



## **Refugees and asylum seekers: Finding a better way**

Contributions by  
notable Australians

Editors Bob Douglas and Jo Wodak

---

---

The essays in this volume express the views of the individual authors and do not necessarily represent the views of Australia21.

This volume is being widely distributed as a prelude to holding a roundtable of stakeholders and policymakers in 2014, which will explore the feasibility of bipartisan support for a fresh Australian approach to refugees and asylum seekers.

Refugees and asylum seekers: Finding a better way

Contributions by notable Australians

Editors Bob Douglas and Jo Wodak

Published December 2013

Australia21 Limited

ABN 25 096 242 010

ACN 096 242 010

Email: [office@australia21.org.au](mailto:office@australia21.org.au)

Web: [www.australia21.org.au](http://www.australia21.org.au)

ISBN 978-0-9873991-6-8

---

# Contents

---

Preface. Bob Douglas and Jo Wodak	2
My name is Widyan: I am a refugee. Widyan Al Ubudy	5
Leading on protection. Jane McAdam	11
Election aftermath: Where to now on asylum seekers and refugees? John Menadue	15
Asylum seeking: Not a new problem, but needing new solutions. Chris Barrie	19
People like us: Personal reflections. Trevor Boucher	23
Asylum seekers: The broader policy context. Paul Barratt	27
Asylum-seeker drownings on Australia's border protection watch: An issue of national decency. Tony Kevin	32
Why we need an end to mandatory detention. Gillian Triggs	38
My brothers and sisters in boats. David Maxwell Gray	42
Boats: What to do? A practitioner's viewpoint. Erika Feller	45
Collateral damage responses when policy causes harm. Louise Newman	51
Ethical issues in the asylum-seeker debate. Simon Longstaff	56
Both sides of politics are failing us and the asylum seekers: There is a better way. Julian Burnside.	59
Asylum seekers: Does our approach reflect our character? The lessons that must be learnt. Mick Palmer	63
A win-win welcome. Anne Kilcullen	67
Ten incremental steps to transform refugee protection in the Asia-Pacific region. Paul Power	71
Is there a fair, just and effective policy approach to asylum seekers? Frank Brennan	75
Beyond the magic bullet: Why the asylum-seeker problem is like the drug problem. Desmond Manderson	80
An inclusive vision. Arnold Zable	85
Who we are not is not who we are: Moving on from Australia's exclusionary approach to citizenship. Kim Rubenstein and Jacqueline Field	88
Who's jumping the queue? Fairness and the asylum-seeker debate. David Corlett	92
A place of refuge: Responses to international population movements. Arja Keski-Nummi	96
There is a better way. John Hewson	101
Why the need for a compassionate policy on refugees? Besmellah Rezaee	105
Acknowledgements	111

---

# Preface.

## Bob Douglas and Jo Wodak

---



*Emeritus Professor Bob Douglas (left) AO is a retired public health academic, who was a Founding Director of Australia21 and its first Chair.*

*Jo Wodak (right) works in the NSW criminal justice system primarily in the area of adult basic education. She has degrees in literature and the history and philosophy of science.*

### The current dilemma

The essays in this volume are in response to Australia21's invitation to people who have been actively engaged in various aspects of asylum-seeker policy to take a fresh look at the current dilemma in its global, regional as well as national contexts, and suggest practical ways in which the Australian community might respond more humanely, more sustainably and more responsibly to it.

Contributions were sought from a wide range of Australians - legal experts, ex public servants and advisers, international and local agency representatives, ethicists, church representatives, academics and researchers, concerned members of the public, and refugees.

In soliciting these contributions, Australia21 did not prescribe any particular opinion or critique. However it is striking that not one of the contributors expresses support for either the Labor or the Coalition Government's position on and treatment of asylum seekers or their response to and representation of the problem of asylum-seeking boat arrivals.

Instead there is a striking uniformity of view that current policies are inhumane, uneconomic and unjustified in terms of international, national and societal obligations, and that core values of fairness and compassion have been sacrificed for political expediency. In the process there has been a demonisation of asylum seekers arriving by boat as opportunistic queue jumpers

Many perspectives on Australia's 'asylum-seeker problem' are discussed in what follows. Some writers focus on Australia's 'problem' as grossly inflated in comparison with the global reality of tens of millions of desperate people in flight from persecution, conflict and war, holed up in camps under usually miserable conditions with no hope of return. Some focus on our policies of mandatory detention and off shore processing in relation to international law, various international agreements, and with respect to human rights. Some stress the need for regional strategies and cooperation if a sustainable solution is to be achieved that takes into account the priorities and capacities of neighbouring countries such as Nauru and Papua New Guinea as well as Malaysia and Indonesia.

---

Others discuss the economic benefits especially to rural and regional Australia of an approach which would allow community placement and permit refugees to work while their claims are assessed.

These critiques and suggestions are important and should be considered in a non-partisan spirit by the Australian people. Through open discussion and dialogue and through allowing the voices of the refugees themselves to be heard, as well as the politicians, the experts and the public, we can surely move towards a solution that is both pragmatic and fairer to all.

## **The global context**

Of course the key underlying problem is that the world is already overpopulated and our human numbers are still growing. There is now a massive imbalance between the carrying capacity of the planet and the demands which humans are making on it. The consequences include a change in the climate and global temperature, a decline in arable land for the production of food, increasing inequality both within countries and between them, wars over resources and access to land, oil and water, and clashes between religious cultures.

All of this is happening during the era of globalisation, with increasing communication and interdependence between what happens in one country and all of the others. We are no longer an isolated independent State. We are part of a global community and Australia is now a member of the United Nations Security Council.

It is little wonder that as less fortunate societies than ours break down, the people forced to flee their home countries will view Australia as the best option on offer and they will go to extreme lengths to get here.

By nearly every parameter we can name, Australia appears from the outside an oasis of space, peace and prosperity in a global sea of overcrowding and increasing trouble. We have one of the highest standards of living and life expectancies in the world, with about 0.3 per cent of the world's human population occupying about 5 per cent of the world's land mass (much of it admittedly uninhabitable). We have survived better than any other nation the recent global financial crisis, have a stable democracy, and are free of wars and relatively free of racial, religious and ethnic conflict.

We live mainly in coastal cities and have low unemployment rates and strong education participation rates. Our natural rate of population growth is small but our population is growing at one of the highest rates in the world because of an ingrained belief by the people who control our political and economic decisions that growth in the economy and population growth through immigration will continue to be the answer to long-term prosperity, notwithstanding the huge biophysical constraints that now operate in a world of 7.1 billion humans.

Immigration has unquestionably served Australia well in the decades since the Second World War and our nation has benefited enormously from the skills and cultural diversity that immigrants, many of them refugees, have brought to our shores.

Elsewhere, unchecked human population and economic growth is almost certainly moving the world towards some kind of civilisation collapse, probably within the lifetimes of our children or grandchildren. Even in spacious Australia we are already living well beyond our sustainable ecological means. The numbers of people wishing to relocate to Australia will almost certainly continue to climb massively in coming decades.

---

## The need for a new approach

It is understandable that those of us who live here already want to exercise control over ‘who comes to live in our country and on what terms’, to paraphrase John Howard’s highly effective election speech in 2001.

Therein lies the dilemma. It is the reason that boat arrivals have become so politicised in recent years and why our major political parties have been engaged in a ‘race to the bottom’ in their determination to deter asylum seekers from paying people smugglers to take the risk of crossing the seas in leaky boats.

Asylum seekers are people like us who have been less fortunate than we have been in their place of birth. They are part of the human family and fellow residents of one overstretched planet. That being said, there is no simple solution for dealing with this ongoing problem of more and more people in desperate circumstances wanting to make Australia home.

Our history has depended upon migrants, refugees and convicts. In earlier periods we prided ourselves on egalitarianism and a fair go for the underdog. Currently, we admit about 200,000 migrants annually of whom 13,750 enter under our humanitarian program. We also accept, preferentially under various migration categories, skilled people from developing countries which can ill afford to lose them. And while we cannot accommodate even a small fraction of the people who will want to come here as problems elsewhere increase, there is a wide view in the community that we must devise a process that is fairer and more humane than the one we have been using in Australia in recent years.

Hence this volume which seeks to broaden the national conversation beyond ‘stopping the boats’.

The views expressed in these essays are the views of the individual authors and do not necessarily represent the views of Australia21, a non-profit body that seeks to develop new insights into complex issues important to Australia’s future. Our ambition in publishing them is to generate a broader conversation in the community about more humane possibilities.

Our plan is that in 2014, after the release of this volume, Australia21 will be in a position to convene a roundtable of stakeholders and decision-makers to examine the feasibility of a fresh new bipartisan approach.

---

# My name is Widyan: I am a refugee. Widyan Al Ubudy

---



*Widyan Al Ubudy is currently the radio host and producer for SBSPopAraby. When not on air, Widyan is also a Community Engagement Project Coordinator for the Community Relations Commission where she works with multicultural and multi-faith youth to maintain community harmony and diversity across NSW. Widyan has just completed her honours thesis on Muslim women media advocacy post 9/11 and is currently working on her first book based on the plight of refugees based on her volunteer work at Villawood Detention Centre with a special focus on the refugee family she helped bring into Australia from Iraq.*

---

## Abstract

For far too long we have become desensitised to the cruel treatment of asylum seekers. The political point-scoring discourse of 'boat people', 'queue-jumpers' and 'illegals' continues to propagate fear and hostility in the Australian mainstream community towards migrants. We have lost perspective on who these people really are and what they have to offer. These so called 'illegals' have faces, names, families, hopes, dreams and aspirations just like you and me. It's time we acknowledged them for who they are as fellow members of the human race. This is my story of migration and one man's desperate determination to change his family's life forever.

## Refugees are real people

My name is Widyan. I am a refugee. My parents were refugees too. The difference is that I was born in a refugee camp and they weren't.

In my world, it is hard to imagine there being more than one degree of separation between any one person and another who is not a refugee. Almost every one of us, regardless of how ordinary we may seem, has an extraordinary story to tell. Many of the stories remain locked up in distant memories or behind psychological barriers built up over years - trying to put pain and suffering out of mind. But the stories and the history are there, regardless.

My parents were born and bred in Iraq's holy Shiite cities of Karbala and Najaf. They were married in July 1983. At the time my father was a soldier, conscripted into the Iraqi army, and serving as a communications officer in the war that was taking place with Iran at that time. When Saddam Hussein invaded Kuwait both my mother and father knew it was inevitable that my father would be called up to join the army again.

They made the heart-wrenching decision to leave the country that had been their home for generation after generation of their forebears and to leave their extended family, perhaps never to see them again. One night as the sound of gunshots and artillery fire echoed across

---

Najaf, my mother, heavily pregnant with me, along with my father and my three older siblings, secretly travelled to the border of Iraq and then crossed into Saudi Arabia. Their escape from Saddam Hussein's regime changed the course of my family's life forever. We stopped being citizens and instead became statistics. We became refugees.

Rafha is in the north of Saudi Arabia. It is desolate. The dusty orange terrain merges into crystal clear, blue skies. As the sea of ragged tents meets your gaze you realise that the refugee encampment stretches beyond the horizon. The tents have been home for hundreds of thousands of Iraqi refugees now for more than 20 years of Middle East wars. Those tents provided the first roof over my head - if you could call it that. That was where, two months after my family arrived in Saudi Arabia, I was born. It was July 1991.

The occupants of Rafha's infamous refugee camp are referred to by the Saudi authorities as 'guests' rather than refugees. This means that they are technically not entitled to any of the legal protections that are guaranteed by international law to refugees. Living in Rafha wasn't easy for my family. Constant dust storms, searing heat, the inability to get a job and the threat of never working again, together with the responsibility of caring for and educating four young children, was like torture for my parents. Nevertheless, we survived the ordeal. For five years my family, along with about 5,000 other Iraqis, eked out an existence thanks to food rations provided by the Saudi Government. Every two days my parents received food that would last us for exactly two days, and every three months they would receive 100 dollars in cash, distributed to every refugee family by the Saudi Government. It was nowhere near enough to care for a growing family, but it helped us make it through.

In early 1995 a group of Australian humanitarian workers who specialised in helping identify refugees eligible for migration visited Rafha. My family was one of those fortunate enough to be interviewed. After a few months of waiting, my parents were told that we qualified. We would be able to settle in Australia.

We found ourselves flying across the world, heading to the place that would become our new home: Sydney, Australia. My parents eventually found a house for us to live in. It was in Auburn. My mother and father were happy for the family to finally be safe and sound, but devastated to be so far away from their brothers and sisters and uncles and aunts, and from the country that still runs through their blood. Iraqis are incredibly passionate about their families, their culture and their history. It seemed to them that Sydney airport, and the sight of departing planes, would be the closest they would get to their lifelong friends, and their brothers, sisters, aunts and uncles - for the rest of their lives.

By 1999 my father had saved enough money from his job as a mechanic to put down a deposit on a brick house that overlooked the local public school. The house was just big enough to accommodate our growing family. There were now six of us kids: me, three sisters and my two brothers.

