirement for the issue of a visitor visa are that an applicant should:

intend a bona fide short term visit only
be in possession of, or have access to, sufficient funds for maintenance and travel purposes without the need to undertake employment
be in possession of a valid acceptable travel document
be in sound health and of good character
provide an undertaking that whilst in Australia he will not engage in employment or formal studies.

There are other requirements also which have limited application. For example, representatives of so-called governments not recognised by Australia would not normally be granted visit visas; in considering applications by persons holding Rhodesian passports, or who ordinarily live in Rhodesia, account is taken of the Sanctions against Rhodesia imposed by Resolutions of the United Nations Security Council; visitors from Taiwan are required to provide an undertaking relating to their activities whilst here.

Visitor visas may be denied in the event that an applicant cannot satisfy any one of these requirements.

Visas. Visas to enter Rhodesia

On 1 May 1979 the Minister for Foreign Affairs provided the following written answer to a question (Sen Deb 1979, Vol 81, 1534):

> Australia, along with other members of the United Nations, adheres strictly to United Nations' sanctions which preclude any official dealings with the Rhodesian regime. The Australian Government therefore makes no arrangements for Australian citizens to obtain visas to enter Rhodesia.
>
> As the honourable senator will be aware, the Government does not place restrictions on Members of Parliament, other than Ministers, going to Rhodesia if they so wish. I understand that a number of Members of Parliament have indeed done so.

Refugees. Definition of "refugee"

On 23 May 1980 Senator Dame Margaret Guilfoyle, the Minister representing the Minister for Immigration and Ethnic Affairs, said in answer to a question (Sen Deb 1980, Vol 85, 2768):

> Australia recognises the international definition of a refugee, which can be paraphrased as being a person who, owing to a well-founded fear of persecution, is outside his country of origin or habitual residence. Members of minority groups who are still in their country of origin or citizenship cannot be regarded as refugees under the international definition.

On 19 February 1980 the Minister for Immigration and Ethnic Affairs, Mr Macphee, wrote in the course of providing a table setting out the numbers of

persons accepted by Australia since 1945 both as refugees and as displaced persons and other humanitarian cases (Sen Deb 1980, Vol 84, 65–6):

> While Australia accepts the international definition of a refugee enunciated in the Convention Relating to the Status of Refugees and the related Protocol, Australian refugee policies provide also for the admission of persons outside this definition but in circumstances of such a nature as to justify special humanitarian consideration for their entry . . . .
>
> Because of varying policies and interpretations of the definition of a refugee over the 34 year period in question, it is not possible to provide figures compiled on the basis of a single statistical definition.

Refugees. Geneva Convention on Refugees. Australia's obligations

On 16 March 1978 the Minister for Immigration and Ethnic Affairs, Mr MacKellar, issued a statement (Comm Rec 1978, 233) announcing a Government decision to accept more refugees from Indochina, and continued:

> In agreeing to take an additional 2000 refugees this financial year we have been mindful of Australia's international obligations as a party to the 1951 Geneva Convention on Refugees and our reputation as a country of immigration with a highly developed system of selection abroad and post-arrival services in Australia.

Refugees. Criteria for selection by Australia

On 3 May 1978 Mr MacKellar wrote in answer to a question asking for the criteria by which Australia selects refugees and how these criteria correlate with those of the United Nations High Commissioner for Refugees (HR Deb 1978, Vol 109, 1754–5):

> In 1951 the United Nations adopted a Convention Relating to the Status of Refugees. This included a definition of a refugee as 'any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political group, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.'
>
> Australia, as a party to this Convention, fully recognises its humanitarian commitment and responsibility to play its part in the resettlement of refugees. The Government recognises, however, that there are people in refugee-type situations who do not fall strictly within this Convention definition. Government policy is sufficiently flexible to enable the extension of this policy to such situations if it is decided that this is appropriate.
>
> Two bodies have been established to advise the Minister on refugee matters. The Standing Interdepartmental Committee on Refugees advises on the designation by Australia of refugee situations and

Australia's response to them. The Determination of Refugee Status Committee evaluates applications by persons in Australia for refugee status in accordance with the definition in the Convention and makes recommendations to me.

Refugees. Temporary refuge. Development of concept

On 2 December 1980 the Australian Representative, Mr Hutchens, spoke in the Special Political Committee of the United Nations General Assembly on the subject of international co-operation to avert new flows of refugees, and part of what he said is reported as follows (A/SPC/35/SR.47, 9):

> 31. His delegation believed that the problem of refugees must be seen as an international problem and that greater joint efforts were needed to share the growing burden. At the recently concluded session of the Executive Committee of the High Commissioner's Programme, Australia had raised the issue and proposed that consideration be given to the need for developing legal concepts in the light of the special conditions prevailing in different countries. There would be value in developing a new concept of temporary refuge in international law on the protection of refugees, particularly to help ensure maximum protection for asylum-seekers in mass-exodus situations. In advancing that concept of temporary refuge, his delegation shared the concerns of many others which had begun to address very basic questions about the competence of the United Nations system to respond to humanitarian emergencies. The frequency with which the world community was faced with large-scale emergencies required the efficient harnessing of the diverse resources of the United Nations.

