Examining the Role of Legislators in the Protection of Refugee Rights: Toward a Better Understanding of Australia's Interaction with International Law

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Abstract

This article aims to make a contribution to understanding the relationship between Australia and international law by focusing on the role of legislators in the protection of the rights of asylum seekers arriving in Australia. Asylum and refugee issues have been at the forefront of the public and scholarly debates over human rights in Australia and elsewhere. Yet Parliament's role in relation to the implementation of refugee rights in Australia is a neglected topic. To the extent that the literature in the area addresses the institutionalisation of human rights at the national level, it predominantly focuses on the conflict between the executive and the courts over which institution should have the final say in deciding refugee status or the conditions of sojourn. Recent examples of Parliament's engagement with asylum policy illustrate the potential for greater legislator interaction with human rights.

Introduction

How Australia interacts with international law is a topic ripe for further analysis.[1] While international law issues like Australia's participation in the war in Iraq can dominate public debate, 'little attention is given to how we as a country decide such matters and how our system of government has been designed to deal with them.'[2] Much of the literature ultimately concerns whether international law should be seen as undermining traditional pillars of the Australian legal order.[3] The tendency is to focus on the role and legitimacy of the branches of government in the incorporation of international law into

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1 Hilary Charlesworth, Madelaine Chiam, Devika Hovell & George Williams, *No Country is an Island: Australia and International Law* (2006) at 1–4.

2 Id at 1.

3 Hilary Charlesworth, Madelaine Chiam, Devika Hovell, & George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423 at 426.

our national legal system, especially the role of the courts in interpreting and applying international law[4] and the role of parliament in reviewing the treaty-making activities of the executive.[5]

Ultimately, this approach is dualistic and atomistic in nature: should international law be viewed as infringing on Australia's national legal institutions? Because of its preoccupation with the invasive qualities of international law, such an approach does not encourage a nuanced understanding of the interaction between international law and our legal system. Scholars are now, however, beginning to take up the challenge of developing a more sophisticated understanding of the relationship between international law and Australia's legal system and a number of seminars and colloquiums are generating further research and debate on the topic.[6] This article is therefore part of a wider initiative in the community of public and international law scholars toward developing an explanatory and normative framework that examines the relationship between the Australian legal system and international law in terms that both acknowledge the complexities of the interaction and chart the way forward.

This article aims to make a modest contribution to this endeavour by focusing on the role of legislators in the protection of the rights of asylum seekers arriving in Australia. While the treatment of asylum seekers is only one area of legislator engagement with human rights, it is an extremely important one. Asylum and refugee issues have been at the forefront of the public and scholarly debate over the role and place of human rights within Australia since at least the *MV Tampa* affair in 2001. The treatment of asylum seekers has similarly dominated the modern human rights debate in other developed countries like the UK.

Yet despite the level of debate on this issue, the Australian Federal Parliament's role in relation to the implementation of refugees rights in Australia is a neglected topic. To the extent that the literature in the area addresses the institutionalisation of human rights at the national level, it predominantly focuses on the conflict between the executive and the courts over which institution should have the final say in deciding refugee status or the conditions of sojourn.[7] In this context, Parliament is typically depicted as the vehicle for executive attempts to restrict judicial review of executive decision-making in the asylum arena.[8] There is enough evidence to support this construction, including Parliament's willingness to introduce a privative clause in an attempt to exclude judicial review of immigration and asylum matters.[9]

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4 See the articles cited in Id at 427 at footnote 17.

5 Philip Alston & Madelaine Chiam, *Treaty-Making and Australia: Globalisation versus Sovereignty?* (1995).

6 The Centre for International and Public Law at the ANU College of Law, under the direction of Professor Kim Rubenstein, has commenced a series of workshops (to be held annually from 2007) bringing together public and international lawyers to discuss the intersection of international and public law. The first workshop, *Untangling the National from the International and the Public from the Private*, took place on 2–4 July 2007.

7 Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51; John McMillan, 'Controlling Immigration Litigation – A Legislative Challenge' (2002) 10 *People and Place* 16.

8 Justice Ronald Sackville, 'Refugee Law: The Shifting Balance' (2004) 26 *Sydney Law Review* 37 at 40–41, 42, 44, 45, 49–50; McMillan, above n7 at 21.

On the other hand, this article argues that when the response of Parliament to asylum matters is scrutinised in light of the diversity of 'Parliament'[10] a more nuanced and fuller picture of Parliament's engagement with asylum policy becomes apparent. In particular, the next section of this article examines the role of legislators in contesting Australia's reliance on mandatory detention and the offshore processing of asylum claims. A comparative analysis of developments in the UK in section three of this article demonstrates that the increased activity of legislators in this area is a cross-jurisdictional phenomenon. These examples of Parliament's engagement with asylum policy indicates the potential for greater concretisation[11] of refugee rights within Australia and in other jurisdictions through the law-making and scrutiny processes. The possibility that Parliament, as well as the courts, might emerge as a champion of refugee rights is an alluring prospect for asylum seekers who are typically marginalised, disenfranchised and unpopular.[12]

Given the limited scope of the case studies in this article, it does not seek to definitively prove that Parliament is (or should be) the sole and main protector of human rights or that there is an emerging 'rights culture' within parliaments generally. Instead, the examples in this article simply highlight the potential for Parliament's greater engagement with human rights when its independence and diversity are given scope.