Now thirteen years later we still live in that medium-sized brick house, twenty minutes from Auburn, overlooking Smithfield public school. The house has an extra room or two that it didn't have when we first moved in. There isn't a day that goes by when I don't remember the struggle that my parents and I went through to live the life we now do.



---

When I see the plight of asylum seekers, maybe it resonates for me in a more personal way because of my personal history, but I feel sure that anyone with the smallest amount of human feeling and emotion will feel some vestige of empathy if they read just one story of just one person. So I want to share with you a story and hopefully this story will resonate with you. You might not have lived through the experience of these people, you might not have felt what they have felt, but remember, the only thing that separates you from them is that you were born in a different country to them, you come from a different race and probably have a different religion.

This then is my perspective on asylum seekers. You won't find this story in the news. You won't hear it at press conferences. You won't hear the politicians telling you about the lives of these human beings, because they hate to allow things to become personal. The politicians and the shock jocks keep telling us why our armed forces were and are in Iraq or Afghanistan, to liberate the people from their oppressive Governments. The refugees from Iraq and Afghanistan just want to be free, but some people are freer than others.

I walked through the metal detector and past the security doors and through a gated barbed wire fence. I clutched at my security wristband. It told me that I was number 35. As I entered for the first time, I knew I was about to experience something that few people who talk about refugees actually experience. I was about to find out what it feels like to be on the inside of one of the most notorious detention centres in the country - Villawood.

One man was standing in a corner with his eyes cast down on the floor in front of him. He didn't seem to want to communicate with anyone and clearly didn't want to make eye contact. I wondered whether he would consider talking to me. I cautiously approached him and started by asking where he had come from. Without altering his downward gaze he told me that he was from Iraq.

I told him that I too was an Iraqi, even though I had actually never set foot on Iraqi soil. He looked up and for a moment his brown eyes flickered as he briefly looked into my eyes. It was as if a flashlight was struggling to come to life. Finally the light came on. He raised his head and then made proper eye contact. I found myself being ushered to a nearby seat.

Immediately he began to talk. 'My name is Jamil,' he said.

'Why are you here? I mean, how did you end up here?'

He smiled and sighed and said, 'Where do I begin?'

Jamil began to talk quietly and passionately. He told me how he missed his home. 'I have been here for over two years. I remember being there, before being here: the days when you could feel safe in Iraq, when my wife could go out at night and visit her friends, when my children could go to school – without us fearing for their safety,' he reminisced. 'Now my country is destroyed and I'm trying to find a place where my family can be safe.'

---

The 2003 invasion was not alone in bringing about sectarian conflict, but it was concurrent with over 4 million Iraqis becoming instantaneous refugees. Many now reside in Jordan and Syria while others, like Jamil, fled without papers. They went to Australia, the US, the UK and Canada. Many experts suggest that since 2007-08, the peak of the war, the number of displaced Iraqis has reached well over 4 million. This is the highest number of refugees the Arab world has seen since the 1948 Palestinian exodus. The United Nations High Commissioner for Refugees (UNHCR), which has worked for over 50 years in humanitarian aid work and the processing of refugees, stated that ‘the magnitude of this crisis is staggering’. In 2007 Iraqi refugees faced extreme hardship, with many forced to live at the margin of survival, just like Jamil.

Jamil’s story was perhaps indicative of many. ‘One day I returned home and found a paper on the door. It read, The blood of the owner of this house is needed! I was certain that they were rebels who had left me a message and had previously worked for the former Government who had arrested me for a few days for not complying to fight alongside them. I actually was quite rich before the war, I owned my home. I had a thriving business and a family.’ He looked at his hands and shook his head. ‘When you read something like that message, you don’t have any other choice but to try to take your family to safety. Your family’s safety is something you can’t compromise.’

Jamil decided to flee the country and seek refuge in Australia after moving his family to a different city. He told me about some of his travails as a refugee, telling me how he rescued a man from the sea when their boat capsized on the way to Christmas Island. ‘The fear in all of us was indescribable. I saw a young guy who was really struggling, who clearly didn’t know how to swim. He was near me, so I swam over to him to try to help. I grabbed

his shirt and got his head above water. I managed to get him to where some pieces of wreckage from the boat were floating. We both held on until we were both saved! We looked death right in the eye that day. When you go through something like that you remember why you risked your life, although it’s scary you realise that the risk is still worth it to come here.’

As an Australian who had herself been born a refugee I had to ask myself, Was Jamil incredibly brave or unbelievably foolhardy?. It made me think of how patient and disciplined my own father and mother had been, and it made me wonder at what point my own father would have broken, and become another Jamil. My reflections were interrupted by Jamil. ‘I’m still here. It’s hard to wake up in the morning knowing I am in jail separated from the world and from life by razor wire as if I have committed the worst offence imaginable.’

Jamil told me how he had used most of his life savings to pay a people smuggler to get him out of Iraq. He told me of the additional money his wife had spent to get the documentation evidence to prove his story to the case manager appointed by the Australian Government. I thought about the concept of people smugglers and their role in the life of refugees like Jamil. Along with ‘boat people’, ‘people smugglers’ is a phrase at the forefront of the media’s attention. They are described as the worst kind of criminals. But aren’t they just another manifestation of what happens when you break obligations under International law? For people like Jamil, they are essentially lifesavers.

---

Taking a pragmatic view, the reality is that people smugglers are assisting refugees in a fight for a better future. People like Jamil are willing to sacrifice everything to ensure the protection of their families. Rather than realising this reality, it seems as if Australia is lost in a political conundrum where the fear of being ‘inundated with refugees’ is producing a mentality that has become an illness that cripples our minds and hardens hearts. We lose our sense of compassion for them and we lose it for each other too.

‘I feel like I’m fighting a lost cause. This country has a reputation for being good to global citizens.’ Global citizen, I thought. Yes, this man was a global citizen, a citizen that a developed first world nation like Australia has a human rights responsibility to help, considering Australia’s contribution to the plight of Jamil’s country. After all, I thought, regardless of how Australia might be trying to contribute to the peace, first it contributed to the war.

As I looked at his weary face, his eyes silently pleaded to me in a way that I was powerless to respond to. I asked Jamil why he chose Australia as his destination. He smiled and shook his head. ‘Someone once told me this country is free, just and fair. I’m starting to think that person was crazy.’

Of course, Australia is all those things when you are here, but when you come by boat the authorities forget all too often their legal responsibilities. The media adopts a simplistic view of this incredibly complex topic, and this leads directly to racial dissonance.

Asylum seekers do not opt for the boat option because it is the inexpensive way to travel – not at the going rate of \$5,000 to \$10,000 per person. The reason why these people risk their life and future is simple, they have been given no other choice. They could quite possibly afford to come by plane, but that would require formal travel documentation. Formal documentation is something that the country they are escaping persecution from is not willing to grant them, as Jamil is discovering.

Courtesy of the Government and the media’s petty obsession with boat people, those who arrive by plane go almost unnoticed. The 2010-11 Asylum Trends report released by the Immigration Department stated that only 30 per cent of Chinese asylum seeker claims and 8 per cent of those made by Indians were accepted, the majority of whom arrived by plane. The largest number of nationals that qualified as genuine refugees according to the Australian Government and who were accepted were Afghans, reaching 89 per cent acceptance rate in 2011. For Iraqis the success rate was 90 per cent and for Iranians 94 per cent. These figures speak volumes but yet are not reflected in the Villawood detention centre because it is Afghani, Iraqi and Iranian refugees who remain locked up, and treated as criminals.

This stark contrast between government figures and the harsh reality is a contradiction in Australia’s legal system and an illustration that this country’s failure to comply with basic human rights is costing people their freedom, time, sanity and sometimes life.

---

In August 2012, Jamil was released from the Villawood detention centre. He was given legitimate refugee status. I realised that the only thing that was going to truly make Jamil happy was for his family to be by his side so that he could start his life over. After his release, Jamil and I faced a one-year battle to bring his family to Australia. After countless meetings, presenting various documents, thousands of dollars and even Jamil returning to Iraq, he and I were successful in bringing his family to Australia. It's been two months since they settled in Sydney. Although they continue to face hardship, Jamil had finally proved that he was genuine in his quest for the search of a better life for his children. He had proved the Australian general public wrong.

Jamil's story, until this day, remains with me. Maybe it's because he is Iraqi like me. Or maybe it's because he is a refugee and I was one too. But when I think of Jamil, and he speaks of his family, it's as if I am hearing my own father telling us our story of migration to Australia. I know my father did everything in his power, along with my mother, to ensure our safe arrival to Australia. Like Jamil my father knows all too well what it's like to leave your native country while it is at war. He wanted to save his family from poverty and corruption in hope of a better life. That is all Jamil wanted too. It's a feeling that will remain with Jamil, my father and with me, forever.

The Universal Declaration of Human Rights states under article 1 that all human beings are born free and equal in dignity and rights. Article number 4 states everyone has the right to life, liberty and security of person. Article number 5 states no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 9 states that no one shall be subjected to arbitrary arrest, detention or exile. And finally article number 14, section 1, says that everyone has the right to seek, and to enjoy in other countries, asylum from persecution. These are just some of the rights Australia is party to, and if we don't honour our agreement then the only logical conclusion is that we are breaching them. It is an irony that makes me realise that by telling these refugee stories I can hold up my head and be proud that I am calling those in authority to account, so that we can all remember that we have to earn the right to be proud to be called an Australian. It is not automatic.

---

# Leading on protection.

## Jane McAdam

---



*Jane McAdam is Scientia Professor of Law and the Founding Director of the Andrew & Renata Kaldor Centre for International Refugee Law at the University of New South Wales. She holds an Australian Research Council Future Fellowship, and is a non-resident Senior Fellow at The Brookings Institution in Washington DC and a Research Associate at the University of Oxford's Refugee Studies Centre. Professor McAdam serves on a number of international committees and has undertaken consultancies for UNHCR and various Governments on issues relating to forced migration and international law.*

---

### Abstract

**How do we create an asylum policy that reflects Australia's international legal obligations and is acceptable to the general public? This essay argues that strong, ethical leadership can shape and shift ideas by educating the community about the complexities of forced migration, and appealing to the Australian ideal of a 'fair go for all'. International law provides both a legal and a moral compass – for our leaders to respect the protection commitments that previous Governments assumed in good faith, and for the rest of us to call our leaders to account.**

In a country as large, wealthy and multicultural as Australia, it is incongruous that the treatment of asylum seekers has become a national preoccupation. The discussion centres not on rights or responsibilities, assistance or protection, but on 'stopping the boats' and 'smashing the people-smugglers' business model'.

As in many countries, asylum seekers are an easy target for anxieties about national security, unemployment and demographic composition. They cannot vote, so their voices are marginalised in political debate, and as they are increasingly moved outside the Australian community into immigration detention in remote offshore processing centres, the divide between 'them' and 'us' is reinforced.

At the heart of Australia's hardline approach to asylum seekers is a fundamental misconception – the assumption that draconian measures will deter desperate people. And on top of such flawed logic, many politically expedient myths have been built.

The foundations were put in place by the Hawke and Keating Labor Governments, with the creation of mandatory detention in 1992 (1). The Minister for Immigration at the time explained that the Government was determined 'that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community' (2).

---

An unfortunate confluence of events in 2001 – the Tampa incident and 9/11 – enabled the then Coalition Government to exploit public anxieties further.

It created a rhetorical – and, ultimately, legislative – divide between the rights of so-called ‘genuine’ refugees, resettled by Australia from camps and settlements overseas, and those arriving spontaneously in Australia, typically by boat, described variously as ‘illegals’, ‘queue jumpers’, and ‘unauthorised arrivals’.

Since that time, politicians on both sides have played up the idea of the ‘good refugee’ who waits for resettlement, and the ‘bad refugee’ who ‘jumps the queue’. International law makes no such a distinction – a person either has a well-founded fear of persecution, or does not.

A refugee’s chance of resettlement does not depend on how long he or she has been waiting, but on factors such as vulnerability, suitability for resettlement, countries Australia deems to be ‘priorities’ for resettlement, and ‘the views of individuals and organisations in Australia conveyed during community consultations with the Minister for Immigration and Border Protection’ (3). The resettlement process operates more like a triage system in which needs are constantly reassessed. Someone who arrives today with an acute resettlement need may be prioritised ahead of someone who has been waiting for many years (4). There is also no resettlement guarantee – less than one per cent of refugees are resettled annually (5).

Nevertheless, this line between the ‘invited’ and the ‘uninvited’ has facilitated Australia’s elaborate construction of such things as Temporary Protection Visas, mandatory detention, migration excision zones, and offshore processing arrangements with Nauru and Papua New Guinea.

All these policies breach Australia’s international human rights obligations in some way.

In addition to undermining the humanitarian object and purpose of the Refugee Convention, they also violate concrete legal obligations – such as the individual right to seek asylum from persecution (and the attendant right not to be penalised for arriving without a visa), the right to be free from cruel, inhuman or degrading treatment, the right not to be arbitrarily detained, the right to non-discrimination, the right to a family life, and the right to adequate housing, work, education and health care (6).