Refugees. United Nations High Commissioner for Refugees. Executive Committee on the High Commissioner's Programme. Australian views on the international protection of refugees. Temporary refuge and international solidarity

The following Memorandum was tabled by the Australian delegation at the Sub-Committee of the whole on International Protection which met in Geneva on 2 and 3 October 1980.[55] The views expressed in the Memorandum were advanced in an exploratory way not necessarily representing the final views of the Australian Government.

MEMORANDUM

Australian Views
on
The International Protection of Refugees:
Temporary Refuge and International Solidarity

In this Memorandum, we should like to elucidate and elaborate the concept of temporary refuge and suggest how it might be related to

55. Text provided by the Department of Foreign Affairs.

possible developments in international refugee law. We also suggest, in the light of the problems of large-scale influx, what aspects of international solidarity might usefully receive further study in the Sub-Committee.

Temporary Refuge

The concept of temporary refuge can be found in an embryonic form in a number of existing international instruments (e.g. Article 31 of the 1951 UN Convention relating to the Status of Refugees, Article 3(3) of the 1967 UNGA Declaration on Territorial Asylum.

While the term "temporary residence" is found in Article II(5) of the 1969 OAU Convention, it is not as satisfactory in the refugee context as the term "temporary refuge". The term "refuge" conveys the element of protection and the applicability of the principle of "non-refoulement". In contrast, the term "residence" is neutral in this respect and more appropriate to the usage of immigration law generally.

The concept of temporary refuge appearing in the 1951 UN Convention was essentially a method for protecting refugees unlawfully in the territory against expulsion or return by providing asylum-seekers the opportunity of obtaining asylum elsewhere. In the instruments on territorial asylum, on the other hand, the concept of temporary refuge was seen also in relation to admission. It was recognised that the admission of all bona fide asylum-seekers who applied at the frontier might create a heavy burden for the receiving State, and that international solidarity and co-operation in burden-sharing were essential aspects of the legal regime for an open frontier. Temporary refuge was adopted, therefore, as a mechanism not only for avoiding expulsion or return but also for admitting refugees in a way which enabled an admitting State, which considered that it could not bear alone the burden of protection, to signal to the international community that international solidarity and assistance were required. It was essentially a method to accommodate a country's reasonable concerns and difficulties in a way which took account also of the international humanitarian concern to provide protection for all bona fide asylum-seekers.

It can be generally agreed that it is most unlikely the international community will agree in the foreseeable future to the recognition of the right to asylum. The unqualified acceptance of the principle of non-rejection at the frontier, which could be seen as derogating from the right to refuse asylum, will only be possible in our view if it is linked with temporary refuge, a concept developed as a category of protection different from asylum.

It is significant that at the last session of the Executive Committee, there was unanimous acceptance of the principle that at least temporary refuge should be accorded every bona fide asylum-seeker. The acceptance of this basic humanitarian principle was only made possible, we believe, by the distinction drawn between asylum and temporary refuge.

It is important that temporary refuge should not be seen as a general alternative to the grant of asylum. The optimum response to a request for protection remains the grant of asylum. We believe that temporary refuge should only be granted where national security or other overwhelming need to safeguard the population, as in the case of large-scale influx, prevents the grant of asylum.

Even in situations of large scale influx, temporary refuge should only be a provisional status. The principle of equitable burden-sharing will normally require that the State granting temporary refuge will eventually accept for lawful residence a reasonable number of the asylum-seekers. Normally, it is impossible for a State to decide at the time of admission who shall be granted asylum, and who should be eligible for resettlement elsewhere. Also, the important possibility of the optimum solution of voluntary repatriation must be kept in mind.

In the light of all the considerations, it may be possible to define temporary refuge in its widest sense as temporary admission falling short of lawful entry or presence within the meaning of the 1951 UN Convention, pending the determination of a durable solution.

Durable Solutions

Recent events have demonstrated clearly that in situations of large-scale influx international solidarity, including burden-sharing and temporary refuge, are important elements in a regime for the international protection of refugees.

In any international regime for the universal admission of bona fide asylum-seekers at the frontier, we believe that there should be a forceful statement of the principle of international solidarity. What is required is a formula similar to that found in the 1969 OAU Convention — that States shall take appropriate measures to lighten the burden (Article II(4)). The obligation should be on 'taking' and not just on 'considering'.

The question arises — who accepts ultimate responsibility for asylum if a refugee granted temporary refuge cannot be repatriated voluntarily?