In light of the preceding discussion, section four of this article questions the adequacy of current analytical frameworks that seek to define Parliament's role simply in terms of the dominance of the executive or the juxtaposition of Australia's observance of its international obligations with the assertion of 'national sovereignty' – presented as the triumvirate of popular will, executive action, and legislative sanction. In the final section, this article explores an alternative framework that builds on the interdependence between international human rights and national law and institutions, while also acknowledging the divisibility of sovereignty within the Australian political system.

1. Legislators Scrutinising and Contesting Key Executive Policies Toward Asylum Seekers

Two recent watershed events in Australia's policy toward asylum seekers illustrate legislators contesting key executive policies in the asylum arena. The first, in 2005, involved in effect an unprecedented Coalition backbench revolt against the Government's policy of mandatory detention of unlawful non-citizens, which took the form of two private members bills prepared by the Liberal member for Kooyong, Mr Georgiou, and introduced into the Senate by Greens Senator Kerry Nettle.[13] The

9 Sackville, above n8 at 43.

10 John Uhr, 'The Performance of Australian Legislatures in Protecting Rights' in Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (2006) at 46.

11 Tom Campbell, 'Democratising Human Rights' in Burton Leiser & Tom Campbell (eds), *Human Rights in Philosophy and Practice* (2001) at 175.

12 Costas Douzinas, *The End of Human Rights* (2000) at 357.

13 Migration Amendment (Act of Compassion) Bill 2005 (Cth); Migration Amendment (Mandatory Detention) Bill 2005 (Cth).

second, in 2006, saw legislators, including members of the then ruling Coalition party, reject the Government's attempts to introduce legislation that would extend the use of offshore detention and processing centres in other countries for the purposes of processing the claims of certain asylum seekers arriving in Australia (so-called offshore entry persons).[14] Before examining these cases in detail, it is important to appreciate the significance of the extraordinary steps taken by individual legislators in contesting the Australian Government's policies of mandatory detention and offshore processing.

A. *Parliament's Traditional Role in Immigration and Asylum Matters*

As Mary Crock and others have highlighted, immigration and asylum policy is an area that has traditionally been under the sway of executive power.[15] Consequently, when the courts were seen to be overstepping the mark and reviewing the merits (as opposed to the legality) of executive decision-making under the *Migration Act 1958* (Cth), or seeking to involve themselves in the business of mandatory detention, successive Labor and Liberal governments introduced legislation to limit appeal rights.[16]

Parliament was a not-so-innocent bystander to the melee between the courts and the executive that accompanied these legislative changes. Aside from giving its official sanction to the laws as passed, there can be little doubt that Parliament was also fully aware that such laws would be in breach of the international rights of non-citizens. Most notably, a succession of parliamentary inquiries, as well as reports from the Human Rights and Equal Opportunity Commission ('HREOC'), placed Australia's mandatory detention policy directly under the spotlight.[17] HREOC, departmental officers from the Attorney-General's Department and individual members of parliamentary committees raised concerns that Australia's policy breached international human rights obligations. Yet this failed to persuade Parliament to pursue reforms to the mandatory detention policy.[18]

B. *A Greater Role for Legislators in Scrutinising and Contesting Asylum Bills*

At the same time, it would be too simplistic to say that Parliament was simply the agent for unfettered executive policy even at the zenith of executive control over asylum seekers during the 1990s. Parliamentary scrutiny[19] during this time provided an

14 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2006 (Petro Georgiou) at 42–44, (Russell Broadbent) at 50–52 and (Judi Moylan) at 57, 59.

15 Crock, above n7; Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 *Modern Law Review* 588 at 591–592.

16 *Migration Reform Act* 1992 (Cth), *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) and *Migration Amendment (Duration of Detention) Act* 2003 (Cth). See generally Duncan Kerr & George Williams, 'Review of Executive Action and the Rule of Law Under the Australian Constitution' (2003) 14 *Public Law Review* 219; Crock, above n7; Sackville, above n8.

17 Joint Standing Committee on Migration, Parliament of Australia, *Asylum, Border Control and Detention* (1994); Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998); Joint Standing Committee on Migration, Parliament of Australia, *Not the Hilton: Immigration Detention Centres: Inspection Report* (2000).

18 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at [160]–[169] (Kirby J).

important forum for individual legislators to voice their concerns in relation to mandatory detention and other harsh features of the *Migration Act*.[20] Parliamentary inquiries also provided HREOC and the United Nations High Commissioner for Refugees ('UNHCR') with an opportunity to criticise policy. The parliamentary reports that followed, although tending to endorse the government policy of the day, fostered an expectation of consultation with the wider community and displayed a robust level of debate.

Most importantly, Australia's international human rights obligations to refugees, as well as its public law values, featured as a currency of contestation during the scrutiny process.[21] This reflected an increasing willingness in parliamentary scrutiny committees across Australia and other jurisdictions to use individual rights as independent criteria for scrutiny.[22] By the end of the 1990s, there was precedent to support legislators' engagement with executive policy under the guise of a rights framework espoused within the committee scrutiny system.

C. *Legislators Contesting the Government's Mandatory Detention and Offshore Processing Policies*

This is not to say that events during the 1990s and early 'noughties' disclose a steady progression toward a proactive legislative model based on a rights-focused system of parliamentary scrutiny. The application of human rights in the pre-legislative scrutiny process within the Australian Federal Parliament is a work-in-progress, while Parliament's role in post-legislative scrutiny remains unsystematic and in need of rights-based orientation and reform. Progress in parliamentary scrutiny was moreover not helped by the previous Government's measures to reduce the exposure of its laws and policies to effective parliamentary scrutiny.[23]

19 This article uses the term 'scrutiny' in the sense of a principled activity which tests the provisions of all legislative measures against the same standards or criteria that are independent of the measures themselves: David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) *Public Law* 323 at 328; Dawn Oliver, 'Constitutional Scrutiny of Executive Bills' (2004) 4 *Macquarie Law Journal* 33 at 36.