In the absence of a domestic bill of rights or a regional human rights treaty, Australian courts have little ability to review such breaches. International human rights obligations are only justiciable in Australian courts to the extent that they are reflected in national law. This has facilitated policies in this country that would be unimaginable in the European Union and Canada, whose robust human rights protections would provide legal recourse against such violations.

The Australian Government’s assertion that it has an electoral mandate to maintain a hard-line policy on asylum is based on flawed logic. This is because any such mandate has been procured by a misrepresentation of the asylum issue by politicians on both sides. Instead of taking a principled and educative stance on asylum, explaining the complexity of forced migration and why Australia has protection obligations to people at risk of persecution and other forms of serious harm, our leaders have relied on emotive language and images to exploit people’s fears and insecurities. In doing so, they have conjured up the idea that Australia is facing a ‘border protection crisis’ that can only be combatted with ‘the discipline and focus of a targeted military operation’ (7).

---

To put this into a global context, in 2012 Australia received 17,202 asylum seekers by boat. While this was our highest annual number (8), it represented only 1.47 per cent of the world's asylum seekers (9). In the same period, we accepted 190,000 migrants – not refugees – through our skilled and family migration scheme (10). The public perception is that asylum seeker numbers are much higher than this, with many conflating Australia's migration and humanitarian programs.

Significantly, it would not be difficult to showcase the very positive contributions that refugees have made to Australia – something that we do not hear nearly enough about. In 2011, the Immigration Department published a report it had commissioned from Professor Graeme Hugo which tracked the economic and social contributions of first and second generation refugees in Australia since 1975 (11). The study revealed that on average they had higher levels of education than other migrants and the Australian-born population; greater entrepreneurial qualities (five of the eight billionaires in Australia in 2000 were of humanitarian-settler background); and often higher levels of participation in both paid and volunteer work. In other words, refugees are some of Australia's most productive and successful people, and make a significant economic and social contribution to this country.

As one of the world's most peaceful, multicultural and upwardly mobile countries, Australia clearly has the capacity to accommodate and celebrate diversity, and foster opportunities. But ironically, Australia's relative political stability and affluence mean that few of us have any conception of what it means to fear persecution or other forms of serious harm. Precisely because the asylum issue has such a negligible impact on most people's everyday lives, we can choose to remain ignorant about the issue. And the more that asylum

seekers are made to disappear from our community, the less chance we have to get to know them as neighbours, colleagues or friends. As this happens, the opportunity to develop greater empathy and understanding also disappears.

It is often said that a quintessential Australian value is 'a fair go for all'. This sentiment embraces concepts such as equal opportunity, mutual respect, tolerance, and human dignity, all of which lie at the heart of international human rights and refugee law. Responsible leadership requires stepping up to educate, to inform, and to appeal to our best selves. In times gone by, our political leaders have stood resolutely against considerable public support for such things as torture (of suspected terrorists) or the imposition of the death penalty (for convicted killers), on the basis that Australia, as a civilised, democratic society, will not engage in such practices – and that to do so would be in breach of our international legal obligations. The same kind of leadership is needed now on asylum.

---

## References

1. Migration Amendment Act 1992 (Cth)
2. Commonwealth, Parliamentary Debates, House of Representatives, 5 May 1992, 2370 (Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs) (Migration Amendment Bill 1992, Second Reading Speech) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1992-05-05%2F0031%22>> accessed 5 February 2013
3. Department of Immigration and Border Protection, 'Fact Sheet 60: Australia's Refugee and Humanitarian Program' (November 2011) <<http://www.immi.gov.au/media/fact-sheets/60refugee.htm>> accessed 29 October 2013
4. Refugee Council of Australia, 'Myths about Refugees and Asylum Seekers' (February 2011) <<http://www.refugeecouncil.org.au/f/myth-long.php>> accessed 27 September 2013
5. UNHCR, 'Resettlement' <<http://www.unhcr.org/pages/4a16b1676.html>> accessed 17 September 2013
6. See e.g. Universal Declaration of Human Rights, arts 2, 3, 5, 7, 9, 12, 14, 16, 23, 25, 26; Convention relating to the Status of Refugees, arts 3, 17, 21, 22, 24, 31; International Covenant on Civil and Political Rights, arts 2, 6, 7, 17, 23; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts 3, 16; International Covenant on Economic, Social and Cultural Rights, arts 2, 6, 7, 10, 11, 12, 13; Convention on the Rights of the Child, arts 2, 6, 16, 24, 28, 37
7. Liberal Party of Australia, 'The Coalition's Operation Sovereign Borders Policy' (July 2013) 2, <<http://www.nationals.org.au/Portals/0/2013/policy/The%20Coalition%E2%80%99s%20Operation%20Sovereign%20Borders%20Policy.pdf>> accessed 24 September 2013
8. Janet Phillips and Harriet Spinks, 'Boat Arrivals in Australia since 1976' (Research Paper, Australian Parliamentary Library, updated 23 July 2013) 22 <[http://www.aph.gov.au/about\\_parliament/parliamentary\\_departments/parliamentary\\_library/pubs/bn/2012-2013/boatarrivals](http://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/2012-2013/boatarrivals)> accessed 3 September 2013
9. Asylum Seeker Resource Centre, 'Australia vs the World' (July 2013) <<http://www.asrc.org.au/pdf/australia-vs-rest-world-refugees-asylum-seekers.pdf>> accessed 24 September 2013
10. Department of Immigration and Border Protection, 'Migration Program Statistics' <<http://www.immi.gov.au/media/statistics/statistical-info/visa-grants/migrant.htm>> accessed 4 October 2013
11. See Graeme Hugo, 'A Significant Contribution: The Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants', Department of Immigration and Citizenship, May 2011



---

# Election aftermath: Where to now on asylum seekers and refugees?

## John Menadue

---



*John Menadue AO is a Fellow of the Centre for Policy Development. He was Secretary Department of Immigration and Ethnic Affairs 1980-3. He was also Secretary, Department of Prime Minister and Cabinet under Gough Whitlam and Malcolm Fraser, Ambassador to Japan and CEO of Qantas.*

---

### Abstract

**Despite the draconian crack-down on boat arrivals by the major parties, there are still some important areas that we could address to help asylum seekers and refugees in their desperate plight. These include increasing the intake; a re-think on offshore processing; alternate migration pathways including orderly departure arrangements; allowing asylum seekers in the community on bridging visas to work; and progressively abolishing mandatory detention, which does not deter. We have a duty to do what we can despite the toxic political environment.**

### Where to now?

Since Tampa in 2001 asylum seekers and refugees have become a divisive public issue. In that debate, boat arrivals have been the most contentious issue of all.

Just before the September election the Rudd Government announced that no asylum seeker coming to Australia by boat would ever receive refugee status and permanent residence in Australia, but would be transferred to Papua New Guinea or Nauru. This hard-line policy, with some additional punitive measures in Operation Sovereign Borders, has been adopted by the Abbott Government.

The number of asylum seekers coming by boat fell dramatically in the last weeks of the Rudd Government. That trend has continued. The net result is that the gate has been very nearly closed for boat arrivals for the foreseeable future, but it will never be shut completely.

Despite that, asylum seekers will continue to come by air. Presently 7,000-8,000 asylum seekers come to Australia by air each year. Invariably they state their intention to come as a student, visitor or working holiday-maker. They then get issued with a visa, enter Australia, and apply for refugee status. The chief source country for air arrivals is China, and about 40 per cent of all air arrivals gain refugee status.

---

This shows that the toxic political debate is only about the mode of arrival and we are obsessed only by boats. However, as the gate for asylum seekers coming by boat closes, more will seek to come by air.

Against this unfortunate background where should we now try to focus the debate? Can we find some ground where effective and humanitarian policies can still be pursued? How can we blunt the edges of cruel policies?

Despite the setbacks of recent years I still think there is quite a lot that we can try and do, difficult as it will be in the present political climate.

We must change the political narrative with a positive message about persons facing persecution and their contribution to Australia rather than the demonisation and fear engendered since John Howard's days. This needs to come about through leadership across our community, not just from politicians. Polls suggest that boat arrivals do not rate highly against such issues as health and education but on their own they are a hot button issue producing a very strong and hostile response. As history shows, it is very easy for unscrupulous politicians and some media people to engender fear of the outsider, the foreigner, and the person who is different. We must keep trying to change the debate, and appeal to the more generous instincts of Australians.

The dialogue between the Government, including the Department of Immigration, and refugee advocates has been broken for a long time. We need a 'second-track dialogue' – involving government officials, civil society, NGOs and refugee advocates in the dialogue process. A more constructive role by refugee advocates is essential and with a Government prepared to listen.

Progressively we should increase the refugee and humanitarian intake. If we took the same number of refugees today that we took during the Indo Chinese program of the late 1970s and early 1980s adjusted for our population increase since then, we would now have an intake of about 35,000. The Gillard Government increased the intake to 20,000 a year but the Abbott Government plans to reduce it to 13,750. Having been frightened over border security, Australians may now feel more secure with the new Government in charge! As a result, they may now be more supportive of refugees that have been processed in a more orderly way offshore, particularly by the UNHCR.

Reluctantly, I have come to the view that the blanket opposition to offshore processing of asylum seekers has politically failed and with dire consequences for asylum seekers. A couple of years ago I welcomed with some reservations the agreement with Malaysia on transfers and processing. Unlike the Rudd Government's agreement with Papua New Guinea, the agreement with Malaysia was supported by UNHCR. On the contentious issue of offshore processing, the UNHCR in May 2013 issued a 'Guidance Note' on bilateral and/or multilateral arrangements for the transfer of asylum seekers. It emphasised that in any arrangement there must be effective protection. This encompasses (a) people given a legal status while they are in a transit country, (b) the principle of non-refoulement (people not being returned to the country from which they have fled), (c) people having access to refugee determination processes either within the legal jurisdiction of the State or by UNHCR, and (d) people being treated with dignity. What is important is not where the processing occurs, but whether it is fair, humane, efficient and consistent with the Refugee Convention.

---

The Malaysian Agreement was opposed by the Coalition, the Greens and almost all refugee advocate groups. It was an odd alliance! The failure of this agreement saw a threefold increase in boat arrivals within a few months. These arrivals rose to 14,000 in the six months to June 2013. The result of that large increase and with an election looming was the draconian agreement with Papua New Guinea.

In opposing the Malaysian Agreement many refugee advocates sided with Tony Abbott on ‘canings’ in Malaysia. It was quite novel to see Tony Abbott and Scott Morrison defending the human rights of asylum seekers. Tony Abbott gave the impression that he was not interested in stopping the boats but stopping the Government stopping the boats. This was consistent with what a ‘key Liberal strategist’ told the US Embassy in November 2009 - that the boats issue was ‘fantastic’ for the Coalition and ‘the more boats that come the better’ (reported in the Sydney Morning Herald 10 December 2010).

The agreement with Malaysia was also criticised because of the treatment of children. However children could never have been excluded from the arrangement or the boats would have filled up with children. They are called ‘anchors’ to haul in the rest of the family. Children do need protection through a guardian arrangement but the Minister cannot be both gaoler and guardian.

We should also pursue alternative migration pathways to discourage asylum seekers taking dangerous boat or other ‘irregular’ journeys.

The first alternate pathway is through Orderly Departure Arrangements with ‘source countries’ such as we had with Vietnam from 1983. Over 100,000 Vietnamese came to Australia under this arrangement. We must pursue Orderly Departure Arrangements with Sri Lanka, Iraq, Afghanistan and Pakistan. In both Iraq and Afghanistan we will have to bear particular responsibilities for our involvement in the wars in those countries, just as we did after the Vietnam War. An Orderly Departure Arrangement with Pakistan would probably have to be managed by UNHCR. Importantly, the Department of Immigration and Citizenship must anticipate future refugee flows from countries such as Syria and Egypt.

Secondly we should consider permanent or temporary migration in particular situations such as Iranians on 457 visas. Recent Iranian boat arrivals are mainly single males, well-educated and resourceful. With a population explosion in Iran and the sanctions biting hard, many want to leave. In the last 12 months the proportion of boat arrivals from Iran has doubled from 16 to 33 per cent. Iranians are by far the largest national group in immigration detention in Australia and we need alternative pathways to address their special needs.

Many asylum seekers in the community on bridging visas are not allowed to work. This is absurd. Work rights for all such visa holders are essential for reasons of human dignity and taxpayer cost. We should also review the ad hoc and confusing support arrangements for all asylum seekers living in the community.

We should progressively abolish mandatory detention. At the end of August 2013 there were over 11,000 people in immigration detention: 96 per cent were asylum seekers. At that time there were 1,700 children in some form of immigration detention. This is cruel and expensive.

---

There is no evidence that these policies deter, but politicians believe that they make them look tough. If we should have learned anything from successive Governments it is that punitive policies in immigration detention centres will result in riots, burnings, suicides and other self-harm. We will bear the human, social and financial costs of mandatory detention for decades.

Despite the heavy-handed crackdown on boat arrivals, there are still some important areas that we could address to help asylum seekers and refugees in their desperate plight. We have a duty to do what we can, despite the toxic political environment.