None of the existing international instruments addresses itself directly to this question. In practice, of course, resettlement takes place following consultations and negotiations between the relevant States and international organisations. It cannot be said that the results have always been timely or effective, but it is clear that they are essential if those States which are reluctant to shoulder alone the burden of protection are not to close their frontiers or return the refugees found in their territory. While such closure or return would be deplorable and contrary to a fundamental humanitarian principle, it is hardly less deplorable if other States fail to take effective measures promptly to assist a State burdened by a large-scale influx. International solidarity in refugee protection is also a fundamental principle.

Various proposals have been made to secure the equitable distribution internationally of refugees requiring resettlement, but so far none of these proposals have commanded wide support. Basically, we believe

that it is almost impossible to devise mathematical distribution formulae which are not too rigid to cope with the multi-faceted aspects of refugee situations, and most States are unwilling to commit themselves to general resettlement plans of universal scope. The international preference has been in favour of ad hoc solutions, which take into account the circumstances of each case, the form of assistance most appropriate in the circumstances, fluctuating national capacity, existing resettlement commitments, regional considerations, and so on.

It is axiomatic that the refugee must not be expelled or returned against his will to a country where he would be in danger of persecution.

It would seem from a literal reading of the 1951 UN Convention that the country of refuge would have an absolute discretion to refuse indefinitely to legitimise the presence of a person who is not lawfully in the country. It cannot be denied that this situation presents humanitarian problems. While substantial restrictions on movement and other conditions of residence may be justifiable for a reasonable period of time, it is hardly satisfactory that a refugee may have to spend the rest of his natural life in a refugee camp because he is unable to find another country willing to grant him normal lawful residence.

We acknowledged that this is an awkward problem. The view has been expressed that if another durable solution cannot be found within a reasonable period of time, the country of first refuge should be willing to "legitimise" the refugee's presence and grant him all the rights of normal lawful residence. The difficulty of such an unqualified view is that it could undermine the equally important consideration that other States must be prepared, if necessary, to share equitably the burden of resettlement. It would be undesirable to upset a delicate balance between these two considerations by establishing an ultimate responsibility in such a way on the country of first refuge. Such a solution would certainly be open to criticism, particularly in situations of large-scale influx. To say this is not to dismiss the humanitarian problems of a situation where a refugee may face a long and indefinite period in a refugee holding centre; it is to place on the international community the onus of finding solutions to such humanitarian problems. It may be possible to devise improved mechanisms for international consultation to facilitate equitable burden-sharing by the international community.

International Solidarity

At the institutional level, international solidarity is embodied in the United Nations, and, in particular, in the United Nations body specifically charged with the task of securing the international protection of refugees, the Office of the High Commissioner for Refugees.

As a principle, international solidarity has a number of aspects, all of which need to be examined in a comprehensive and balanced way. Basically, it relates to protection and to assistance — protection to individuals by joint or individual action, and assistance to States who receive large numbers of refugees in their territories.

In the Sub-Committee last year, international solidarity in large-scale influx situations was considered principally in relation to admission, equitable burden-sharing, and consultation with the Office of the United Nations High Commissioner for Refugees and other international bodies.

We believe that the Sub-Committee should also consider other aspects of international solidarity particularly relevant to large-scale influx situations. These include the value and importance of even political and moral expressions of solidarity by States in the protection of refugees, and action by States to exercise their responsibility or influences to obtain the optimum solution to a refugee situation, i.e. voluntary repatriation, by their endeavours, jointly or individually, to secure an immediate improvement in the situation in the country of origin of the refugees so as to make possible their voluntary return

The role of the Office of the United Nations High Commissioner for Refugees in relation to these aspects should be considered.

The Problem of "Source" or "Origins"

In addition, though in another forum, we believe that the United Nations generally should address itself further to the problems of the "origins" or "source" of any large-scale exodus. The international responsibility of the "source" State is involved not only by the often grave and systematic violations of fundamental human rights which lie behind a mass exodus, but also by the consequences for other States who, without their consent, have to receive and support the victims of such violations.

Enforced departures or the deprivation of nationality contrary to human rights are seriously wrongful acts, both in regard to the individuals concerned and to other States. Such solutions to internal problems are unacceptable. While expulsion or enforced departure may be preferable to detention, imprisonment or death, neither is a legitimate alternative to respect for human rights. Asylum or refuge granted by other countries does not relieve the "source" country of continuing responsibility to accord their nationals fundamental human rights, including the right to return and enjoy them.

While we do not believe that it would be appropriate to consider the problems of "origins" or "source" in the Sub-Committee on International Protection or in the Executive Committee, we feel that the subject should continue to receive the urgent attention of the United Nations. A dangerous imbalance could be created if remedial measures were stressed without corresponding emphasis on preventive aspects.