20 Joint Standing Committee on Migration, Parliament of Australia, *Asylum, Border Control and Detention* (1994) Dissenting Report (Senator Chamarette); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Migration Legislation Amendment Bill (No. 4) 1997 & Migration Legislation Amendment Bill (No. 5) 1997* (1997) Minority Report (Senators Bolkus, McKiernan, & Murray); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Migration Legislation Amendment (Judicial Review) Bill 1998* (1999) Dissenting Report (Senator Bartlett), Minority Report (Senators McKiernan & Cooney).

21 See, for example Senate Legal and Constitutional References Committee, Parliament of Australia, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000) at [1.2]–[1.9], [6.66]–[6.74].

22 Bryan Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making' in Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds) *Protecting Rights Without a Bill of Rights* (2006) at 78; David Feldman, 'The Impact of Human Rights on the UK Legislative Process (2004) 25 *Statute Law Review* 91; Feldman, above n19; Dawn Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' (2006) *Public Law* 219; David Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead' (1999) 10 *Public Law Review* 252.

23 Harry Evans, 'Constitutionalism, Bicameralism and the Control of Power,' Senate Report HL. PAP. 15167, 26 September 2006 at 1, 9.

Furthermore, the rush of legislation through both Houses of Parliament in the wake of the *MV Tampa* affair, showed the susceptibility of parliamentary scrutiny to the vicissitudes of executive policy where there was bipartisan support for steam rolling a series of legislative responses through Parliament. In a swift blow to the refugee rights regime in Australia, the series of bills that were pushed through Parliament in 2001 with little or no scrutiny sought to curtail judicial review by way of the insertion of a privative clause,[24] as well as facilitating the policy of removing certain 'offshore entry persons' for refugee status processing at ministerially designated countries (Nauru and Manus Island, Papua New Guinea).[25]

Ironically, the Liberal Government's victory in pushing the controversial legislation through Parliament also sowed the seeds of its most embarrassing policy defeats. The rush of the 2001 legislation through Parliament without scrutiny and without input from civil society, coupled with the much-publicised treatment of refugees expelled to Nauru and Manus Island, triggered a renewed vigour in the public and intra-party debate over asylum. In 2002, the Federal Labor Party indicated a turnaround in its policy toward the offshore processing of asylum claims on Nauru and Manus Island. The vehicle for that change was the Senate Legal and Constitutional Legislation Committee inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill of the same year, which effectively sought to extend the reach of the Government's offshore processing policy.[26] The Labor Party members on the Committee joined with the minor parties in recommending that the Bill not be passed and, furthermore, that the use of declared countries for the processing of asylum seekers be abandoned.[27] These developments within Parliament culminated in an official change of Labor party policy in December 2002, which included the rejection of both offshore processing and the mandatory detention of children.[28]

Labor's turnaround in 2002 meant that any future Coalition backbench revolt against the mandatory detention and offshore processing policies would have bite. This is exactly what happened following a steady and high profile campaign by civil society, further investigations by HREOC into the mandatory detention of children,[29] and a series of High Court decisions in 2004 upholding the power of Commonwealth officers to detain unlawful non-citizens under the *Migration Act* irrespective of age,[30] the duration of detention,[31] or the conditions of detention.[32] In 2005, Mr Georgiou, the Liberal

24 *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth).

25 *Migration Amendment (Excision from Migration Zone) Act* 2001 (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth).

26 Senate Legal and Constitutional References Committee, Parliament of Australia, *Migration Zone Excision: An Examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and related matters* (2002).

27 Id at 84.

28 The Hon. Simon Crean MP & Julia Gillard MP, *Protecting Australia and Protecting the Australian Way: Labor's Policy on Asylum Seekers and Refugees,* ALP Policy Paper (2002).

29 HREOC, *A Last Resort: The National Inquiry into Children in Immigration Detention* (2004).

30 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365; *Re Woolley* (2004) 225 CLR 1.

31 *Al-Kateb v Godwin* (2004) 219 CLR 562.

member for Kooyong, prepared two private members bills, which Greens Senator Kerry Nettle introduced into the Senate on 16 June that year.[33] Faced with an embarrassing backbench revolt in Parliament, the following day Prime Minister Howard announced a series of changes to Australia's detention policy designed to appease his backbench by ameliorating the harshness of mandatory detention.[34] The Government subsequently introduced the *Migration Amendment (Detention Arrangements) Act 2005* (Cth), which amended *the Migration Act* to provide that 'Parliament affirms as a principle that a minor shall only be detained as a measure of last resort'.[35] The 2005 Act also amended the *Migration Act* to give the Minister the power to make a residence determination permitting unlawful non-citizens to reside in community detention.[36]

The following year in August, in an unprecedented move, Mr Georgiou and two other Coalition backbenchers crossed the floor in the House of Representatives to vote against the Migration Legislation Amendment (Designated Unauthorised Arrivals) Bill 2006, which again sought to extend the reach of the offshore processing regime.[37] The Coalition backbenchers gave speeches in the House of Representatives expressing their dissent from the Bill in the language of human rights and the rule of law, since they saw the Bill as reinitiating the policy of mandatory detention offshore, as well as frustrating access of asylum seekers to the Refugee Review Tribunal and Australian courts.[38] When the Bill reached the Senate, the Government dominated Senate Legal and Constitutional Legislation Committee bravely recommended against passage of the Bill despite the importance placed on its passage by the Government.[39] Reports in the media appeared that suggested that members from the Coalition would cross the floor in the Senate to vote against the Bill if the Government attempted to pass it. Recognising this probability, Prime Minister Howard withdrew the Bill on 14 August 2006.[40]