However we cannot manage these problems on our own. Regional cooperation is essential, not to shift the burden but to share it. That is why we need to work particularly with both Indonesia and Malaysia in cooperation with UNHCR in the processing and then the resettlement of refugees. Those arrangements will depend on trust as they will probably not be 'legally binding'. Whatever we do, there is no 'solution'. Refugee flows will always be messy. Desperate people will try and cut corners and they will not play according to our rules. However, we can do a lot better as we have shown in the past by successfully settling 750,000 refugees in Australia since 1945.

---

# Asylum seeking: Not a new problem, but needing new solutions. Chris Barrie

---



*ADM (Retd) Chris Barrie AC, former Chief of the Australian Defence Force, is now an Adjunct Professor at the Strategic and Defence Studies Centre of the Australian National University. He has interests in strategic affairs, leadership in complex and diverse organisations and engagement with young leaders of the future.*

---

## Abstract

**The problem of asylum seekers shows little signs of disappearing. The Australian Defence Force has been involved on border protection operation RELEX since 2001 but the work goes on. We may need a revised UN Convention on Refugees to deal with this widespread problem. This is work that Australia and Indonesia could usefully collaborate on and take a leadership role to implement the necessary changes.**

This is the century of the failed State and poor leadership. It has been apparent in the opening thirteen years of the 21st century that we have a dismal track record in dealing with both these issues in making the world a safer place. The international community has failed many people on this planet who live with war and indescribable social conditions, as well as poverty. Yet all this time the interconnected world we live in has promoted images of a better opportunity for those who are prepared and desperate enough to accept the risk of leaving their homelands to seek a more rewarding life elsewhere, especially for their children.

The imperative to find a better life has become the very foundation of the asylum-seeker problem that many OECD countries, including Australia, now have to deal with. In an ideal world, where human rights are fully respected and supported by international law, asylum seekers would be few in number, and they would not have become the present burdensome issue that policy makers have to deal with in most OECD countries.

No OECD country has a satisfactory answer yet for dealing with the problems presented by desperate asylum seekers who seek opportunities for themselves and their children in a secure situation. In addition, the urgency with which many asylum seekers act to bring about a change in their country does not allow for the orderly processing of immigration visas to a new country through normal government channels because of political and/or civil insecurities. Thus, it is this vision for a new life coupled with the desperation requiring urgent action that lays the foundation, and demand, for the people-smuggler business model.

---

It has been easy for the community in Australia to presume that Australia, alone, has this policy problem. Certainly the media report our difficulties over the policy issues in this way. But I hope we can understand that most developed countries in the OECD share the difficulty of deciding what to do. Moreover, future projections of the numbers of asylum seekers indicate this problem is not going to go away.

We also need to bear in mind what forces will come to bear on us over the coming decades as the population burden of the planet grows to a point beyond which we will not be able to sustain ourselves in the way we have over the past 110 years. As Australians, living in one of the wealthiest countries on the globe, we need reminding that assumptions that this state of affairs will continue ‘ad infinitum’ is dangerous complacency.

We are mostly an immigration nation. Apart from Australia’s first people, the rest of us were born of families who came to this country since 1788, or were born overseas and immigrated to Australia during the 20th and 21st centuries. Part of our complacent thinking is that we conceive of our security in terms of being surrounded by sea; we believe that the sea offers an impermeable barrier to any people that want to come here except through channels that we have authorised.

From any perspective the world population between now and 2050 is going to grow by about 30 per cent. This means that we will have to try and support an additional 3.5 billion people on the planet, and many of these people will want to take a share, a reasonable share, of the world’s resources in fostering better livings for their children.

I think that these few facts offer us little prospect that the stream of people who want to come to Australia to live after escaping from intolerable situations in their country of birth is going to dry up. This leads us to think about how to view the current position in Australia in respect of those people who seek entry but for whatever reason cannot wait for due processing in the normal course.

Since the institution of Operation RELEX in 2001, in which the Government decided to make a concerted effort to locate and interdict boats containing asylum seekers on their way to Australia, the media has had a field day. Up to this point we mounted sporadic efforts to find these boat people – often unsuccessfully. Thereafter the statistics on boat arrivals have varied significantly, but analysis should be telling us that there is almost no chance that desperate people will give up the effort to get to Australia by whatever means they can.

In July 2011 Dr Timothy J. Hatton of the ANU and the University of Essex delivered a paper on this subject to the Centre for Economic Policy Research in London (1). In 155 pages, ‘Asylum Seeking: Trends and Policies in the OECD’ dissects the available data and looks at where we should go next. It concludes with the rather obvious points that something needs to be done!

Hatton’s recommendations, inter alia, are:

‘We need to consider making the present UN convention more relevant to modern requirements. This may mean a totally new convention or radical changes to present convention. Either way, though, this becomes just another wicked problem to be solved and I see little heart in the leadership of the international community to do much about it right now.’

---

Hatton proposes the adoption of a new model for getting more acceptable outcomes and this model ought to be explored in detail for its application to today's circumstances.

My own opinion is that we need to address the core issues with a far-sighted view of the future – not one driven by the current election cycles. It is likely that the population burden of the planet will increase by over 30 per cent in the next four decades and bring huge shifts in the demographic makeup of the various communities that inhabit the globe. So the apparently intractable problems we are trying to solve today will only become more intractable if we do nothing about them, and these problems have the potential to bring serious security consequences with them if left unresolved.

I also want to offer a few remarks about my practical experience of the 2001 effort and make a few observations about the way in which the Government made its decisions.

Against a climate of very high security concerns before and after 9/11, the Australian Government saw Australia as confronted by a low level threat to its security over which the Government was apparently able to exert much control. I think Ministers were concerned about the public's perception of their leadership capabilities if matters were not taken in hand. This perception became an important driver for something to be done.

In implementing our operations in 2001 the principle that no one should lose their life in the conduct of operations was paramount. This principle was critical to providing Australian Defence Force personnel with the moral authority from which to operate in these very difficult situations. It also reflected the position that asylum seekers should not be construed as the 'enemy' in any way.

While conducting operations such as RELEX we recognised that these commitments would be a diversion from normal types of Defence Force war-fighting operations, and certainly in the post 9/11 climate there was plenty of that kind of work to be done. But the conduct of detection and interdiction operations like RELEX represented classic maritime operations that were carried out over centuries.

Concomitantly, what did concern me about a campaign to combat people-smuggling operations specifically was the apparent lack of a serious countervailing strategy to take their business away. We seemed focused only on enforcement and control to solve this problem, rather than finding an offsetting strategy that would put these criminals out of business. While I do know that the intake of processed immigrants was lifted as part of the deal at the time, I think little was done to give special help to those people who were desperate to get out of terrible situations in their homelands.

The Defence Force personnel that I commanded in 2001 and 2002 did a fantastic job in what sometimes turned into very trying circumstances, including the mix and match of operations in the Middle East, East Timor, Diego Garcia and concurrently on Operation RELEX. In my view all the qualities I saw on display in the operation to secure East Timor from militia terror were repeated here - young Australians all doing a fine job in the military supporting Australia's laws but also going about their duties with a great deal of compassion.

Now that time has moved on, my assessment is that little has changed in the regional dynamics for preventing people smuggling.

---

In looking at the current situation I wonder just how far we want to go in applying pressure on our near neighbour, Indonesia, to deal effectively with certain measures designed only to resolve Australia's problem with people smugglers and, consequently, those unfortunate people who want to seek sanctuary in Australia by making hazardous voyages here by unseaworthy boats.

Strategic analysis suggests to me that we should be working hard to try and deliver an effective engagement with Indonesia to enhance Australia's security over the next few decades. Yet these asylum-seeker issues have the potential to remain a significant irritant in the relationship, in the absence of a collaborative effort to deal with the issues on asylum seekers that face both countries. Australia cannot make its asylum-seeker solution a problem for other countries in our region.

On this basis I recommend that Australia and Indonesia collaborate on taking forward Hatton's proposals in the spirit of finding new ways for each country to manage asylum seekers in a more satisfactory way, including taking leadership in review of the international protocols under the present UN convention and recommending changes where necessary, and taking on a fair share of the burden in dealing with specific cases.

## Reference

1. Timothy R. Hatton, 'Asylum Seeking: Trends and Policies in the OECD', CEPR Report 14 July 2011.



---

# People like us: Personal reflections. Trevor Boucher

---



*Trevor Boucher's 36 years in the Australian Taxation Office was capped by 8 years as Commissioner of Taxation. Two years as Australia's Ambassador to the OECD followed. Reflecting the broad social concern inculcated through his upbringing and sensing that negative attitudes towards today's boat people spring significantly from notions that they are not like 'us', Trevor reflects on his journey and that of others of his generation.*

---

## Abstract

**Newcomers once seen as different, even sometimes as something of a threat, have fitted in and been part of the remoulding and enriching of Australia, becoming a significant component of the 'us' in 'people like us'. The author sees hope that today's boat people will come to be regarded the same way, noting that attitudes to our Indigenous people remain a 'work in progress'. The good thing is that Australian children of today do not see racial differences that previous generations did.**

## People like us

One of my great-great grandfathers on my mother's side was transported to Australia in the early 1840s for stealing lead from a chapel roof. The lash and Van Dieman's Land didn't reform him although marriage in Geelong to an Irish orphan helped – even though a couple of manslaughter convictions followed.

Not that I knew about this as a child born in 1936 in remote eastern Victoria. My family historian brother later extracted the information from a reluctant Mum (a crusading Salvationist's daughter). Her opinion was, 'We don't need to talk about that sort of thing'. With hardworking and upright Dad being a Methodist local preacher, the numerous local Catholics (of Irish origin) were to be treated with some reserve – not really people like us. For their part, they probably saw us as 'wowsers'. The hundreds of Chinese alluvial gold miners who once dug up the place had long gone. They didn't meet 'White Australia' prescriptions anyway.

During the Second World War years Dad returned from a visit to relatives in the Western District with stories of how a companionable Italian POW assigned to them sat at the family dinner table.

A few years later Dad employed on our farm one of the 'Balt' refugees then coming into the country. Although he spoke funny, he seemed to be a decent person to have around.

---

Both my parents had limited educational opportunities. In Dad's case it was through family and financial circumstances, in Mum's because she was a girl. They wanted their kids to have a better chance.

So they sent me off to boarding school in Melbourne in 1949. Boarders included Chinese 'boys' sent by the Missions from Rabaul, whose wartime internment by the Japanese had delayed and interrupted their schooling. They were great fellas; impromptu and illicit after-hours Chinese tucker in the boarding quarters provided a great introduction to different food. Another student was the daughter of a Jewish refugee doctor from central Europe.

Then came teenage hitchhiking around north-east Victoria. I was a bit of a problem for my mates. Being blonde and blue eyed, I looked too much like a 'reffo' from the Bonegilla migrant camp. The word was out that they, not being 'people like us', were a problem if you let them into your car. So I was hidden away from the edge of the road while the mates did the hitching.

Back at the school I was elevated to dormitory master. There were different faces in the streets as the mass immigration recruiting ground of Arthur Calwell (he of 'two Wongs' fame) was moved from northern European climes to the warmer Mediterranean, bringing in 'wogs' and 'dagoes'. A Greek kid arrived at the school with not a word of English, and was fluent within weeks.

By then the melting pot of the Snowy scheme was a great demonstration of how Australia could manage the welding together of many diverse cultures. The term 'New Australian' was coined in an attempt to get away from derogatory references to newcomers. It worked for a while.

Like others, I was caught by National Service Training requirements. I spent my twenty-first birthday with the Melbourne University Regiment in the bush at Puckapunyal, helping set up a jungle training shooting alley as part of national preparations against the 'coming hordes from the North'.

In late 1972, another brother escaped being Vietnam fodder. Malcolm Fraser later let in Vietnamese boat people, something I remember each time I visit my highly competent Vietnamese dentist.

Through most of my early life, people of Aboriginal descent were in the shadows around my old country market town, Bairnsdale, having come from nearby Lake Tyers Mission settlement. The lawyer in me found the Mabo decision when handed down by the High Court a road to Damascus, yet despite formal constitutional and judicial recognition, attitudes of other Australians generally remain apathetic towards dealing effectively with the continuing profound disadvantage that stands in the way of First Australians being 'people like us'.

My elder daughter Katherine has married Colin, an ethnic Chinese from Malaysia. They have three gorgeous and talented children - Nicholas, Hannah and Julia. What a gift!

A few years back I took Bryce, the elder son of my younger daughter Nicole, from Canberra to the cricket in Sydney. Going up the afternoon before, we walked down a Sydney suburban shopping street. I was struck by the fact that nearly all shop signs were in Chinese or another non-English language. There was scarcely a Caucasian face. I said to Bryce, 'Do you notice anything different around here?' He said he didn't and we walked on. A few minutes later he said he had spotted the difference. 'What is it?' Bryce's answer: 'They've all got I-pads.'

---

Some days on after-school pickup of his young blonde brother Trent, I meet the latter's best mate, a refugee kid from deep in the Sudan - someone with the best smile and the brightest dark eyes, the best rugby player in the team.

Waiting in the schoolyard each day are parents from all over the globe. Among them are modestly dressed mothers who I take from their dress to be Muslims. Happy kids mix with each other. At a well-attended school concert, kids dance as they sing a song in Arabic.

