

CHAPTER 2 - INTERNATIONAL REFUGEE LAW

Rights of Refugees and asylum seekers

A person who is a refugee has a number of important rights under the Refugee Convention, including:

- the right to seek asylum in a country outside their country of origin which has agreed to be bound by the Refugee Convention;
- the right not to be returned to the country where they have a well-founded fear of persecution;
- the right not to be discriminated against or penalised because they are a refugee;
- the right to equal access to the courts;
- freedom of religion and movement;
- the right to education and employment; and
- access to travel documents.

Article 31 of the Refugee Convention prohibits penalising asylum seekers based on the manner of their arrival into the country from which they are seeking protection.

However, asylum seekers and refugees also have rights under other international agreements which are shared by the general population in countries party to these agreements. Simply complying with the rights outlined in the Refugee Convention does not satisfy a country's duty to protect the general rights of asylum seekers and refugees under these other agreements.

These agreements, all of which Australia is a party to, include the International Covenant on Civil and Political Rights (1966), the Convention on the Rights of the Child (1989), and the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (1984).

Some of the key rights contained in these instruments include:

- the right to liberty and security of person;
- freedom from arbitrary arrest or detention;
- freedom from torture, cruel, inhumane or degrading treatment;
- the right to the equal protection of the law
- the right not to be expelled, returned or extradited to a State where there are substantial grounds for believing that a person would be in danger of being subjected to torture;
- the right of children to have their best interests taken as a primary consideration in all actions concerning them, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies
- the right of a child or his or her parents to have applications to enter or leave a country for the purpose of family reunification dealt with by the state in a positive, humane and expeditious manner; and
- the right of a child to express his or her own views freely in all matters affecting the child, including the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

AUSTRALIA'S INTERNATIONAL OBLIGATIONS

The place of International Law

International law is the law which governs the relationship between countries. International law is made up of international conventions to which countries have agreed to be bound, customary principles which have been accepted by the international community as being 'law' and general principles of law that are recognised by nations.

Conventions and protocols (along with covenants, treaties, agreements and exchange of letters) are forms of agreement between countries which are binding in international law.

Unlike domestic law, there is no police force or system of punishment for countries who breach international law. Where a country breaches international law, the international community may agree to act either through sanctions or by military force against it but this happens very rarely in practice.

The relationship between international law and Australian domestic law

Australia ratified the Refugee Convention on 22 January 1954 and the Protocol on 13 December 1973. This means that Australia has agreed to be bound by certain obligations under international law towards people who meet the Convention definition of a refugee. The most important of these obligations is the requirement under Article 33 that persons who are recognised as ‘refugees’ must not be returned or “refouled” to a country where they face persecution for one of the Convention grounds.

In some states, such as the Netherlands, France, and Switzerland, ratification of international conventions results in their automatic incorporation into domestic law. However, in other states, including Australia, such incorporation does not happen automatically. Instead, Australia must pass legislation specifically implementing its international obligations. In the case of the Refugee Convention, the primary piece of domestic legislation that sets out Australia’s obligations is the *Migration Act 1958 (Cth)* (**Migration Act**).

States are required both to carry out their treaty obligations in good faith and to interpret a treaty “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” These requirements are set out in Articles 26 and 31 of the Vienna Convention, to which Australia is a party.

When countries ratify international conventions, they become bound by the articles of those conventions, but in some cases it is possible for countries to make ‘reservations’ to particular provisions in conventions. This effectively means that a country agrees to be bound by all the provisions except those in relation to which they have made a reservation.

However, conventions can prohibit countries from making reservations to particular articles of that convention. In the case of the Refugee Convention, countries are prohibited from making reservations about Article 1 (the definition of the term ‘refugee’) and Article 33 (non-refoulement).

Putting Australia’s international obligations in context

Australia is a sovereign nation and is entitled to *offer* protection to whomever it chooses, regardless of whether a person is a ‘refugee’ at international law. This means that, to a large extent, a decision by the Australian Government not to *select* a particular offshore asylum-seeker for protection as part of Australia’s refugee and special humanitarian program does not contravene its duties under the Refugee Convention.

However, the situation is different for people who claim asylum once they arrive in Australia (onshore asylum seekers). The Refugee Convention makes it clear that when asylum seekers enter Australia seeking asylum, the Australian Government must determine whether they are ‘refugees’ within the Convention definition and if they are, it must offer them protection.

Neither the Refugee Convention or Protocol prescribe the *process* for determining refugee status – the Australian executive, legislature and judiciary have a discretion in framing and interpreting Australian laws to meet our international obligations.

The way in which Australia has interpreted its international obligations in the area of refugees and asylum seekers is set out in the next chapter.