These extraordinary developments illustrate important points about Parliament's role that inform the analysis in sections four and five of this article. First, when explaining Parliament's engagement with international law and government policy there must be an awareness of the fact, as pointed out by John Uhr, that 'Parliament' is a diverse institution.[41] Parliament consists of not just the political executive, but also a majority of non-executive members who serve in either the House of Representatives or the Senate. Each chamber has 'its own power to organise itself as a remarkably autonomous

32 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

33 Migration Amendment (Act of Compassion) Bill 2005 (Cth); Migration Amendment (Mandatory Detention) Bill 2005 (Cth).

34 Prime Minister John Howard, 'Immigration Detention' (Press Release, 17 June 2005).

35 *Migration Act* 1958 (Cth), s 4AA.

36 *Migration Act* 1958 (Cth), s 197AB.

37 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2006 (Petro Georgiou) at 40–44, (Russell Broadbent) at 49–52, and (Judi Moylan) at 57–60.

38 Id (Petro Georgiou) at 42–44, (Russell Broadbent) at 50–52, and (Judi Moylan) at 57, 59.

39 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006) at 59.

40 John Howard, Commonwealth, *Parliamentary Debates*, Senate, 7 December 2006, Government Responses to Parliamentary Committee Reports, at 115.

41 Uhr, above n10 at 46; Oliver, above n19 at 39.

constitutional entity.'[42] This underlying institutional dynamic has allowed the Senate scrutiny committee structure to play an important role in facilitating the discussion and application of international human rights alongside traditional rights and liberties.

A second and related point is that it should not be assumed that Parliament will react with homogenous rapture at the prospect of passing restrictive asylum legislation or, for that matter, any other legislation that infringes on human rights. The recent record in Australia with respect to mandatory detention and offshore processing suggests the opposite may in fact be true. Given that asylum-seekers are non-members with no representation or voice in Parliament other than indirectly through legislators acting individually or in committee, Parliament's diversity is instrumental to the protection of their rights. The internal divisions of legislative power in the Australian Federal Parliament, especially those found in its bicameralism, give 'legitimate holders of legislative power a safe harbour'.[43]

At the same time, the backbenchers who challenged the Howard Government's Designated Unauthorised Arrivals Bill in the House of Representatives did not have the luxury of the protection of committee proceedings. By dissenting on the floor of the House, it was clear that the dissenters were readying themselves for the party executioner's axe. As one of the dissenters remarked during the debates, '[i]f I am to die politically because of my stance on this bill, it is better to die on my feet than to live on my knees.'[44] It is also up in the air whether the Government Senators who recommended against the passage of the Designated Unauthorised Arrivals Bill escaped the ire of their colleagues in the House. The actions of individual legislators in opposing their Government's policies therefore transcended the mechanics of legitimate and allowable dissent within committee and parliamentary proceedings, pointing to the possibility of an emergent independent human rights culture within Parliament.

The full significance of the dramatic revolts of the Coalition backbench in 2005 and 2006 becomes apparent when considered alongside developments in other jurisdictions. This comparison provides further evidence of an emergent human rights culture within Parliament that is funnelled by the committee structure, and which is informed by a strong dialogue between legislators and independent human rights agencies at the national and international levels, national courts, international human rights committees and inquiries, and civil society. At the same time, the following examples illustrate that this is a culture that needs to be fostered by improvements in the committee scrutiny system, including ensuring the independence and resources of the scrutiny committees, enhancing the integration of pre and post-legislative scrutiny and encouraging the integration of human rights into policy-making.

42 Uhr, above n10 at 46.

43 Id at 55.

44 Russell Broadbent, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2006 at 52.

2. Comparisons with the UK

Scholars in other jurisdictions have noted the role of courts as an internal constraint on the exercise of government authority in the asylum and immigration arenas.[45] As with Australia, less attention has been given to the role of legislators. Yet recent asylum policy initiatives in the UK have seen parliamentarians engage in a robust scrutiny of government policy toward asylum seekers, suggesting that more attention needs to be given to the role of legislators in this area.

As with Australia, the intervention of UK parliamentarians in the traditionally executive-dominated arena of asylum policy occurs against the historical backdrop of the steady erosion of the substantive and procedural rights of asylum-seekers during the 1980s and 1990s.[46] While some parliamentarians expressed concern with these policies during this period, the passage of the *Human Rights Act* 1998 (UK)[47] provided legislators with an independent set of scrutiny standards and machinery to engage with asylum bills that sought to limit the rights of asylum seekers in the UK. Specifically, the *Human Rights Act* gave effect to the *European Convention on Human Rights* ('ECHR')[48] in domestic law[49] and saw the establishment of the all-party, bicameral Joint Committee on Human Rights ('JCHR'), which was given wide scope to consider 'matters relating to human rights in the United Kingdom'.[50]

The new intensity in parliamentary scrutiny of asylum bills from this time reflected the fact that the passage of the *Human Rights Act* and the JCHR scrutiny machinery had resulted in the growing use and awareness of human rights as a fundamental scrutiny standard.[51] Parliamentary scrutiny of the Anti-Terrorism, Crime and Security Bill illustrates the extent of Parliament's willingness to engage with the executive on asylum matters, as well as the limitations of parliamentary review.[52] The Bill was one of the measures that the Home Office announced shortly after 11 September 2001 would be part of the UK's legislative response to terrorism.[53] During the second recall of Parliament to consider developments post 11 September 2001, the Prime Minister made

45 Christian Joppke, 'The Legal-Domestic Sources of Immigrant Rights: The United States, Germany, and the European Union' (2001) 34 *Comparative Political Studies* 339 at 340–342; Randall Hansen, 'Globalization, Embedded Realism, and Path Dependence: The Other Immigrants to Europe' (2002) 35 *Comparative Political Studies* 259 at 279–280.