As I chat about these things on the way home Paige, sister of Bryce and Trent, chimes in from the back seat to say matter-of-factly that her school friend (from Indonesia) has been fasting all day because of Ramadan and will be away, at prayers, the next day. This leads me to reflect on how religious observance and practice were a major part of my upbringing, my Protestant Mum going to great lengths to ensure that we ate fish on Good Friday.

Travelling interstate, I can't remember the last time that the taxi driver from and to the airport was someone who once would have been described as 'dinki-di'. Someone has to do that tough and not greatly rewarding job, just as other immigrant people work hard at jobs that are not appealing to the 'mainstream'.

Names in today's telephone book, like names of players in sporting teams, strongly demonstrate a world-wide spread of family origins of Australians. On the other hand, when I indulge my pastime of attending country clearing-sale auctions, I don't see the faces of a typical urban Australian street, just faces reflecting the time of my childhood.

Last weekend a couple who've been friends for over 50 years visited. We got talking about the latest drownings of boat people - this time of people trying to get into Europe from the African continent and the Middle East. Leaders overseas have called for broad solutions. Our friends tell us that they are both offspring of boat people. Both sets of parents came by ship as '10 Pound Poms'.

It strikes me that ten quid is not much compared with the amounts desperate boat people are reported to be paying to 'people smugglers' or (dare I say) as air fares for a 'legal' arrival followed by a visa overstay.

The old Protestant/Catholic divide has gone but religious prejudice stays around. It seems funny that proposals for a Muslim school, a mosque and even recently a Muslim cemetery in the country still meet with NIMBY-type objections (for example, adverse traffic effects). Sadder still to me (now an agnostic) is that if one follows the claimed lineage of the Christian, Muslim and Jewish faiths, they all lead back to the same 'big fella'. Were I to choose to be buried, which denominational section would I be put in? Would it matter?

While my great-great grandfather came involuntarily to a continent then little changed from the way it had been managed by Indigenous people for centuries, succeeding waves of boat people - people seeking a better life - and their descendants have created a diverse society that is rightly envied elsewhere. People once feared as being 'different' have not only fitted in, widening the sense of 'us', but also greatly enriched Australian life.

My granddaughters, Gracye, Ellanor and Maddison, sing the National Anthem at morning line-up at their little country school at Numeralla. They are too young to catch the irony in the words that 'for those who come across the seas' we have 'bounteous plains to share'.

---

---

Australian society and its composition have changed and pressures for further change will not go away. Sitting on our island we would be both foolish and inhumane not to recognise that there are many more at-risk human beings beyond our shores who are desperate for somewhere to go and who, on any analysis, are simply people like us.

The great thing is that kids of today don't see the differences between people that my generation did.

The Australia of my childhood has changed. It is still changing. But is it better and does it hold more promise? You bet!

---

# Asylum seekers: The broader policy context. Paul Barratt

---



*Paul Barratt AO is a founding director of Australia21 and its current Chair. He spent most of his career in the Commonwealth Public Service, mainly in areas relating to resources, energy and international trade, culminating in appointments as Secretary to the Departments of Primary Industries and Energy (1996-98) and Defence (1998-9). He now runs his own consulting business. He has an Honours Degree in Physics from the University of New England and an Arts Degree (Asian Civilisation and Economics) from the Australian National University.*

---

## Abstract

This article reviews the nature rather than the specifics of the asylum-seeker issue in order to define the context within which the development of a successful approach must take place. The issue is a classic example of what social scientists call 'wicked problems'. Their complex, interdependent nature means that attempts at partial solutions will often lead to important unintended consequences. In seeking to frame a solution, policy makers need to bear in mind the vital interest Australia has in the maintenance and strengthening of the rules-based international system that has been developed since the Second World War, governing the use of force in relations between States, human rights, and the liberalisation of the global economic system.

## Wicked problems

Over the last thirty years there has emerged a substantial literature on so-called 'wicked problems'. This is the class of problems that may be considered highly resistant to solution, by contrast with so-called 'tame' problems, those that might be technically complex to solve but can be tightly defined and a solution fairly readily identified or developed.

The terminology was originally proposed by H. W. J. Rittel and M. M. Webber, both urban planners at the University of California, Berkeley in 1973. In a landmark article, the authors observed that there is a whole realm of social planning problems that cannot be successfully treated with traditional linear, analytical approaches. To the extent that they can be modelled mathematically the mathematics is non-linear: everything is connected to everything else, and there is acute sensitivity to initial conditions.

---

There is a good succinct summary of the characteristics of wicked policy problems on the Australian Public Service Commission website archive (1). In brief, these characteristics are:

- They are difficult to define clearly: different stakeholders have different versions of what the problem is, and there is usually an element of truth in each of those versions.
- They have many interdependencies and are often multi-causal. Often, there are also conflicting goals and objectives within the broader policy problem. This means that solving them requires coordinating inter-related responses, and accepting trade-offs between conflicting goals.
- Attempts to address wicked problems often lead to unforeseen consequences. This arises from the complex connections between the component elements of the problem.
- Often they are not stable: the nature of the problem is changing while the attempt is being made to fashion and implement a solution.
- They are socially complex and it is their social complexity that often overwhelms the efforts to solve them.
- They hardly ever sit conveniently within the responsibilities of one organisation.
- The solution to wicked problems involves changing the behaviour of some or all of the stakeholders.
- Some wicked problems are characterised by chronic policy failure.

A most important characteristic of wicked problems is that they have no stopping rule, that is, no mechanism for deciding whether to stop or continue a process on the basis of present and past events. Another is the fact that

every attempt to solve a wicked problem is a ‘one-shot operation’ because there is no opportunity to learn by trial and error; every attempt is significant.

In the case of asylum-seeker policy the disagreement about what the problem is is starkly obvious.

Both our major political parties attribute the ‘problem’ of asylum seekers arriving on our shores to the existence of people ‘smugglers’ (an odd term to choose because there is no intent, as one would expect with smuggling, to introduce anyone into the country unobserved – the whole point is for the asylum seekers on the arriving vessels to give themselves up to the competent authorities, have their claims processed, and acquire a right to remain in Australia).

I would suggest, however, that the causation is the opposite of what is being represented here. People don’t arrive on our shores because of the existence of ‘people smugglers’; the people ‘smuggling’ networks exist because of the number of people in the world who are forced to flee for their lives, due to upheavals or specific persecution in their own countries, together with the lack of a systematic process, such as was developed after the Second World War and eventually after the Vietnam War, for resettling displaced people and enabling them to begin a new life. In economic terms, the people smugglers are simply supplying an unfulfilled demand for resettlement because Governments choose not to do so. As with illicit drugs, where Governments choose to control the market via managed supply, the illicit suppliers do not have a business.

The description ‘they have many interdependencies and are often multi-causal’ means that the mathematics of wicked problems is chaotic in the technical mathematical sense: any attempt to model the outcomes of policy involves the simultaneous solution of a large number

---

of partial differential equations. The mathematics of such systems is inherently intractable: the results are enormously sensitive to the initial conditions (and hence the quality of the data) and the assumptions that are made.

The prototypical example of such systems is the modelling of weather systems, the famous example of the sensitivity being the statement that the flapping of a butterfly's wings in the Amazon rainforest can precipitate a hurricane in the Gulf of Mexico.

### **Need for whole of system thinking**

Inherent in wicked problems is the need to analyse them at a whole-of-system level – any attempt to limit the analysis to a subset of the interdependent variables will produce a mathematical nonsense, leading in turn to unexpected and unintended consequences when policy based on less than a whole-of-system view is implemented.

To take just one example, Governments have justified 'getting tough with people smugglers' as a measure designed to save people from the risk of drowning while attempting the hazardous sea voyage.

Pursuant to that, Governments have enacted policies like the confiscation and scuttling or burning of the boats, and mandatory five-year prison sentences for the crew. The consequence is that a typical asylum seeker boat is a coastal fishing boat which is neither designed nor equipped to undertake a voyage on the high seas, and is inexpensive because it is at the end of its life if not downright unseaworthy.

It will be manned by a young and inexperienced crew; the members will typically come from a poor fishing village, have probably been tricked into crewing the vessel,

and have no obvious qualifications for undertaking the navigational task or managing an overcrowded vessel in heavy seas.

What experienced seaman with the necessary certificates would expose himself to the certainty of a lengthy prison term at the end of a single voyage?

To deter people from undertaking the voyage, Governments declare that people arriving by boat will have no right of family reunion. The perverse consequence of this is that the only way for a family to be reunited in these circumstances is for any following family members to attempt the boat journey, so that we see a rise in the proportion of women and children on board these vessels. Many of the people drowned in the SIEVX tragedy were women and children whose menfolk had been granted refugee status in Australia but were on Temporary Protection Visas with no right of family reunion. They were attempting the only means available to them to be reunited with their families.

### **Australia's vital interest**

Finally, our approach to asylum-seeker policy needs to take account of Australia's strong interest, as a medium-scale power with strong political, security, economic, cultural and family links all around the world, in a rules-based international system. We rely in a great variety of ways on respect for international laws, treaties and agreements, and we cherry-pick the ones we choose to abide by at our peril; if we are selective about the ones which bind us, we can hardly be surprised if other countries behave similarly in relation to treaty rights which we hold important.

---

Before the Second World War there were few international rules and they addressed only a small number of areas of human activity (2). Governments were basically free to do anything that was not expressly prohibited by international law.

There were some rules governing the treatment of foreigners and their property, but there were no rules protecting fundamental human rights. International law did not prohibit the wholesale slaughter or elimination of groups of people on grounds of religion or ethnicity or political belief, as happened in Nazi Germany, the Soviet Union and many other parts of the world. There were no restraints on territorial domination or the creation of colonies. Piracy and slavery were outlawed but discrimination, racism, apartheid and colonial domination and exploitation were not.

There was no general prohibition on the use of force, no global free trade rules, and no rules of international law committing States to protect the environment. At that time, the world of international law was premised on the principle that sovereign and independent States could do pretty much as they liked, except where they expressly agreed otherwise. As very little was prohibited, their freedom to act was virtually unlimited.

All this began to change, however, when on 14 August 1941, on board the US flagship *Augusta*, President Roosevelt and Prime Minister Churchill signed the 'Atlantic Charter'. The Atlantic Charter committed the United States and Britain to a new order based on a few key principles: an end to territorial aggrandisement or territorial changes; respect for self-government; social security; peace and freedom from fear and want; high seas freedoms; and restraints on the use of force (3).

The Atlantic Charter formed the basis of the development of a massive and sustained effort to develop a rules-based international system. Its principles served as the guidelines for a new post-war world order, and were later enshrined in the United Nations Charter.

They can be reduced to three key principles which have remained in place for over sixty years: a general obligation on States to refrain from the use of force in their international relations, except under strict conditions of self-defence or where authorised by the international community acting through the UN Security Council or a regional body; a new commitment to maintain the 'inherent dignity' and 'equal and inalienable rights' of all members of the human family, through the adoption of international instruments which would protect human rights by the rule of law; and an undertaking to promote economic liberalisation through the adoption of free trade rules and related obligations in the fields of foreign investment and intellectual property (4).

Australia has a heavy investment and interest in the rules-based system and associated institutions which emerged during the 1940s and 1950s, and Australian delegations participated actively in the negotiations which established them. Components of this international framework included the Bretton Woods Agreements (1945) which created the World Bank and the International Monetary Fund (IMF), the 1947 General Agreement on Tariffs and Trade (GATT), the Genocide Convention (1948), the Universal Declaration of Human Rights (1948), the four Geneva Conventions for the Protection of War Victims (1949) including treaties on the treatment of prisoners of war (Geneva III) and the protection of civilians (Geneva IV), the Refugee Convention (1951), and four conventions on the law of the sea (1958), which were replaced in 1982



---

by the United Nations Convention on the Law of the Sea (UNCLOS).

Important arms control treaties were negotiated in the 1960s, including the treaty banning atmospheric nuclear tests (1960) and the 1968 Nuclear Non-Proliferation Treaty (NPT).

In the early 1970s a systematic effort began – with the strong support of President Richard Nixon – to put in place rules for the protection of the global environment, including those relating to biodiversity, the ozone layer and the climate system.

A moment's reflection on this body of international rules, institutions and instruments will show that Australia has a great deal at stake in the preservation and enhancement of this rules-based international system, and we would be most unwise to undermine it by being selective about the elements of it that we choose to respect.

The conclusion I draw from the above analysis is that Australia needs to take a fresh and mature look at how it can best deal with the issue of asylum seekers. That fresh look must be informed by an awareness that unless we take a 'whole of system' approach we will continue to experience chronic policy failure which is hugely expensive in both financial and personal terms, and must take as a guiding principle the vital stake that Australia has not only in respecting, but in developing and nurturing, the rules-based international system. Returning to a world in which individual Governments can behave as they please is not something we would want to see.

## References

1. See <http://www.apsc.gov.au/publications-and-media/archive/publications-archive/tackling-wicked-problems>
2. Sands, Philippe, 'Lawless World: Making and Breaking Global Rules', London, Penguin Books, 2006, pp 7ff.
3. Sands, op. cit., pp 8-9.
4. Sands, op. cit. p. 9.