Further International Measures

We believe that it is desirable to elucidate and elaborate temporary refuge in any further international instrument dealing with admission.

We believe also that the status of a refugee granted temporary refuge should be defined in such an instrument, providing the basic humanitarian standards necessary and appropriate to the nature of temporary refuge.

A major omission in the 1951 UN Convention is the absence of an adequate provision to protect a refugee who is in the country of refuge other than lawfully. Such a person can often find himself in a virtual legal vacuum, with very unsatisfactory consequences from the humanitarian point of view.

A basic requirement of any such international legal regime is that a refugee granted temporary refuge should not be penalised on account of his entry or presence in the country. While it may be necessary to impose restrictions on his freedom of movement, he should be accorded humane treatment and the essential conditions for an existence worthy of a human being. He should not be treated as a criminal or someone undeserving of human respect and sympathy. The principle of equality of treatment requires that there should be no discrimination on grounds of race, religion, political opinion, nationality, or country of origin. He should receive all the help and understanding that his tragic situation demands. His spiritual, moral and material needs should be recognised and met as far as possible. Basic sanitary and health facilities should be provided. Wherever possible, families should be kept together. The refugee should be allowed to send and receive mail and to receive at least limited amounts of material assistance from relatives or friends.

It is particularly important, we believe, that these minimum basic standards should be adhered to by the international community as a whole. In a situation where many important States are still not parties to the 1951 UN Convention, humanitarian provisions dealing with the status and treatment to be accorded refugees who are not lawfully in the country of refuge and are not covered by the 1951 UN Convention are an urgent necessity. We believe that the Sub-Committee should consider the matter of these basic minimum standards as an integral aspect of temporary refuge.

We wonder also whether the problems of the large-scale influx should be considered not so much in the context of admission as in connection with the situation arising following admission. It is generally not the admission as such which presents problems but the consequences. If measures could be agreed upon for dealing with these problems, the political and other difficulties in the way of the admission of refugees could be significantly reduced.

It is partly with these considerations in mind that we raise the question whether an international instrument should not be prepared to deal with the status of refugees who are in the country of refuge on a basis other than lawfully within the meaning of the 1951 UN Convention and Protocol. An international instrument governing the status of such persons could not only provide humanitarian standards for their protection but also provisions on international solidarity, including immediate assistance to a State burdened beyond the capacity of its resources, and on durable solutions, including voluntary repatriation. On the matter of admission, a provision could be included that a person seeking asylum and who meets the criteria for an asylee shall receive at least temporary refuge.

> The inducement to countries who are not party to the 1951 UN Convention or the Protocol to become parties to such an instrument might be the provisions on international solidarity and co-operation in burden-sharing. At the same time, it would be clear that the humanitarian nature of the refugee situation required not only international provisions for assistance but also provisions for the protection of refugees, since the political, economic and humanitarian aspects are inextricably bound together.
>
> We believe that the matters raised in this memorandum warrant serious consideration. We hope that at the forthcoming meeting of the Sub-Committee on Protection there will be a renewed discussion of the large-scale influx situation and that the question of the improved international protection of refugees in such situations will be discussed with a view to determining the principles which should guide the conduct of States, and what steps should be taken for the progressive development of international refugee law.

Asylum. Diplomatic asylum. Australian view

An article on Asylum concluded as follows (*Backgrounder*, 7 May 1980):

> In the light of developments in the last decade, the Australian Government itself has taken the view that diplomatic asylum is now an institution recognised in general international law. In order to clarify and elaborate the institution, the Australian Government took the initiative in 1974 to inscribe an item on diplomatic asylum on the agenda of the United Nations General Assembly. The resulting discussion in the General Assembly was helpful but did not lead to any general conclusions. The General Assembly decided to resume consideration of the item at a later date.
>
> There is no general provision in Australian domestic law relating to asylum, but the principle of non-refoulement as it applies to extradition is incorporated in legislation governing extradition. Domestic legislation has not been considered necessary, since executive power has been considered sufficient to grant asylum, and compliance with international obligations can be achieved by administrative action.

Asylum. Political asylum. Grant of asylum to citizen of the German Democratic Republic

On 22 April 1980 the Minister for Foreign Affairs, Mr Peacock, issued a statement (Comm Rec 1980, 542) announcing that a ballet dancer from the German Democratic Republic, Miss Heidrun Giersch, would be permitted to stay in Australia. The statement continued:

> Mr Peacock said that after careful consideration of Miss Giersch's statement to Foreign Affairs officials in Melbourne yesterday he was satisfied that there was a well founded fear that Miss Giersch would face persecution should she return to the German Democratic Republic. Accordingly he had decided to grant Miss Giersch political asylum in Australia.