46 Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68 *Modern Law Review* 378; Dallal Stevens, 'The Nationality, Immigration and Asylum Act 2002: Secure Borders, Safe Haven?' (2004) 67 *Modern Law Review* 616; Dallal Stevens, 'The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum' (1998) 61 *Modern Law Review* 207; Andrew Le Sueur, 'Three Strikes and It's Out? The UK Government's Strategy to Oust Judicial Review from Immigration and Asylum Decision-Making' (2004) *Public Law* 225.

47 *Human Rights Act* 1998 (UK) s 42.

48 *European Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221.

49 *Human Rights Act* 1998 (UK), s 1(2).

50 United Kingdom, *Standing Orders of the House of Commons,* Standing Order Number 152B(2)(a).

51 Feldman, above n22 at 92–93; Feldman, above n19 at 324.

52 Anti-Terrorism, Crime and Security Bill 2001 (UK).

53 Home Secretary David Blunkett, 'New anti-terrorist measures announced by David Blunkett' (Press Release, 3 October 2001).

it clear that the measures were directed at 'bogus' asylum seekers who were considered to be a threat to national security.[54]

Part 4 gave the Secretary of State power to exclude the substantive consideration of asylum claims by suspected terrorists where the Secretary of State certified that the removal of the suspected terrorist would be conducive to the public good.[55] Part 4 also proposed to give the Secretary of State power to detain those aliens that the Secretary of State certified to be threats to national security but who the Government could not remove from the country due to the operation of article 3 of the ECHR.[56] The European Court of Human Rights had earlier held that the non-derogable provisions of article 3 prohibited the removal of a person to a place where he or she could face torture or inhuman or degrading treatment or punishment.[57] Unable to remove such a person, the Government chose to derogate from article 5 of the ECHR thereby effectively permitting indefinite detention of aliens considered a risk to national security.[58]

The Anti-Terrorism, Crime and Security Bill was subject to scrutiny by a number of select committees. They included the House of Commons Home Affairs Select Committee,[59] the House of Lords Constitution Committee,[60] the House of Lords Delegated Powers and Regulatory Reform Committee,[61] and the JCHR.[62] Public comment was sought, the committees were able to question the Minister responsible and various cross-references to each other's work were reported.[63] The JCHR, according to Janet Hiebert, used the scrutiny of the Bill to 'assert a role as "parliamentary guardians" of the *Human Rights Act*'.[64] The JCHR generally found that 'on the evidence available to us, the balance between freedom and security in the Bill before us has not always been struck in the right place.'[65] The JCHR specifically concluded that the Home Secretary's responses during the scrutiny process had not persuaded it that the risk of discrimination on the grounds of nationality in the provisions of Part 4 of the Bill had been 'sufficiently taken on board'.[66]

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54 HC Deb 4 Oct 2001 col. 475.

55 Anti-Terrorism, Crime and Security Bill 2001 (UK) cl 33–34.

56 Anti-Terrorism, Crime and Security Bill 2001 (UK) cl 21–23.

57 *Chahal v UK* (1996) 23 EHRR 413 at [80].

58 Human Rights Act 1998 (Designated Derogation) Order 2001; Anti-Terrorism, Crime and Security Bill 2001 (UK) cl 25–33.

59 Home Affairs Committee, Parliament of the United Kingdom, *The Anti-Terrorism, Crime and Security Bill,* First Report (2001).

60 Constitution Committee, Parliament of the United Kingdom, *The Anti-Terrorism, Crime and Security Bill*, Second Report (2001).

61 Delegated Powers and Regulatory Review Committee, Parliament of the United Kingdom, *Anti-Terrorism, Crime and Security Bill, Office of Communications Bill, and Request for Evidence for the Proposal for the Draft Regulatory Reform (Voluntary Aided Schools Liabilities and Funding) Order 2002*, Seventh Report (2002) at 3–9, 11–22.

62 Joint Committee on Human Rights, Parliament of the United Kingdom, *Anti-Terrorism, Crime and Security Bill*, Second Report (2001); Joint Committee on Human Rights, *Anti-Terrorism, Crime and Security Bill: Further Report*, Fifth Report (2001).

63 Feldman, above n19 at 342.

64 Janet Hiebert, 'Parliamentary Review of Terrorism Measures' (2005) 68 *Modern Law Review* 675 at 677.

65 Joint Committee on Human Rights, Parliament of the United Kingdom, *Anti-Terrorism, Crime and Security Bill*, Second Report (2001) at [78].