---

# Asylum-seeker drownings on Australia's border protection watch: An issue of national decency.

## Tony Kevin

---



*Tony Kevin was a career public servant and diplomat 1968-98. His last overseas posts were as Australia's ambassador to Poland and Cambodia. Since retirement, he has regularly written for publication, mainly on questions of national security policy and refugee issues, from a perspective of ethical governance. He has published four books, two addressing Australia's asylum-seeker safety-of-life-at-sea record: *A Certain Maritime Incident: the sinking of SIEV X* (Scribe 2004) and *Reluctant Rescuers* (self-published, 2012). He testified before the Angus Houston Asylum Seekers Panel and maintains working contact with the Department of Customs and Border Protection and the Australian Maritime Safety Authority.*

---

### Abstract

Regardless of which Government is in power, or its ambitions to turn back asylum seekers to Indonesia, Australia's maritime border protection system has professional search-and-rescue obligations under maritime law that must never be questioned or weakened. Every distress call received, no matter from whom or from where at sea, must be promptly investigated and if necessary assisted within available resources. Over 1,100 deaths over the past five years is a shameful statistic of rescue failure that cannot reasonably be blamed on people smugglers or on Indonesian failings. There has been a disturbing record of disbelief, buck-passing and delayed Australian rescue responses, resulting in repeated cases of avoidable loss of human life. This essay dissects the flawed assumptions and protocols that have infected Australia's border protection and maritime safety working cultures, under both Labor and Coalition Governments.

In 2002, I started scrutinising asylum-seeker drownings in Australia's northern maritime approaches (1). Since 2001, around 1,500 asylum seekers have drowned in 38 incidents of boats trying to reach Australia. Remarkably, 1,100 drowned under Labor Governments in the period 2007-2013 (2). Already there has been one fatal incident under the present Coalition (27 September 2013, 53 estimated deaths).

I believe many of these lives could have been saved, had correct safety-of-life-at-sea protocols and procedures always been observed in Australia's intelligence-based border protection system.

This essay explores this wicked problem: why in many cases has the border protection system got maritime rescue wrong, and why is it in denial as to the true reasons? Simply to raise this issue for discussion evokes angrily defensive reactions. Politicians and senior Defence, Immigration and Border Protection, and Australian Maritime Safety Authority officials, contend that 'of course' Australian agencies always do everything possible to save lives known to be in peril at sea. It is offensive even to suggest otherwise (3).

---

The numbers are not trivial. Each death represents a family's irretrievable loss of loved ones. Each death causes grief somewhere in Australia. Each death is a loss to our nation, no less than deaths in bushfires or floods or government agency negligence. We have efficient emergency rescue services and accountability mechanisms because the goal of a decent society is to minimise avoidable human deaths.

Does not this obligation extend to homeless asylum seekers trying to reach here by boat? Commenting on the Lampedusa tragedy, Pope Francis condemned a 'globalisation of indifference' towards the plight of asylum seekers. Australia cannot evade such critiques when so many have drowned trying to reach here.

Australian society faces particular conceptual problems. As a walk through any city shopping mall shows, we are a country of successful global immigration. We have become a thoroughly multicultural nation made up of many diverse ethnicities. Yet our political class and national security discourse is still dominated by European, indeed Anglo-Celtic, values and prejudices. This 'Australia' viscerally fears and resents the threat to national order ('sovereignty') allegedly posed by unauthorised maritime arrivals.

The framing of the mainstream debate on boat people has become cruel, ranging between a frankly brutal message of 'don't come this way, your kind of immigrant is not wanted' to a more subtle 'don't come this way, because we fear you may drown on the way'.

Even liberal humanitarians can be trapped in the latter framing. All sides proceed from the agreed proposition that the more people come in these boats, the more people will drown. My analysis suggests the truth is more complex and discomfiting.

As numbers of people trying to reach Australia in small unseaworthy boats mounted since 2009, Australian politicians and border protection and maritime rescue officials have erected six powerful, mutually reinforcing propositions – really, psychological defence mechanisms – as to why, whenever one of these boats sinks and people drown, it is always somebody else's fault: never the result of correctable failures in Australia's border protection and maritime rescue systems. In every case of asylum-seeker deaths at sea since 2000, I have found avoidance of real accountability. This would not be tolerated in any other Australian emergency services context.

This essay analyses how all six propositions are rebutted by the weight of evidence and their own logical contradictions:

1. It is impossible to know how many people drown in asylum-seeker boat sinkings.
2. Such tragedies are entirely the fault of the ruthless people smugglers who organise these unsafe voyages.
3. If people choose to risk their lives in unseaworthy boats, it is their own fault if they drown.
4. Because these boats do not carry adequate distress-signalling and location-fixing technology, or adequate lifesaving devices, it is the people's own fault if our authorities cannot always locate and rescue them in time.
5. Asylum seekers have a group history of making unjustified or exaggerated distress phone calls to Australia from international waters. Though Australian agencies assess these boats generally unseaworthy by our standards, many distress calls have in Australian Maritime Safety Authority's experience been found to be 'unnecessary alerting',

---

in that boats were not at imminent risk of sinking when intercepted and inspected by Australian authorities. Agencies need discretion to assess if distress calls are necessary, if our limited rescue resources are not to be misused.

6. Usually, distress calls are made to Australia from boats in international waters within the Indonesian search and rescue zone. It is then proper for the Australian Maritime Safety Authority to try to transfer the rescue coordination responsibility to its Indonesian counterpart BASARNAS. Only if these efforts fail should rescue responsibility revert to the Australian authority. If lives are lost through delay, it is the fault of BASARNAS.

Taking each proposition seriatim:

1. These days, no boat sinks without this soon becoming known. Every boat carries at least one satellite-linked mobile phone. Relatives onshore know when journeys commence. Agencies can establish a boat's coordinates by GPS tracking of phone calls made en route. Distress call records to public agencies are recoverable.
2. All boats are sent by people smugglers. Some are safer, some less safe, yet 97-98 per cent of boats reached a stage in their journeys at which they were safely assisted or intercepted by Australian border protection ships. If we failed to save just 2-3 per cent of these boats, how could this be the fault of people smugglers? Do we not need to look also at possible Australian process failures?
3. Motives for travel should never be a factor in rescue decisions. People choose to buy risky passages on people-smuggler boats because they are desperate to end their anxiety and homelessness. Australia as a country of global migration is seen as a potentially welcoming new home. Sometimes, overwhelming

desire for blocked family reunion drives highly risky decisions. In any case, the obligation to rescue people in distress at sea proceeds from international law and decency. We cannot choose whom we rescue.

4. The international Search and Rescue Convention does not stipulate boats must carry adequate signalling and safety equipment as a precondition for rescue. Under the Convention, countries must make every effort to locate and assist every boat that reports distress to them. Most times, our well-resourced Border Protection Command and Australian Maritime Safety Authority have the technologies to quickly locate boats telephoning distress, or seen from the air in apparent distress. The issue then becomes whether or how quickly Australian maritime assets are sent to investigate and assist.
5. There have been conspicuous admitted examples in recent years of Australian rescue system failure to act promptly on clear distress messages, for example the report of the SIEV 358 coronial inquest. However there has been no inquest into the equally tragic loss of all lives from a boat whose passengers had signalled distress by waving to an observing aircraft from the deck of a boat observed as dead in the water just 28 nm from Christmas Island on 5 June 2013. The drifting capsized hull was re-located from the air two days later. Bodies were sighted, but none ever recovered.

The system can at times be unaccountably blind or slow to act on clear distress signals. When disasters like this happen, the system closes ranks, taking comfort in shared judgements of operational agencies and intelligence assessment committees. When everyone is responsible, no one is responsible.

- 
6. Because the whole 200 nm maritime space between Java and Christmas Island is deemed in international maritime law to be within Indonesia's search and rescue zone, Australian agencies have claimed at times that they properly passed distress calls made to them from boats in this area to Indonesia's BASARNAS for action.

This would be correct only if Indonesia agreed to accept the search and rescue responsibility, and if Australia as the country first receiving the distress call were satisfied that Indonesia had the resources and reliable intention to respond effectively. This has often not been so, for complex reasons going to the two countries' very different resources and skill sets, maritime organisations, and attitudes to distressed asylum seekers in these waters.

The fact is, in every case where Australia has tried to bump the rescue responsibility to BASARNAS, the latter's response has been absent or inadequate. Hundreds have died as a consequence. Australia knows this: it is why most Australian maritime rescue actions have been of boats reporting distress in the Indonesian search and rescue zone. Had Australia insisted in every case on Indonesia taking charge of responses to distress calls in its Search And Rescue zone, the death toll would be far higher than it is now.

With respect to Operation Sovereign Borders, the Abbott Government's declared policy of turning back boats 'when safe to do so' would increase risks of deaths at sea. Desperate people would do everything possible to resist turn-back including sabotaging their boats. This would put themselves and Australian escort crews at risk.

Indonesia will not accept intrusion into Indonesian territorial waters by Australian navy ships, so asylum-seekers' boats would have to be transferred at the 12 nm limit. If boats sink, burn or explode before Indonesian ships have taken safe charge of them (or if they decline to do so), it would be Australia's obligation to rescue drowning people.

Australian career service personnel should not be exposed to such risky and discreditable Australian-created crisis situations.

---

## Conclusions

This kind of analysis is confronting and thankless, however it is necessary, if lives are to be saved in future Australian maritime border protection operations under any Government.

The maintenance of decent non-discriminatory standards of rescue at sea remains a standing ministerial and senior executive responsibility of Immigration and Border Protection, Defence, the Australian Maritime Safety Authority, and now Operation Sovereign Borders. It is only when Australian border protection and maritime safety agencies know that their work is under regular and searching public scrutiny that can there be hope that professional and lawful standards of Australian response to people in distress at sea will be upheld, in the face of ill-informed pressures from elements of political opinion. Secrecy in this area will lead to more deaths – more SIEV X's.

The evidence of deaths at sea in the past five years – under Labor – is that the legal integrity and basic decency of Australian border protection and maritime safety practice were being eroded by negative mindsets and cultural assumptions that were creeping into the way agencies approached their missions.

A culture of scepticism about the veracity of asylum-seeker distress claims, encouraged by the resentful rhetoric of some politicians and media outlets, was degrading the assistance response enshrined in maritime law and decent practice. It was becoming easier for entire bureaucracies to slide into dysfunctional collective attitudes and behaviours, without necessarily perceiving what was happening to them.

Something was wrong in the Australian Maritime Safety Authority when a series of ten distress calls telephoned over 24 hours from SIEV 358 were assessed as 'the normal refugee patter'. Something was wrong in Border Protection Control when the Minister and the commanding Admiral told a press conference on 9 June 2013 that there was no indication from the demeanour of persons waving to an Australian Border Protection Control aircraft that their drifting vessel was in distress: all mariners know that people waving to a plane from a boat seen as dead in the water is a distress signal. Something was wrong in the Australian Maritime Safety Authority when its officers tried to bully their obviously reluctant, ill-equipped and linguistically challenged Indonesian counterpart organisation to take charge of the SIEV 358 search and rescue operation: when the Australian Maritime Safety Authority admitted to the Coroner that the two organisations could not even communicate requests and undertakings reliably by telephone, and that the Authority had to resort to back-channel calls via the Australian Embassy in Jakarta to try to check what if anything BASARNAS might be doing.

Such examples of maladministration – and there are many more, in sinking chronologies assembled over the past four years - might be amusing, if the consequences had not been so deadly.

---

What has changed under the Coalition's Operation Sovereign Borders? In sum: harsher language and tighter information control. Operation Sovereign Borders is drip-feeding minimal aggregate facts and statistics in weekly briefings. Media will only be briefed on specific 'water operations' if 'serious incidents' (i.e., deaths at sea) occur. The underlying culture of operations described above has not changed.

Indonesia did not under Labor, and will not under the Coalition, allow turn-back. If attempted, turn-back will come back to bite Australia. There is need for review of Australian rescue-at-sea protocols and practices in respect of asylum-seeker boats signalling distress. Too many people have been left to die under both Governments to allow any complacency about the present system's values and workings. Over 1500 avoidable deaths in our maritime approaches violates our national values.