The following day, Senator Carrick, the Minister representing the Minister for Foreign Affairs, informed the Senate in relation to the grant of asylum (Sen Deb 1980, Vol 85, 1699, 1701):

> The real test is whether this young woman is genuinely under peril concerning her future. If she is, then in ordinary humanitarian ways the Australian people have a duty. I think the average Australian would support that.
>
> My advice is that there are no internationally agreed criteria for states to grant political asylum. The granting of asylum is entirely at the discretion of the state concerned. Attempts have been made to codify provisions relating to asylum in an international convention, but these attempts so far have not succeeded. The granting of refugee status is governed by the convention relating to the status of refugees, and its accompanying protocol, to which Australia is a party. Under the terms of the convention Australia is obligated to grant refugee status to anyone in Australia who is no longer willing or able to avail himself of the protection of his own country because he has a well founded fear of being persecuted for reasons of religion, race, nationality, membership of a particular social group or political opinion . . . .
>
> The Government will pursue its attitude both to political asylum and to refugee asylum without fear or favour as to whether a person holds certain views or whether the government concerned is of the extreme Right or the extreme Left.

On 28 April 1980 Senator Carrick said further (Sen Deb 1980, Vol 85, 1813):

> According to official records which have been checked, Miss Giersch is the first person to have been granted asylum in Australia since the case of Mr and Mrs Petrov in 1954.
>
> . . . the departmental submission stated that 'the grounds on which Miss Giersch has based her application are amongst the strongest of any recent application for asylum'. Moreover, during the period of this Government, it was the first time that a positive recommendation was offered.

On 22 May 1980 Mr Peacock wrote in answer to a question (HR Deb 1980, Vol 118, 3262):

> Miss Giersch was granted asylum because I was satisfied that she had a well-founded fear of persecution should she be returned to the German Democratic Republic.
>
> The evidence in support of her claim was amongst the strongest put forward by any applicant for asylum in recent years.

Human Rights. Nature of civil, political and economic rights

On 17 February 1978, the Australian Representative on the United Nations Human Rights Commission, Mr Davis, is recorded as having said (E/CN.4/SR.1446, 11–13):

> 57. One approach to the different categories of human rights was to argue that civil and political rights were different in nature to economic and social rights. It was thus considered that civil and political rights

were universally applicable, that they could be defined with greater precision, and that they could more easily be given a legal connotation and, thus, more easily applied. It was also claimed that economic, social and cultural rights were more difficult to define in legal terms, that, in some cases, they were not universally applicable and that some of them were less capable of enforcement not only because they usually placed emphasis on an obligation of the State rather than on individual rights, but also because they could depend to a large extent on the level of economic development of the State concerned.

58. That did not mean that the economic rights embodied in international instruments were not of fundamental importance. His delegation believed that the economic and social rights which were not well-defined or which could not be immediately enjoyed or enforced could be regarded as inchoate rights and that States and individuals had an obligation to seek to establish them as full rights, as required by article 2 of the International Covenant on Economic, Social and Cultural Rights.

59. It was claimed that, in pursuing the commitment to the realisation of all human rights, a distinction had to be made between domestic and external obstacles. Some held the view that the main task was to find the appropriate procedures and sanctions to prevent violations of human rights. Others took the view that priority must be given to an analysis of the causes of such violations. His delegation was of the opinion that both of those approaches were valid.

60. Referring to the philosophic and legal aspects of human rights, he said that there was much diversity of opinion, depending on national approaches, ideologies and religious or cultural backgrounds. For a variety of reasons, however, that question was of importance for the over-all analysis, particularly since it would bear on the nature of the choice of procedures which might be considered appropriate in cases of the violation of human rights.

61. His delegation considered that human rights, which had their historical origin in the needs and demands of peoples and which had been supported by arguments based on their moral validity, had become internationally recognised standards or values. In addition, through the combined effects of international usage and of Articles 1, 55 and 56 of the Charter of the United Nations and the provisions of the Universal Declaration of Human Rights, the International Covenants on Human Rights and various treaties in the field, they had acquired international legal status as rights.

Human rights. Universal Declaration of Human Rights

On 11 December 1978 the Australian Permanent Representative to the United Nations, Mr Anderson, said in the General Assembly (A/33/PV.77, 51):

> The Universal Declaration of Human Rights lays down in concise form the range of basic human rights and fundamental freedoms to which all people are entitled. The rights embodied in the Declaration derive from

the promise that the United Nations era, emerging from the Second World War, would see the creation of societies in which all human beings would be entitled to live in freedom from fear and freedom from want. The Declaration stands today as one of the most impressive and enlightened achievements of the United Nations.

Australian support for the Universal Declaration has never been in doubt. It is a document of immense and unquestioned importance. As the Australian Minister for Foreign Affairs said during the general debate earlier in this Session, the moral authority of the United Nations depends on our recognising that the United Nations must deal with human rights issues in a fair and practical way. This, he said, is something we are particularly conscious of as we commemorate the thirtieth anniversary of the Declaration.