The Government ultimately proceeded on its path irrespective of the JCHR's central concerns, introducing s 23 of the *Anti-Terrorism, Crime and Security Act 2001* to detain non-nationals indefinitely in circumstances where deportation was not possible. JCHR's concerns were vindicated when the House of Lords, in *A v Secretary of State for the Home Department*, held that the legislative response was discriminatory because the measures did not apply to British nationals suspected of terrorist links.[67] The Government then introduced the Prevention of Terrorism Bill 2005, which sought to establish a control order regime that the Government argued was compatible with the ECHR.[68] The JCHR subjected the 2005 Bill to rigorous rights-review soon after its introduction.[69] The JCHR's second report drew attention to the potential adverse effect of the Bill on ECHR rights, the minimal requirements before making a control order and the lack of judicial involvement.[70] Although the Bill was passed in the Commons despite the JCHR's concerns, the House of Lords resisted passage of the Bill until a one-year review clause was inserted.[71]

A further illustration of the role of legislators in the scrutiny of asylum bills in the UK is the passage of clause 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003/4 (UK). Clause 10 contained an ouster clause that would have excluded the UK courts from reviewing decisions of the new Asylum and Immigration Tribunal. Richard Rawlings relates how the successive reports from the JCHR, which expressed 'very serious doubts' about compatibility with the ECHR, 'did not deliver the knock out blow that committee members were clearly looking for'.[72] Again, despite strong criticisms of clause 10 by the JCHR and the House of Commons Constitutional Affairs Committee, the House of Commons passed clause 10. Yet, as Richard Rawlings points out, '[b]ackbench speeches in favour of the ouster were notable by their absence'.[73] Rawlings goes on to describe how, after 'having struggled through the Commons, ministers abandoned the ouster on reaching the House of Lords, where the list of speakers lined up to do battle reads like a "who's who" of the legal establishment, headed by two former Lords Chancellor (Mackay and Irvine) and Lord Woolf'.[74] In the end, Rawlings likens the 'legal politics' of the ouster clause 'to a game of poker played for high constitutional stakes between the executive and parliament and the courts. And it was to be ministers who blinked first'.[75]

66 Joint Committee on Human Rights, Parliament of the United Kingdom, *Anti-Terrorism, Crime and Security Bill*, Second Report (2001) at [39].

67 *A v Secretary of State for the Home Department* [2005] 2 WLR 87 at [43],[68] (Lord Bingham), [84] (Lord Nicholls), [103], [105], [132], [138] (Lord Hope), [157]–[158] (Lord Scott), [171] (Lord Rodger), [229], [236] (Lady Hale).

68 Prevention of Terrorism Bill 2005 (UK).

69 Joint Committee on Human Rights, Parliament of the United Kingdom, *Prevention of Terrorism Bill: Preliminary Report*, Ninth Report (2005) at [5]–[13], [15]–[17].

70 Joint Committee on Human Rights, Parliament of the United Kingdom, *Prevention of Terrorism Bill*, Tenth Report (2005) at [6]–[15].

71 *Prevention of Terrorism Act* 2005 (UK) s 13.

72 Rawlings, above n46 at 401.

73 Id at 403.

74 Id at 406.

75 Id at 382.

The progress of the above bills through the UK Parliament showed both the scope and limitations of Parliament's role. Stephen Tierney has argued that the passage of the 2001 Bill illustrated Parliament's 'marginalisation' and 'emasculation'.[76] He points to the fact that the 2001 Bill was passed in two weeks with only three days of debate on the floor of the House set aside for its 125 clauses, and to the fact that both the JCHR and Home Affairs Select Committee complained that they did not have sufficient time to scrutinise the Bill.[77] Dawn Oliver also deduces from the passage of clause 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Bill through the Commons that parliamentary scrutiny is a 'rather fragile protection against the passage of unconstitutional laws'.[78] The Government's willingness to push through legislation despite concerns from the JCHR and other parliamentary committees also highlights the limitations of parliamentary scrutiny when governments decide to 'chance their arms'.[79]

On the other hand, the scrutiny proceedings surrounding these asylum bills demonstrated Parliament's willingness to engage the executive on its traditional 'home turf' — national security and asylum — in a robust and bi-partisan fashion. In this regard, the sometimes diverse and independent nature of 'Parliament' — the committee procedures, bicameralism and the willingness of individual legislators to dissent from the party line — played an important role in fostering Parliament's engagement. Janet Hiebert concludes that the scrutiny of the 2001 and 2005 bills is evidence that a:

> …culture of rights does seem to be taking hold within parliament, as manifest in the work of the JCHR, the willingness of many governing party members (in both houses) to break ranks with their party, and the House of Lords 'rebellion' at being asked to pass legislation despite having serious concerns that rights would be jeopardised.[80]

Rawlings would also argue that the defeat of the ouster clause in the House of Lords was due in large part to the conjoining of rights-based arguments that stressed a vibrant common law constitutionalism and reinforced human rights arguments with traditional domestic notions of the rule of law.[81]

In summary, both the UK and Australian contexts demonstrate that despite limitations in the effectiveness of parliamentary scrutiny in preventing the passage of controversial legislation, legislators in both jurisdictions have evinced a proactive engagement with executive government policy toward asylum seekers even when operating in the highly politically charged areas of border control and national security. Significantly, in both jurisdictions, human rights and the rule of law have provided the

76 Stephen Tierney, 'Determining the State of Exception: What Role for Parliament and the Courts?' (2005) 68 *Modern Law Review* 668 at 671, 672.

77 Joint Committee on Human Rights, Parliament of the United Kingdom, *Anti-Terrorism, Crime and Security Bill*, Second Report (2001) at [76], [79]; Home Affairs Committee, Parliament of the United Kingdom, *The Anti-Terrorism, Crime and Security Bill*, First Report (2001) at [11], cited in Tierney, Id at 671.