## General references

Jack Waterford, Time for scrutiny on boat rescues, Canberra Times feature story, 28 July 2013. <http://sievx.com/articles/Kaniva/20130728Waterford.html>

Jess Hill, ABC Radio National Background Briefing, Asylum seekers - drowning on our watch, audio 1 September 2013, transcript <http://sievx.com/articles/Kaniva/20130901Hill.html>

## Specific references

1. Tony Kevin, 'A Certain Maritime Incident: the sinking of SIEV X' (Scribe Publications, 2004, 2006, 2008) Tony Kevin, 'Reluctant Rescuers', self-published, July 2012 and see [www.reluctantrescuers.com](http://www.reluctantrescuers.com) Numerous articles in Eureka Street, Inside Story, Canberra Times, The Conversation, etc.
2. A referenced, regularly updated tally is kept by Marg Hutton in the 'Drownings Table', on her website [www.sievx.com](http://www.sievx.com). <http://sievx.com/articles/background/DrowningsTable.pdf>
3. As a typical response, see Michael Pezzullo, CEO of Customs and Border Protection, interviewed by Fran Kelly on ABC Breakfast, 15 July 2013 <http://sievx.com/articles/AUSSAR2013-4724/20130715FranKelly.html>

---

# Why we need an end to mandatory detention.

## Gillian Triggs

---



*Emeritus Professor Gillian Triggs is the President of the Australian Human Rights Commission. She was Dean of the Faculty of Law and Challis Professor of International Law at the University of Sydney in 2007-12 and Director of the British Institute of International and Comparative Law in 2005-07. She is a former Barrister with Seven Wentworth Chambers and a Governor of the College of Law.*

---

### Abstract

For more than a decade, the Australian Human Rights Commission has raised significant concerns about Australia's mandatory immigration detention system, which applies to all non-citizens who arrive in Australia without a visa, including asylum seekers. Having investigated hundreds of complaints from individuals in detention and conducted several monitoring visits to immigration detention facilities the Commission has concluded that the system breaches fundamental human rights. It is also well-documented that mandatory and indefinite detention takes a significant toll on the mental health of those detained. For these reasons, the Commission has long advocated for individualised assessments of the need to detain people who arrive to Australia without a visa, and greater use of alternatives to mandatory detention in immigration facilities, such as community detention and bridging visas.

For over 20 years Australia has adopted a policy of mandatory immigration detention. When it was introduced in 1992, the policy was intended only as a temporary measure, and the detention of certain 'designated' asylum seekers arriving by boat was limited to 273 days. However, in 1994, the policy was expanded to apply to all non-citizens who arrived to (or who were in) Australia without a valid visa, and the time limit was removed.

The policy of mandatory and indefinite immigration detention is still in place today. As a result, at 30 September 2013 there were 6,403 people being held in immigration detention facilities, including 1,078 children (1). They were being held in 25 different immigration detention facilities around the country, including four facilities on Christmas Island. The vast majority of the detainees are asylum seekers who arrived by boat without authorisation.



---

The Australian Human Rights Commission was established to act as an independent monitor of Australia's compliance with its international human rights obligations. In assessing Australian law and practice, the Commission uses as its bench mark the human rights set out in the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), and various declarations.

For over a decade the Commission has repeatedly recommended that mandatory and indefinite immigration detention be abolished as the policy breaches Australia's international obligations. There is no evidence that mandatory detention effectively deters irregular arrivals. Moreover, the human and financial costs of mandatory detention have been enormous.

The Commission works to promote and protect the human rights of people held in detention through a number of functions, including investigating complaints about alleged breaches of human rights. It also monitors the conditions in immigration detention facilities through regular visits. Since mid-2010 the Commission has undertaken monitoring visits to seven immigration detention facilities across Australia, including on Christmas Island. The Commission has published detailed reports with recommendations on six of these visits. The Commission's experience from these visits is that regular monitoring contributes to ensuring greater respect for the human dignity of those who are detained.

In my role as President of the Australian Human Rights Commission I have visited some of Australia's immigration detention facilities and spoken to many asylum seekers. The reality of life in Australia's immigration detention network is very confronting, especially when those caught up in that network are children. The children and young people who are in

detention are no different from our own. They need a safe environment, education and family support.

During the Commission's most recent visit to the detention facilities on Christmas Island, Commission staff noted the prison-like nature of the immigration detention centre. The centre has high wire fences, walkways enclosed in cage-like structures, CCTV surveillance, metal reinforced officer booths with perspex security screens, and metal grills on bedroom windows - intrusive security measures which give the immigration facility a harsh and punitive feel. At the time of the Commission's visit, the immigration detention facilities on Christmas Island were significantly overcrowded. This placed added strain on the already limited access that asylum seekers had to essential services in these remote locations - such as health services, education, migration agents and legal representatives (2).

It is important to remember that the asylum seekers in Australia's immigration detention facilities are not being detained because they have been charged with any crime; they are detained because they do not hold valid visas. Many asylum seekers express despair and confusion about why they are treated as if they are criminals.

A key concern of the Commission is the detrimental impact that long periods of detention (especially in a harsh environment, in a remote location without adequate access to services and support) can have on the mental health of those detained. It has been clearly established that detention for prolonged and uncertain periods of time both causes and exacerbates mental illness, and that there is a strong link between length of time spent in detention and deterioration of mental health. In 2012-13 there were 846 reported incidents of self-harm across Australia's immigration detention

---

network. Between 1 July 2010 and 20 June 2013, there were 12 deaths in immigration detention facilities, six of which were found by coroners to have been suicides (3).

The Commission has raised concerns over many years that Australia's system of mandatory detention leads to breaches of its international human rights obligations.

Under article 9(1) of the ICCPR, the Australian Government has an obligation not to subject any person to arbitrary detention. In order to avoid being arbitrary, detention must be a proportionate means to achieve a legitimate aim, and be reasonable and necessary in all the circumstances. Australia's obligation to avoid arbitrary detention is even stricter in the case of children. Article 37(b) of the CRC provides that children should only be detained as a measure of last resort, and for the shortest appropriate period of time.

The detention by Australia of 'unlawful non-citizens' (including children) is not based on an assessment that the particular person needs to be detained. Their detention is not subject to a time limit, and those detained are not able to challenge the need for their detention in a court of law. The United Nations Human Rights Committee has repeatedly found Australia to be in breach of its obligations under article 9(1) of the ICCPR. The Committee's most recent finding against Australia related to the indefinite detention of refugees who had received adverse security assessments (some of whom had been detained for over four years). The Committee found that their detention was not only arbitrary, but was also 'inflicting serious psychological harm upon them' amounting to cruel, inhuman or degrading treatment in violation of article 7 of the ICCPR (4).

The Commission recommends that, instead of requiring the mandatory detention of broad groups of people, a person should be detained only if they are individually

assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Time limits for detention and access to judicial oversight of detention should be introduced to ensure that if a person is detained, they are not detained any longer than is necessary.

Unless a person is assessed as posing an unacceptable risk, they should be permitted to reside in the community while their immigration status is resolved. This can be achieved through the use of 'community detention' (whereby the Minister makes a 'residence determination' in respect of a person in immigration detention, allowing that person to live in a specified residence in the community). The Minister can also permit asylum seekers to live in the community by granting them bridging visas. These are both alternatives to holding people in closed detention facilities that allow for the protection of the community from identified risks, while at the same time ensuring that people are treated humanely and in line with internationally accepted human rights standards.

Community-based alternatives can be much cheaper and more effective in facilitating immigration processes. They are certainly more humane than holding people in detention facilities for prolonged periods of time. Other comparable jurisdictions, such as the United Kingdom, use a range of community-based alternatives rather than a system of mandatory, prolonged and indefinite immigration detention.

The Commission has welcomed the Government's movement of groups of asylum seekers out of closed detention into the community particularly over the last few years. As at 30 September 2013 there were 3,241 people in community detention, and 22,987 asylum seekers on bridging visas. However, it is of concern to the Commission that under current government policy, asylum seekers on bridging visas are not allowed to work

---

to support themselves or their families (5). Compounding the problem is the failure to process claims for refugee status in a timely manner. The consequence is that asylum seekers may remain on bridging visas for months, even years.

The abolition of mandatory immigration detention, and the adoption of a presumption in favour of allowing asylum seekers to live in the community while they wait for their claims to be processed, would not only bring Australia more into line with its international obligations. It would also benefit the current Australian community, and future members of that community, given that 90 per cent of asylum seekers who arrive by boat are found to be refugees (6).

Detaining asylum seekers on the basis of a blanket rule and failing to consider their individual circumstances are fundamentally inconsistent with Australia's obligations under international law. The end of mandatory detention would mark the beginning of a better, more humane approach to those who come to our shores seeking protection.

## References

1. Department of Immigration and Border Protection, Immigration Detention Statistics for 30 September 2013, at <http://www.immi.gov.au/About/Pages/about-immigration-detention.aspx> (viewed 11 November 2013)
2. See the Commission's immigration detention report regarding Christmas Island at: <http://www.humanrights.gov.au/publications/immigration-detention-christmas-island-observations-visit-immigration-detention>
3. See section 2.4 of the Commission's report 'Asylum seekers, refugees and human rights: snapshot report 2013', at <http://www.humanrights.gov.au/publications/asylum-seekers-refugees-and-human-rights-snapshot-report/2-onshore-detention-and>
4. Human Rights Committee, *F K A G et al v Australia*, at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Jurisprudence.aspx> (viewed 11 November 2013)
5. See on this issue the Commission's fact sheet 'Tell Me About: Bridging Visas for Asylum Seekers', at <http://www.humanrights.gov.au/publications/tell-me-about-bridging-visas-asylum-seekers>
6. See Department of Immigration and Border Protection, 'Asylum Trends – Australia 2011–12' (2012), p 31 (Table 36). At <http://www.immi.gov.au/media/publications/statistics/> (viewed 11 November 2013)

---

# My brothers and sisters in boats.

## David Maxwell Gray

---



*David Gray has worked as an agricultural economist, a management consultant and a schoolteacher. He currently works with the Department of Agriculture and Food in the WA Government and is an active layperson and member of the Board of Social Justice of the Western Australian Uniting Church.*

---

### Abstract

**This paper reports the resolution of the Synod of the WA Uniting Church about current Australian policy on asylum seekers, which draws attention to concerns of 64 agencies which work with asylum seekers and the UN Commission.**

### Becoming involved

An affinity with boat people: is this a long bow to draw? Without exception, all of my lineal antecedents were early settlers in the South Island of New Zealand, mostly Scots, but also from Yorkshire and Leicester, all participants in a wave of migration in the 1860s. They came on small, leaky sailing ships which were at the end of their economic life: carrying economic refugees was a low-value use. Two of these ships were lost at sea on their next voyage. The press paid scant attention at the time.

Perhaps it is then not surprising that I, as a Christian, have been concerned with Australia's treatment of refugees coming by boat. Both before and since joining

the Social Justice Board of the Uniting Church in Western Australia in 2012, I have closely monitored the refugee issue. For instance, I became aware that the United Nations Human Rights Committee has found Australia guilty of violations of international law in its indefinite detention of 46 refugees (1). After examining their cases the Committee found 'Australia's indefinite detention of 46 recognized refugees on security grounds amounted to cruel, inhuman and degrading treatment, inflicting serious psychological harm on them.' These particular refugees have been in detention for more than four years. The report concluded that the continued detention of these refugees, the majority of whom are Sri Lankan Tamils, was in breach of the International Covenant on Civil and Political Rights. Can we, as Australians, be indifferent?

My decision to engage in the Social Justice Board has deeply affirmed my core beliefs, despite knowing that the Church is neither a popular, nor populous movement. The Uniting Church in Australia has been clear, courageous and consistent in its espousal of the cause of refugees, of our need as a nation to treat them compassionately, respectfully and in accordance with our

---

promises. For me, the recent culmination of this has been the policy, reproduced below, adopted in September this year by the Uniting Church, Synod of Western Australia. This is a direct, unbroken elaboration of a line of policy developed within the wider Church. This was perhaps most clearly espoused in 2000 at the national (Assembly) level (2), but kept burningly alive by Uniting Justice, an agency of the national Assembly. It has been supported by the various state arms of the Church. Many Australian organisations and other Christian churches have espoused similar policies.

If one observed the collection of mostly older, ordinary Australians who make up the Western Australian Synod as representatives of church congregations around our State, one would not suspect them of radical or outlandish views. But it was just this group that voted unanimously, without a contrary vote, the following policy, which challenges our Governments and most political parties -

### **Resolved that the Synod:**

1. note with great concern that the Parliamentary Joint Committee on Human Rights in its report tabled in Parliament on June 19, 2013 concluded that Australia's offshore processing laws do not comply with fundamental human rights principles;
2. further note that the United Nations Commission has found Australia to be guilty of 150 breaches of human rights in its arbitrary detention regime;
3. endorse the statement by 64 agencies who work with asylum seekers called 'Enough is Enough: It's time for a new approach' issued on the first anniversary of the report by the Expert Panel on Asylum Seekers (3).
4. call on all political parties to demonstrate true leadership by working cooperatively to refocus Australia's policy approach in line with the following principles:
  - a. maintain Australia's position as a world leader in resettlement;
  - b. abandon offshore processing;
  - c. redouble efforts to build regional cooperation on refugee protection;
  - d. ensure prompt access to permanent protection;
  - e. commit to a sustainable model of community-based processing;
  - f. maintain a timely and fair system of refugee status determination;
  - g. provide access to timely and realistic family reunion opportunities; and
  - h. abandon policies which pit onshore protection against resettlement; and
  - i. call on the Synod and all congregations to continue to pray;
  - j. for all refugees and asylum seekers, and especially for those who seek shelter and help in Australia;
  - k. for political leaders and the staff of government departments who have responsibilities in this area, that a longing for justice and peace will guide them in the exercise of their responsibilities; and
  - l. for chaplains to the detention centres and volunteers who regularly visit, and all who endeavour to extend the hand of welcome and care to strangers in need.