Human rights. International Covenant on Civil and Political Rights. Implementation in Australia

On 13 May 1978 the Attorney-General, Senator Durack, addressed the United Nations Association of Australia seminar on human rights at the University of Sydney, as follows (Comm Rec 1978, 590–2):

. . . the Covenant deals with matters that are the subject of both Commonwealth and State laws. For this reason, and consistent with the Government's philosophy of 'co-operative federalism', the implementation of the Covenant is seen as a matter requiring close Commonwealth and State co-operation.

Turning now to the question of what action needs to be taken by Australia to implement the Covenant, there are several observations I will make in relation to Article 2. The first of these is that a study of relevant United Nations papers makes it clear that this article (in particular the words 'in accordance with its own constitutional processes' appearing in paragraph 2) expressly recognises the right of each state party, when taking such steps as may be necessary to implement the Covenant, to do so within the context of its own constitutional framework . . .

The Commonwealth Government has repeatedly expressed the view, both within and without the Parliament, that it does not regard a Bill of Rights as an appropriate vehicle for giving effect to the Covenant . . .

Another important observation I would like to make concerning the Covenant, is that unlike most treaties affecting domestic laws, Article 2 requires only that state parties 'undertake to take the necessary steps' to give effect to the rights recognised in the Covenant. Full implementation before ratification is therefore not required, although by implication early action to remedy any deficiencies will need to be taken and the Covenant requires a report to be submitted after one year on the measures adopted and the progress made. At the same time, it is fair to say, I feel, that having regard to the existence of such safeguards as the common law, statutory and procedural remedies (such as those provided by the various ombudsmen and the Administrative Appeals Tribunal), the system of law, the independence of the judiciary and the freedom of

the press, Australia is already substantially in conformity with the Covenant. Nevertheless there are still a number of areas which require attention. It would be a function of the proposed Commission to identify these and to advise government on appropriate legislative and/or administrative measures that need to be taken.

My third observation relates to the provisions of Article 2 of the Covenant, which provides that each state party is to undertake to ensure that an individual whose rights as recognised in the Covenant are violated has an effective remedy, and that an individual claiming such a remedy has a right thereto determined by 'competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state'. The International Covenant and the debates that preceded the Covenant make it clear that processes to respond to individual complaints under the Covenant may be provided not only by legislative measures and common law and procedural remedies, but also by remedies of an administrative and executive character.

In the Government's view there are compelling reasons for the ratification by Australia of the Covenant in the near future. Failure by Australia to ratify the Covenant might well give rise to the implication that Australia's protection of basic rights is inferior to the protection provided in other countries that have ratified the Covenant.

On 19 November 1979, Senator Durack said (Sen Deb 1979, Vol 83, 2512):

I want to make quite clear, insofar as the ratification and the future implementation in Australia of the Covenant are concerned, that we are engaged in a co-operative exercise with the States and the obligations that we can undertake internationally are only those such as can be agreed to by the States as well as by ourselves.

On 5 August 1980, the Minister for Foreign Affairs and the Attorney-General announced that Australia would be ratifying the Covenant later in the week. Part of their statement read (Comm Rec 1980, 1163):

Reservations and declarations

There have been a number of changes in law and practice to bring Australia into conformity with the Covenant (for example, by taking steps to improve the civil rights of prisoners). However, extensive consultations between the Commonwealth, the States and the Northern Territory on the question of ratification have revealed that particular provisions of the Covenant are not altogether appropriate to Australian conditions. Accordingly, the Commonwealth's instrument of ratification contains a number of reservations and declarations.

One main reservation refers to Australia's position as a federal state. It indicates that responsibility for giving effect to the provisions of the Covenant is shared between the Commonwealth and State governments. This reservation emphasises the need for co-operative action to ensure that the standards set by the Covenant are achieved and maintained throughout Australia.

At a press conference by the Attorney-General on the same day, Senator Durack said:[56]

> We assume obligations in ratification of the Covenant to report to the United Nations — there's an Article 40 report which is provided for in the Covenant. We will have to report on observance in Australia as a whole. In doing so we will be discussing with the States questions of their compliance or matters that have been raised in complaint about their compliance and so on. These matters will have to be reported and will have to be discussed in Australia . . .
>
> Everybody's situation as a matter of law at the moment in Australia is unchanged by ratifying this Covenant. The laws are not changed by ratifying the Covenant. We are simply assuming an international obligation by which we judge our laws in accordance with the principles of this Covenant. The laws themselves are still a matter for the Parliaments of the Commonwealth and the States and they will need to implement the Covenant in accordance with their own legislative processes.
>
> I believe that by and large Australian law and practices under Australian laws are substantially in accordance with the Covenant and the principles in it.