78 Oliver, above n19 at 52.

79 Feldman, above n19 at 93.

80 Hiebert, above n64 at 680.

81 Rawlings, above n46 at 404–405.

justification for parliament's rejection of key planks in the government's restrictive asylum policies — in Australia, the rejection of mandatory detention and offshore processing, and in the UK, the rejection of the ouster clause. These developments point to the need to appreciate and foster the diversity, independence, and rights-centeredness of Parliament in both jurisdictions as key institutional strengths that enable legislators to channel human rights into the law-making process. Arguably, this potential has not been sufficiently explored in the asylum debate to date.

3. Current Explanatory and Normative Frameworks for Parliament's Involvement in Asylum Matters and the Implementation of International Law Generally

As mentioned in the introduction, current approaches to the implementation of refugee rights in Australia tend to focus on the relationship between the courts and the executive.[82] In this debate, Parliament's actions are understood either as an extension of executive policy[83] or representative of an assertion of parliamentary sovereignty over the courts.[84] A similar tendency is evident in the international and comparative literature on the role of national institutions in placing restraints on a state's asylum policies, which has tended also to view 'the sovereignty of Parliament' as the 'sovereignty of the executive'.[85] The failure of this point of view to entertain any independent or nuanced role for Parliament is symptomatic of the fact that 'the Parliament' is rarely 'unpacked' (to borrow from John Uhr).[86]

The general reforms in the UK and Australia, introducing greater parliamentary rights-based scrutiny of law and policy, suggest that Parliament has a potentially bigger role to play than is currently entertained in the literature. On the other hand, the variable success of the scrutiny of asylum bills discussed in sections two and three above highlight the fact that further work needs to be done to strengthen Parliament's capacity to engage with the executive on human rights matters generally. Suggestions for further strengthening of Parliament's role include the adoption of more certain human rights scrutiny standards (ranging from scrutiny checklists to 'democratic bills of rights'[87]), better co-ordination with independent rights-agencies and inspectorates in the post-enactment scrutiny of laws and policy, and greater public input.[88] Such initiatives have the potential to strengthen Parliament's role in concretising rights within the Australian political system.

82 Crock, above n7; McMillan, above n7.

83 McMillan, above n7 at 21.

84 Sackville, above n8 at 49-50.

85 Christian Joppke, 'Asylum and State sovereignty: a comparison of the United States, Germany, and Great Britain' (1997) 30 *Comparative Political Studies* 259 at 285.

86 Uhr, above n10 at 46.

87 Tom Campbell, 'Human Rights Strategies: An Australian Perspective' in Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (2006) at 319.

88 Horrigan, above n22 at 93.

In order for this to occur, however, there must also be allowances made in the conceptual framework that surrounds the role of Parliament. First, advocating a greater role for Parliament as a protector of the rights of a minority or a marginalised group, such as refugees, has traditionally raised the vexed issue of the place and role of the *demos* in relation to asylum policy. Matthew Gibney's work provides probably the most sophisticated analysis of this issue. Central to Gibney's work is his notion of the 'democratisation of asylum'. Gibney argues that the trend toward restrictive asylum policies since the 1980s is the result of the 'democratisation' of asylum policy.[89] By this Gibney claims that after the end of the Cold War asylum policy shifted from 'high politics', involving geopolitical security issues centred on the Cold War, to 'low politics', which concerned 'matters of day to day electoral politics, including employment, national identity and the welfare state'.[90]

Gibney further asserts that the asylum crisis 'exposes the tense and conflictual relationship between the values that constitutional democracies are supposed to uphold'.[91] According to Gibney, '[e]mbodying the principle of democratic rule, electoral politics pushes policies towards closure and restriction; embodying constitutional principles, the law inches unevenly towards greater respect for the human rights of those seeking asylum'.[92] Gibney argues that a principal solution to restrictive asylum policies is to neuter the push of electoral politics by 'a more inclusive politics of asylum, one that goes beyond the law to elicit from the public of western states greater identification with and respect for the claims of refugees and asylum seekers'.[93] Gibney presciently observes that 'a new and positive political bipartisanship within western states on refugee questions would be needed'.[94]

Gibney's thesis has been borne out to a certain extent by subsequent developments in Australia. There is no doubt that important sectors of public support, co-ordinated by civil society and aided by a certain level of bipartisanship, fuelled backbench revolts against Australia's mandatory detention and offshore processing policies. On the other hand, it is probably unwise to hitch the reform wagon too tightly to electoral change. The approach of the Australian public to refugee rights is incredibly unstable (compare the reaction of Australians to the arrival of Kosovar refugees to the arrival of the asylum seekers on the *MV Tampa*). There is little doubt that if the opinion polls had their way the Labor Party would not have performed a policy turnaround in 2002. It would also be difficult to argue that the parliamentary revolts in the UK and Australia between 2004 and 2006 were inspired or in step with the polls.

More deeply, too great a focus on public opinion risks endorsing a crude majoritarian conception of democracy. As Tom Campbell observes, '[d]emocratic governments have

89 Matthew Gibney, 'The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy' in Susan Kneebone (ed), *The Refugees Convention: 50 years On* (2003) at 28.

