

The High Court and Refugee Policy: Implications and International Comparisons

By André Dao



The lecture theatre was packed for this panel on refugee policy.

Exactly two weeks after the High Court ruled against the Malaysia Solution, the Castan Centre held a public lecture to discuss the decision and its political implications. With the decision still fresh on everyone's mind, the lecture theatre at the Monash Law School was completely filled, with audience members sitting in the aisles by the time Melissa Castan introduced the three speakers.

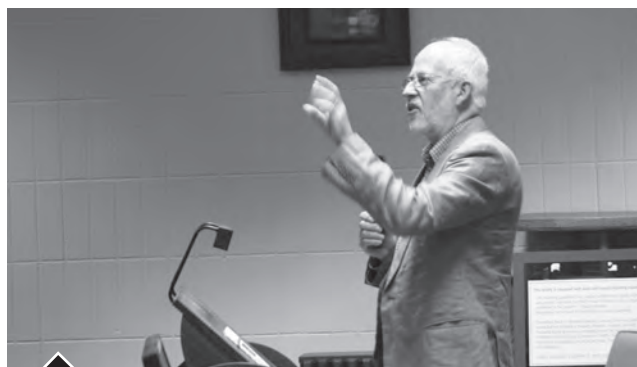
Dr. Susan Kneebone, a member of the Castan Centre, titled her short talk "From Alien to Asylum Seeker: or, How the High Court Learnt to Count from 1 to 34". She explained the title by saying that the *M70* decision represented a significant change in attitude by the High Court as it recognised the claimants as asylum seekers under Australian law, whereas in previous decisions they had always been referred to as Constitutional aliens under the aliens and naturalisation power. The second part of the title referred to the 34 substantive provisions of the Refugee Convention. Previously, the focus had been on procedural rights, in particular the right not to be refouled. However, the High Court's reasoning in *M70* incorporated into the *Migration Act* substantive rights for refugees from the Convention for the first time. Most importantly, the High Court recognised the legal doctrine of accrued rights, which holds that when a refugee arrives in a country, they have accrued rights and therefore the state cannot contract its obligations towards the refugees away.

The next speaker was Maria O'Sullivan, a Castan Centre Associate. She gave an international perspective on the Malaysia Solution by comparing it to the Dublin Convention, which came into force in 1997 throughout the European Union. Essentially, the Convention is a transfer agreement which allows European states to transfer asylum seekers back to their point of entry into the E.U., which usually equates to northern states transferring asylum seekers to southern states. According to Ms. O'Sullivan however, the key difference between this transfer agreement and the Malaysia Solution is that the E.U. regional agreement is underpinned by complex and harmonised laws, including the Common European Asylum System, which is binding on all E.U. states. The E.U. arrangement also incorporates two supervisory courts, whereas there is no equivalent in the Asia-Pacific region. Indeed, one of those supervisory courts, the European Court of Human Rights, found both

Greece and Belgium in breach of torture and ill-treatment provisions of the European Convention on Human Rights. This decision was of particular relevance because Belgium, as the transferring country, was still found in breach despite the fact that the breaches themselves occurred in Greece.

Professor James Walter from the Monash University School of Political and Social Inquiry offered the enthused audience a more pragmatic analysis of the political ramifications of the decision for future immigration policy. According to Professor Walter, the Prime Minister's attack on the High Court following the *M70* decision was symptomatic of the unwarranted growth in executive power in recent times. Professor Walter believes that by attacking the judiciary, public distrust of all arms of government will have increased. For Professor Walter, the solution is not to try to redraft the *Migration Act*, even if the Government could get Coalition support. Instead, he argued that real leadership is required, of the kind shown by Malcolm Fraser when he welcomed the Vietnamese boat people into Australia. However, such a move would require walking away from the Malaysia Solution and admitting that the entire asylum seeker debate has been incorrectly framed – a rather unlikely scenario.

With so much information to take in during the session, the audience was full of questions. One questioner asked Professor Walter what the political ramifications would be if onshore processing was adopted, to which he replied that there is actually widespread support for onshore processing, and that current asylum seeker policy is focussed on marginal seats, especially those where socio-economic disadvantage has provoked fear and anxiety. Another interesting question was addressed to all of the panellists – what would they say to the UNHCR regarding the Malaysia Solution? Ms. O'Sullivan said that she would stress the lack of an E.U. style international framework guaranteeing human rights protections, while Dr. Kneebone thought that we should be looking at how to help Malaysia improve its human rights record and Professor Walter emphasised the damage that has already been done to Australia's international reputation. With the official question time over, many audience members stayed behind to continue conversations with the panellists while others started fresh discussions about Australia's refugee policy on the way out.



Professor James Walter discusses the political ramifications of the *M70* decision.