On 13 August 1980 Australia's instrument of ratification was deposited in New York, and the Covenant entered into force for Australia on 13 November 1980. Australia's reservation and declaration to Articles 2 and 50 reads:[57]

> ARTICLES 2 and 50
>
> Australia advises that, the people having united as one people in a Federal Commonwealth under the Crown, it has a federal constitutional system. It accepts that the provisions of the Covenant extend to all parts of Australia as a federal State without any limitations or exceptions. It enters a general reservation that Article 2, paragraphs 2 and 3 and Article 50 shall be given effect consistently with and subject to the provisions in Article 2, paragraph 2.
>
> Under Article 2, paragraph 2, steps to adopt measures necessary to give effect to the rights recognised in the Covenant are to be taken in accordance with each State Party's Constitutional processes which, in the case of Australia, are the processes of a federation in which legislative, executive and judicial powers to give effect to the rights recognised in the Covenant are distributed among the federal (Commonwealth) authorities and the authorities of the constituent States.
>
> In particular, in relation to the Australian States the implementation of those provisions of the Covenant over whose subject matter the federal authorities exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and the implementation of those provisions of the Covenant over whose subject matter the authorities of

56. Press Release by the Attorney-General No 57/80 dated 5 August 1980.
57. Aust TS 1980 No 23, 18.

> the constituent States exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and where a provision has both federal and State aspects, its implementation will accordingly be a matter for the respective constitutionally appropriate authorities (for the purpose of implementation, the Northern Territory will be regarded as a constituent State).
>
> To this end, the Australian Government has been in consultation with the responsible State and Territory Ministers with the object of developing co-operative arrangements to co-ordinate and facilitate the implementation of the Covenant.

With respect to the Optional Protocol to the Covenant, the Australian Government submitted the following information on 17 June 1980 to the Secretary-General of the United Nations (E/CN.4/Sub.2/452):

> Australia has not signed the Optional Protocol. In view of the long and complex State and Federal negotiations leading to Australia's ratification of the International Covenant on Civil and Political Rights, the Australian Government has not been in a position to consider ratification of the Optional Protocol to this Covenant.

Human rights. Helsinki Final Act

In the House of Representatives on 18 September 1980, the Minister for Foreign Affairs, Mr Peacock, said in the course of a statement on the Government's response to the report of the Joint Parliamentary Committee on Foreign Affairs and Defence on *Human Rights in the Soviet Union,* as follows (HR Deb 1980, Vol 119, 1486):

> The recommendation in paragraph 50 is that the Government make every use of appropriate opportunities to:
>
> (a) give full support for the principles contained in the Final Act of the Helsinki Agreement . . .
>
> Australia is not a participant in the Conference on Security and Co-operation in Europe — CSCE — which produced the Final Act in Helsinki. The Government has made it very clear, however, that it gives its full support to the principles contained in the Helsinki Final Act including those concerning human rights and civil liberties. We accept this recommendation.

Human rights. Freedom of thought, expression and the press

On 20 November 1980 the Australian representative, Mr Hutchens, spoke to a meeting of the Special Political Committee of the United Nations General Assembly and is reported to have said in part (A/SPC/35/SR.36, 5):

> Australia was committed to the concept and practice of freedom of the press. A free press was not a licence to irresponsibility but an essential condition for the exercise of genuine freedom. Freedom of thought and expression and the unfettered circulation of news and ideas were fundamental human rights which must be kept in the forefront of any consideration of the development of a new and more just world information and communication order. His delegation was committed

to the implementation of that new order and shared the view that it was important to proceed only by consensus.

Human rights. Declaration on the Rights of Disabled Persons

On 18 September 1980 the Minister for Social Security, Dame Margaret Guilfoyle, wrote in answer to a question (Sen Deb 1980, Vol 86, 1429):

> The Department of Foreign Affairs has advised that the draft resolutions which contained the Declaration on the Rights of Disabled Persons was presented to the UN General Assembly on 9 December 1975 and adopted by consensus as General Assembly Resolution 3447 (XXX). The question of signature or ratification did not arise in view of the nature of the instrument itself. Australian support for the consensus resolution is evidence of Australian support for the Declaration.

Human rights. Torture. Crime against humanity

On 30 October 1979 the Australian representative, Mr Holloway, is reported to have said at a meeting of the Third Committee of the United Nations General Assembly (A/C.3/34/SR.31, 4–5):

> 12. Torture was widely regarded as a crime against humanity and its condemnation was a firm principle of international law based on article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights. His Government noted with satisfaction the growing number of international instruments which condemned torture and other cruel, inhuman or degrading treatment or punishment . . .
>
> 15. Although the international instruments against torture and other similar practices were extremely important, they were not in themselves sufficient. There was an enormous gap between the establishment of standards through international instruments and the implementation of those standards in practice. Much needed to be done in the area of implementation, both at the national and the international levels. The international community could help by ensuring that the international standards were translated to the national level, where the ultimate responsibility for ensuring the elimination of torture and similar practices inevitably resided.