90 Ibid.

91 Id at 43.

92 Ibid.

93 Id at 45.

94 Ibid.

a built-in bias towards the abuse of the power that they are designed to control'.[95] Campbell therefore argues that there is 'a perpetual imperative to reassert human rights values and to work out how they may be better protected'.[96] 'The articulation and promotion of human rights', says Campbell, 'is an important part of the endeavour to make democracies more democratic and protect both majorities and minorities against ever-present internal and external threats to their wellbeing'.[97] In agreement with this understanding of democratic government, strengthening the institutions of rights-scrutiny within Parliament is a demonstratively and normatively preferable solution to reliance on the vagaries of public opinion (as interpreted from time to time by the political executive). This is particularly essential in refugee law and policy where the persons subject to the policies are non-members and rarely popular — the classic 'other' according to Costas Douzinas.[98]

Secondly, at the same time as it raises the issue of Parliament's role in upholding the rights of marginalised groups, asserting a role for Parliament with respect to the rights of refugees and human rights challenges assertions of 'Australia's sovereignty' as a 'shield' against international legal rules.[99] Parliament's capacity to engage independently with international human rights law in a way that internally restricts Australia's sovereignty requires a rethink of the rhetoric behind such assertions of 'sovereignty'. Thus, the engagement of legislators with the executive in matters of refugee rights also has implications for the nature of Australian sovereignty and Australia's relationship with international law. These implications are discussed in the next section.

4. Underlying Notions of Sovereignty

In *No Country is an Island: Australia and International Law*,[100] the authors examine the place of the sovereignty doctrine in analysing the modern debate in Australia over the role and legitimacy of international law. They make the important point that the concept of sovereignty is 'infinitely fluid'.[101] As the authors remark, '[s]overeignty can be understood as the capacity of a country to cooperate with the international community to prevent arbitrary action and the abuse of power in all spheres' (citing Philip Allot's *Health of Nations*) as well as a '"conceptual barricade" against what is assumed to be a meddling or hostile international society'.[102]

Philip Allot bases his account of sovereignty – an account that recognises the role of international law in preventing the 'abuse of power in all spheres' – on a transcendental, Kantian vision of the international legal order.[103] Other scholars, in the meantime, have

95 Campbell, above n87 at 324.
96 Ibid.
97 Ibid.
98 Douzinas, above n12 at 357.
99 Charlesworth et al, above n1 at 3.
100 Charlesworth et al, above n1.
101 Id at 144.
102 Ibid.
103 Philip Allot, *The Health of Nations: Society and Law beyond the State* (2002).

derived the same principle as Allot but from a more positivist framework – one that recognises the role of States in making international law, but which also entertains the interdependence of national, regional and international legal institutions and laws.[104] Erika de Wet has argued, for example, that there exists an 'international community with an international value system' that 'leads to the replacement of the traditional, dualist system with a more integrated system'.[105] She observes that in this system 'individuals and State organs simultaneously function both within the national and post-national communities and legal orders'.[106] This analysis rings true if we consider Parliament's direct engagement with international law through the scrutiny process, for example, its ability to request, assess, and question submissions from international rights agencies such as the UNHCR.

It is important to recall, in addition, that the human rights that legislators employ during the scrutiny process have both an international and national dimension. Rights were originally conceived of as an internal restraint on the exercise of public power within the state long before they were an external restraint imposed on national sovereignty from 'outside'. While human rights may derive from international law, they fundamentally reconfigure the relationship between the state and its citizens (and non-citizens). In addition, as can be seen by the practice in both the UK and Australia of conjoining international human rights with traditional rights and liberties, for example, the rule of law, there is interdependence between the substantive principles that constrain the exercise of public power within the State. The substantive norms underlying human rights traverse the international and national, binding the exercise of public power at different levels of the international legal order.

Once accepted in principle as a binding set of normative criteria, state organs (the courts, parliament, and the executive) inevitably confront the limitations that rights place on the exercise of public power within the state. The evidence of the application of independent human rights scrutiny criteria by Parliament as evinced in the asylum case studies in section two and three above, despite no bill of rights at the federal level in the Australian context, signals that the conceptual force of rights as a normative constraint on the exercise of public power has its own momentum irrespective of formal acts of incorporation. Traditional conceptions of Australia's relationship with international law, which maintain the dualist division between international and domestic law, struggle to accommodate this fluidity and interdependence.

The tendency to overlook the true significance of Australia's relationship with international human rights law has gone hand in hand with ignoring the importance of the divisibility of sovereign power within the state when debating the relationship between Australia and the international legal order. Australia's 'sovereignty' is often invoked as a 'shield against international legal rules'[107] without any true understanding

104 Erika de Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51.
105 Id at 75.
106 Ibid.
107 Charlesworth et al, above n1 at 3.

or analysis of how that 'sovereignty', commonly understood as an expression of Australian sovereignty at the international level, divides within the Australian political system. Mary Crock has highlighted how in the immigration and asylum context, for example, the executive's tendency has been to conflate the exercise of the State's sovereign authority over aliens and the internal authority of the executive, thereby providing the executive with a wide discretion in asylum matters.[108] Arguably, the more complex reality of the engagement of legislators with the executive's asylum policy suggests a need to acknowledge the role of Parliament in interpreting the extent to which Australia's international obligations impinge on its sovereignty.

Conclusion

In conclusion, the role of legislators in scrutinising asylum bills in Australia and the UK signals the need to appreciate and foster the benefits that Parliament can bring to the protection of rights. From the limited asylum case studies addressed in this article, it becomes clear that the diversity of Parliament and the independence of legislators are key preconditions that must be taken into account when charting the way forward for Parliament's engagement with rights. Instead of attempting to 'shut out' rights by appeals to national sovereignty, The advancing engagement of legislators in the protection of rights – instead of attempting to 'shut out' rights by appeals to national sovereignty – reflects the power of rights in transcending traditional boundaries between international and national law, and imposing fundamental limitations on the supposed indivisibility of national sovereignty unfiltered through the inviolability of executive authority.

108 Crock, above n7 at 54.