Are Lawyers representing asylum seekers "un-Australian"?

According to Minister for Home Affairs and immediate former Minister for Immigration, Citizenship and Multicultural Affairs Peter Dutton, Lawyers representing asylum seekers who want to stay in Australia are "un-Australian". The Minister's remark came amid former Prime Minister Tumbull's government's news to end financial support for up to 100 Australian-based asylum seekers on the grounds that the government was frustrated by its constitutional responsibilities to asylum seekers.

The actions of Tumbull's government and the Minister's remarks drew mixed reactions from various sectors of society with the most prominent one being from Opposition Leader Bill Shorten who termed it as "[immediate former] Prime Minister Malcolm Tumbull's weakest move yet." The former Immigration minister is not the first person to level criticism advocates representing asylum seekers and he certainly won't be the last in view of the growing fight against multiculturalism.

Multiculturalism and multilingualism are inevitable consequences that come with asylum migration. Although often seen as problematic, they are actually resources for society. They are resources for identity construction at the personal and group level, as well as resources for participating in society. The importance of the construction and perception of individual and group identities in contact is becoming increasingly salient, particularly as evidenced in current political discourse especially in Europe. A common identity is often perceived as essential for providing social cohesion in society today, yet respect for diversity is at the core of the Australian, and more generally, European and American ideals. This is a challenge for a new understanding of identity, one that takes into account the diversity, hybridity, and change in identities in contact in Australia today. In today's multilingual and plural cultural world, the notion of identity is central for understanding matters concerning the integration and socialization of migrants and asylum seekers. New knowledge of identity among multilinguals in a plural society is truly necessary for political and educational decision-making. It is no wonder that Australia's newly appointed Minister for Immigration, Citizenship and Multicultural Affairs, David Coleman, has hailed multiculturalism and also acknowledged the contribution of migrants to the Australian society.

Refugee Legal Framework

For years, States have been granting protection to individuals and groups fleeing persecution. The present refugee legal framework traces its origins in the aftermath of World War II as well as the refugee crises of the interwar years that preceded it. Article 14(1) of the 1948 Universal Declaration of Human Rights (UDHR) **guarantees the right to seek and enjoy asylum in other**

countries. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the "*right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions*."[1]

The two international laws governing the treatment of refugees are:

a) 1951 Convention relating to the Status of Refugees (1951 Convention) and its;
b) 1967 Optional Protocol relating to the Status of Refugees (1967 Optional Protocol).

Australia is a signatory to both of these conventions. Australia ratified the 1951 convention on 22 January 1954. The 1951 Convention establishes the definition of a refugee as well as the principle of non-refoulement[2] and the rights afforded to those granted refugee status. Although the 1951 Convention definition remains the standard definition, regional human rights treaties have since modified the definition of a refugee in response to displacement crises not addressed by the 1951 Convention.

The 1951 Convention gives State parties the leeway to establish asylum proceedings and refugee status determinations. This in turn has led to disparities among different States as governments craft asylum laws based on their different resources, national security concerns, and histories with forced migration movements. Despite differences at the national and regional levels, the fundamental goal of the current refugee legal framework is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.

The Minister's Remark

The former Immigration Minister's remark as ill-advised as it was brings to the fore the inherent conflicts in as far as implementation of laws is concerned. It is universally accepted that every person has the right to legal representation. It is a right that has been entrenched in International, regional and even national laws of nearly all countries. That said it is undoubtedly clear that every country's duty is to its citizens in terms of food security, national security among other obligations.

Many countries have faulted the current refugee legal framework on the grounds that it is so much outdated that it is no longer applicable to the

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[1] See Article 22(7) of American Convention on Human Rights and Article 12(3) of the African [Banjul] Charter on Human and Peoples' Rights.

[2] The basic principle of refugee law, non-refoulement refers to the obligation of States not to refoule, or return, a refugee to "the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

realities of those requiring international protection. Although the 1951 Convention acknowledges the right to asylum, the fact that it does not refer to asylum seekers makes it incredibly difficult to implement especially in the modern times. Other than that, the 1951 Convention is still valid in a number of ways especially when it relates to protection of the rights of refugees.

The Minister's remark reveals a deep seated frustration occasioned by the influx of asylum seekers who flood into Australia owing to its standing as one of the few rich states that is also a signatory to the 1951 Convention in the Asia-Pacific region. It is inevitable that such numbers would put tremendous pressure on a country to not only meet the needs of its citizens but also those who escaping persecution from their own countries. The fact that Australia and many other countries are obligated to accept asylum seekers is what frustrates many governments and forces them to find creative ways of circumventing the international framework in a way that suits their situation.

It is clear that the present system is not sustainable given the changing dynamics in our society and countries will only find better and more sophisticated ways to flout the international framework but changing or revising the current framework is not presently feasible. Given that it took nearly half a century to craft one, there is no guarantee that revising or changing the current framework will take a lesser period of time let alone be done in our lifetime.

As I stated previously, there is some sort of conflict by governments when it comes to national interests versus international obligations. More often than not, governments tend to look inward. This is by no means excusing the Minister's remark. My interpretation of his remark is from the perspective of a frustrated government that is struggling to balance the needs of its people and its international obligations. Granted, the problem of asylum seeking is one that has and is still plaguing many countries in Europe.

Is representing asylum seekers make you "un-Australian"?

In many common law jurisdictions, lawyers are bound by the **cab-rank rule** which essentially places an obligation on them to provide legal services to **ALL** who are in need of those services.

The cab-rank rule precludes a lawyer from refusing a case/brief, whether to act as an advocate or to advise, unless in exceptional circumstances such as the lawyer is already professional committed, has not been offered a proper fee, is professionally embarrassed by a prior conflict of interest or lacks sufficient experience or competence to handle the matter. Lawyers must therefore act on a first come, first served basis, just like cab drivers just as a cab driver must drive the next person in line at the rank (hence the reference to the "cab-rank rule"). The sanctity of this rule has been compared to that of the doctor's Hippocratic Oath.

The reasoning behind this rule is that if lawyers are permitted to cherry pick their clients, there is an almost certain danger that some people will be unable to obtain necessary legal representation.

Section 21 of the *Barristers' Conduct Rules* of the Bar Association of Queensland (made pursuant to the *Legal Profession Act 2007*) outlines cab-rank principle as follows:

> ***"Cab-rank principle***
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> ***21. A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:***
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> > ***(a) the brief is within the barrister's capacity, skill and experience;***
> >
> > ***(b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence;***
> >
> > ***(c) the fee offered on the brief is acceptable to the barrister; and***
> >
> > ***(d) the barrister is not obliged or permitted to refuse the brief under Rules 95, 97, 98 or 99.***
>
> ***22. A barrister must not set the level of an acceptance fee, for the purposes of Rule 21(c), higher than the barrister would otherwise set if the barrister were willing to accept the brief, with the intent that the solicitor may be deterred from continuing to offer the brief to the barrister."***

With the foregoing in mind, the Minister's remark clearly undermines the rule of law. In fact, it would be "un-Australian" and an affront to justice and the rule of law for the lawyers to refuse represent the asylum seekers. A society and by extension a country is judged by the manner in which it treats its most vulnerable people.

Conclusion

I am of the opinion that there is nothing "un-Australian" or unpatriotic about representing asylum seekers. If the government apparatus permits such remarks with respect to who lawyers can or cannot provide legal representation

to, then the whole judicial system will disintegrate quite quickly. While I am able to appreciate the unenviable position that governments find themselves in as far as implementing the framework is concerned, nothing, absolutely nothing justifies actions or value judgments that have the effect of undermining the rule of law and demeaning a sector of the society.