Human rights. International Covenant on Economic, Social and Political Rights

At the 36th Session of the United Nations Commission on Human Rights held in Geneva in 1980, the Australian representative made a statement on the Question of Economic, Social and Cultural Rights, as follows (PP No 72/1980, 28):

> We recognise that many of the economic and social rights are essential to the 'full and free development of the human personality', to use the terms of the Universal Declaration on Human Rights, Articles 22, 26 and 29 and Article 13 of the Covenant on Economics, Social and Cultural Rights. And we believe that many of the civil and political rights are also

> essential to the progressive development of the individual. But do the adding together of rights A, B, C and D produce a new rights X? Are we entitled to regard the right to development as a synthesis, an amalgam of a variety of already recognised human rights? Or do we read into those Articles of the Declaration and of the Covenant the recognition of a right to the 'full and free development of the human personality' as a human right. Of the two, I tend to think the latter may be found to be the more logical course.

Australia's report dated 17 March 1978 concerning rights covered by articles 6 to 9 of the Covenant (E/1978/8/Add.15) was considered by the Sessional Working Group on the Implementation of the Covenant at its 12th and 13th Meetings held in New York on 21 April 1980. The report was introduced by Mr Joseph, an Observer for Australia at the Working Group, who is reported to have said in part (E/1980/WG.1/SR.12, 10–11):

> 42. Introducing the report of Australia, he said that his Government accepted the rights covered by the Covenant and was progressively implementing them. Its policies at both the federal and State level were designed to maintain and, if possible, improve the standard of living in the country. Australia was a very egalitarian country as could be seen, for example, from the housing situation and income differentials. In such matters as full employment, the right to work and the right to organise, Australia's record was second to none. Such caveats and reservations as could be made were to be attributed to technical considerations or were the reflection of common sense.
>
> 43. Australia had ratified the principal Conventions of the International Labour Organisation (ILO) relating to articles 6 to 9 of the Covenant and would continue to strive fully to implement their provisions. His delegation welcomed ILO's comments on the report submitted by Australia and would transmit them to the Australian Government. Although Australia had made no formal declaration concerning the applicability of the Covenant to Norfolk Island, which was populated exclusively by Australian citizens, the internal arrangements covering employment on the island were very similar to arrangements in force on the mainland.

Human rights. The right to development

On 20 February 1979 the Australian representative on the United Nations Human Rights Commission, Mr Davis, is reported to have said (E/CN.4/SR.1488, 10):

> Most analysts of the concept of development considered, however, that it related to the economic and social development of States. That concept was to be found in the relevant General Assembly resolutions and declarations, and in the Declaration and Programme of Action on the Establishment of a New International Economic Order. If that was all that was meant by development, the right to development could not be said to be a human right exercisable by individuals. It was interesting to note that the Secretary-General considered that the right to development existed as a human right and should thus operate at the

level of the individual. His delegation hoped that the Commission would give careful consideration to the report of the Secretary-General before reaching final conclusions on the existence or scope of the right to development as a human right.

Human rights. Prisoners. Transfer arrangements

On 22 May 1980 the Attorney-General, Senator Durack, wrote in answer to a question (HR Deb 1980, Vol 118, 3222):

> . . . the conclusion of arrangements for the transfer of prisoners with other countries will have to await the outcome of the negotiations for a scheme for the transfer of prisoners within Australia. Proposals for the development of arrangements for the transfer of prisoners between Commonwealth countries were discussed at the Commonwealth Law Ministers Meeting held in Winnipeg in 1978 and again at the Law Ministers Meeting in Barbados from 28 April to 2 May 1980. At the latter meeting Ministers endorsed in principle the suggestion that a scheme for the transfer of prisoners should be developed and have, as its basis, the consent of the countries involved, and in particular, the consent of the prisoner himself.

For an example of the use of international human rights standards in relation to prisoners, see the dissenting judgment of Murphy J in the High Court of Australia in *Dugan v Mirror Newspapers Ltd* (1979) 53 ALJR 166, at 175–177.

Human rights. Children. Recognition and enforcement of custody orders

On 9 September 1980 the Minister for Foreign Affairs, Mr Peacock, wrote in answer to a question (HR Deb 1980, Vol 119, 1065):

> The Government's efforts to enter into reciprocal arrangements for the recognition and enforcement of custody orders between Australia and the countries listed in the honourable member's question have so far been unsuccessful. The Government is now of the view that seeking to conclude such arrangements with individual countries is not the most effective means of approaching the problem of international child removal by a parent or guardian; the more promising solution seems to lie in Australia's accession to multilateral convention on the subject.