---

I was so proud of these people. John Wesley, the founder of Methodism, would have been proud!

For me now, I will not cease from mental fight, nor shall my sword sleep in my hand, till we have built (4) a compassionate, respectful way of treating refugees in accordance with: first, the policy of my Church; second, the policies of the many other churches and organisations which hold virtually identical views; and third, my own values.

## References

1. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13648&LangID=E>
2. The reader is referred to the statements section in the website of UnitingJustice [www.unitingjustice.org.au](http://www.unitingjustice.org.au) and of the Assembly of the Uniting Church in Australia at <http://assembly.uca.org.au/>
3. The Uniting Church in Western Australia is one of 64 signatories to a joint statement by Australian non-government agencies on the first anniversary of the report on the Expert Panel on Asylum Seekers, known as the Houston Report. In the statement, Enough is Enough: It's time for a new approach the endorsing bodies seek a new approach which 'focuses on protection rather than punishment, on facts rather than fear-mongering, and on long-term solutions rather than short-term political gain.' Refer <http://www.unitingjustice.org.au/refugees-and-asylum-seekers/news/item/929-enough-is-enough-it-s-time-for-a-new-approach>
4. From the anthem, 'Jerusalem', based on a poem by William Blake, 1804.

---

# Boats: What to do?

## A practitioner's viewpoint.

### Erika Feller

---



*From 2005 to April 2013 Ms Feller held the post of Assistant High Commissioner for Protection, one of the four top management positions with the United Nations High Commissioner for Refugees. She was the initiator and manager of the 2001-2 Global Consultations on International Protection, which generated the Agenda for Protection, the internationally endorsed global 'road map' on protection policy. She has recently been appointed a Fellow of the Australian Institute of International Affairs.*

---

#### Abstract

I argue here that investment in deterrence as the preferred solution to the challenge posed to States by irregular boat arrivals is doomed to failure. The problems are complex and have a context internationally which renders solving them now an over-ambitious goal. More realistically States should be aiming at better management strategies which take more holistically and compassionately into account some central characteristics, using more effectively existing tools. The essay is concerned to debunk the myth that the 1951 Convention is at the root of the problem. It calls for strategies which address properly, robustly and compassionately deficiencies in national asylum systems, which protect rights and which promote better international cooperation and burden-sharing to address what is at root a global problem.

#### A lifeline for the desperate

October was yet another lethal month in the Mediterranean. The press was full of reports about deaths of boat migrants, beginning with the 3 October

tragedy when a boat sailing from Libya to Italy with some 500 passengers (mainly Eritreans and Somali) sank about one km off the Italian island of Lampedusa. It had been 13 days at sea and regularly passed by. Well over 300 bodies were recovered. Divers trying to free them described a wall of people so entwined that they were difficult to pull out. On 11 October, a boat that had set out from Egypt with an estimated 112 passengers, 40 of whom were Syrian, sank before it reached the open sea: twelve bodies were recovered, including five children. Only 200 people survived a boat carrying between 400 and 500 Syrians and Palestinians from Syria when it sank in the Mediterranean on 11 October.

With these stories running, the features website of the BBC also included a story on a mass escape 70 years previously from Nazi-occupied Denmark, when almost the entire Jewish population fled the country, in fishing boats, in rowing boats, as stowaways on ferries and cargo ships. The cost of securing a place amounted to some £5,500 per head in today's money.

---

One incontrovertible fact flowing from these two situations, separated by 70 years, is that boats, if a problem for States, have long been and remain a lifeline for the desperate.

### **What is the boat problem?**

Incontestably, Australia has a problem with irregular boat arrivals. But what sort of problem is it really?

During 2012 a total of 17,202 (1) asylum seekers on 278 boats arrived in Australia, with Sri Lankans, Afghans, Iranians, stateless and Pakistanis the largest represented groups. By mid July 2013 close to 14,000 more people had similarly arrived.

Granted, such numbers can give cause for concern. However the reality is that Australia still receives less than 2 per cent of the 45.2 million people fleeing persecution, conflict and war around the world. Australia's difficulties with boats have a broader context which arguably has not been given sufficient attention in the over-heated debates which have been playing out over many months in Parliament, the press and civil society. This debate has badly served an Australian public struggling to understand the nature of the problem and what can be done about it.

No responses will really work unless they take holistically and responsibly into account the bigger context, which includes the following characteristics:

#### *Boat arrivals are a humanitarian concern:*

However the law may classify them, the persons on the boats are people with rights and seriously in need. Some will be asylum seekers, but not all. Some will be refugees, but not all. The group may include trafficked women and girls. Many will be the so-called economic migrant, bent on building a better future, or even just

a future. A boat will usually carry people whose reasons for being on it are very diverse, quite often defying precise legal classification. This is too often overlooked in the rush to classify the boat passengers as illegals. It is acknowledged that the economic migrants can pose the larger challenge when it comes to longer term solutions and managing complex international relations. However, refusal to assist persons in distress at sea, regardless of who they are or how they came to be there, can lead to terrible consequences. It is both a serious abrogation of basic rights and responsibilities, and a grave humanitarian failure.

#### *The boat problem is a shared problem:*

It has a very important international dimension which is too often under-appreciated or downplayed in national policy responses. The deteriorating living and security conditions in Myanmar and Bangladesh fuelled a substantial increase in boat departures from Rakhine State and Bangladesh towards Thailand and Malaysia over 2012-13. These were accompanied by grave maritime incidents involving significant loss of life, as well as some trafficking of those arriving safely at the Thai-Malaysian border and unable to pay the smugglers. In 2012, some 107,532 migrants and refugees crossed the Arabian and Red Seas to Yemen. Between January and 30 September, 7,557 Syrians and Palestinians arrived along the coast of Italy, 6,233 since early August. Most of the Syrian refugees that reach Italy continued on to other European countries to seek asylum.

From the Gulf of Aden to the Mediterranean, from the waters of the Caribbean to those off Australia, Canada, Yemen, Bangladesh, Djibouti or Tanzania, boats variously carrying Eritreans, Somalis, Afghans, Syrians, Iranians, Iraqis, Sudanese or Nigerians, Cubans and Haitians arrive irregularly, in defiance of concerted efforts to deter them. This situation calls absolutely for



---

greater international cooperation around search and rescue procedures and the sharing of responsibilities and burdens.

*The forces that drive people onto the boats lie as much in the conditions in the countries of first asylum as they do in the circumstances in countries of origin:*

As a general rule, more than 80 per cent of refugees are hosted within their own region, often for many years and in countries struggling to meet the needs of their own citizens. Protracted refugee situations are not the high-profile and strategically important operations preferred by donors, and hence are almost invariably neglected and underfunded. More often than not, refugees find themselves in remote, isolated and seriously under-developed areas, with limits placed on their freedom of movement and other rights, including access to work, and where livelihood opportunities (for both exiled populations and citizens alike) are scant. In many cases, security is precarious, education for children is rudimentary and support structures for the traumatised are absent.

Just to illustrate, Eritreans and Somalis regularly take to boats. The combination of economic collapse, conflict and human rights violations in the Horn of Africa has driven them out of their countries to seek safety and employment elsewhere. But neighbouring states they move to – Yemen, Egypt or Sudan, for example – can neither guarantee this nor be expected to do so. Trafficking and abduction of asylum seekers and refugees en route to the camps throughout the region is a major protection concern. Migrants are increasingly being kidnapped for ransom, or face extortion, torture, rape, sexual abuse, violent assault and murder. There are repeated reports of the theft and sale of body parts. Harsh living conditions in the camps, limited prospects of socio-economic integration as well as continued

security concerns are a daily reality. Resettlement places available are way below the needed numbers.

Despite a growing number of countries, including Australia, which admit refugees through organised resettlement programs, the number of places available each year accommodates less than one per cent of the global refugee population. It is no wonder, therefore, that there is no orderly queuing for departure.

*The problem is undeniably a law and order challenge, but with many heads:*

People smugglers and traffickers are reprehensible and deserve tough and committed push-back. The difficulty, though, has been that people smuggling in its narrowest dimension has become the dominant driver of domestic policies. The smugglers exploit the miserable circumstances of others, to their hugely profitable gain. They are however only one part of an enormous enterprise in which many have vested interests, including the boat operator, his family, the passengers, their families, the many intermediaries who forge the passports or take the bribes, right up to the Governments in the countries of origin who have no interest in facilitating the return of their citizens if it means remittances are lost (2). Destroying a ‘business model’ with so many diverse and deeply rooted tentacles is a tall order which to date has defied success. There has to be more to any Government’s response.

*Boat arrivals are a vexing and contested legal issue, but refugee law is not the problem:*

There are a plethora of laws which relate, and often conflict. National legislation is a primary source of restrictions, responsibilities and rights. At the international level, there are relevant Conventions which include the 1951 Refugee Convention and the human rights conventions protecting against torture and guaranteeing the rights of children, the disabled, migrant

---

workers, or stateless people. The interface between national law and international law, questions linked to how the provisions of maritime law, human rights and refugee law relate, and the issue of extraterritorial effect, have proven a field day for lawyers - both those determined to maximise the deterrent effect of the law, and those bent on harnessing its every protection. The increase in maritime arrivals since October 2011 coupled with a number of high profile maritime incidents involving loss of life at sea have resulted in major policy changes in Australia's response to irregular maritime arrivals. It suffices here to note that under international law, transferring asylum-seekers to a third country does not remove the State's obligations under international law.

The law is a tool which can be used to better and more responsibly manage asylum challenges. It should neither become the cover nor the scapegoat for failed policies. Of particular concern in this regard is the disservice being done internationally to the cornerstone instrument of refugee protection, the 1951 Refugee Convention, by all those keen to attribute to the Convention much of the blame for the failure of States to get a grip on boat arrivals. This has no basis either in the words of the Convention or in its intent. It is not a straight-jacket of absolute prohibitions, as some might wish to misconstrue it, but a flexible framework of bottom lines, leaving considerable discretion as to its mode of implementation. Its main purpose is to ensure that particularly vulnerable people, who cannot rely on the normal protections of their own country, have at least a temporary and secure alternative. It sets out a basic framework of protections for refugees and indicates criteria for assessing who should qualify for these entitlements, and who should not.

The Convention was never drafted as a migration control instrument. It does not have provisions on illegal immigrants, or even specifically reference 'asylum seekers' as such. The Convention does not stipulate which solution must be pursued and where. True, the Convention is not perfect. Its framework needs to be built upon. However it seriously confuses the picture to locate policy failures at the door of the Convention. This threatens an instrument on which millions globally rely and practically it only serves to distract attention away from developing more effective, collaborative and humanitarian arrangements responsive to complex mixed migration contexts.

### **So where to?**

To recap, boat departures have always been a safety valve for the persecuted and the downtrodden. They are symptomatic of the much deeper malaise which variously afflicts the societies from which the boat people come and through which they pass. The root problem is the malaise. The boats will continue as long as the root causes of departures remain unresolved. However, as stopping conflict and redressing violence and inequality in the world are obviously long-term objectives, so too it must be realised is solving the boat problem. This needs to be stated much more clearly for public opinion to absorb. More modest ambitions, focused on better management strategies rather than stopping the boats, can more productively and compassionately be pursued at this point.

This is more complicated than it used to be, but not impossible. There are tools that might be harnessed to this effort. One is UNHCR's 10-Point Plan of Action on Refugee Protection and Mixed Migration (3). The framework is a planning and management tool, predicated on the evidence-based understanding that managing mixed asylum/migration flows requires

---

arrangements which build well-functioning national decision-making structures in tandem with better responsibility and burden-sharing approaches. The focus is on measures which more comprehensively take account of the situations in the countries from which people flee, through which they pass, and where they finally arrive. The framework aims to ensure that people who need protection receive it; that asylum systems are not overburdened by unfounded claims; and that people are treated with dignity and respect for their rights while appropriate solutions, including return, are found. It has growing support internationally with Governments and NGOs, with a comprehensive 'how to do' manual now part of it. The maritime protection aspect has been expanded through development of a model framework for the handling of sea rescues.

The Plan has a particular value as a management tool in mixed-flow situations which have regional dimensions. There is a clear opening for its use in South East Asia where countries are beginning to accept that the diversity of their national responses to mixed flows has become part of the problem. Within the context of the Bali process, States have endorsed the creation of a Regional Cooperation Framework (RCF) and a Regional Support Office (RSO) originally intended to assist efforts to build asylum structures in the region and promote better burden-sharing. The Bali endorsements need, though, much more concerted follow-up. Unfortunately, while the RSO is in place, the RCF has been slow in the coming, with the focus, if not the rhetoric, having reverted again to anti-smuggling initiatives. This is short-sighted, and could be a lost opportunity in a region enjoying active cooperation on people smuggling, but a dearth of initiatives when it comes to building asylum regimes. The urgency of the need to move from the language of cooperation to practical and concrete

measures was recognised again in the region at a Ministerial level meeting in Jakarta in September.

Forced displacement remains one of the most visible and profound consequences of persecution, other abuses and armed conflict. Millions are trapped in spiralling cycles of violence, deprivation and displacement inside their countries, while many of those able to flee and seek asylum find themselves in long-term camp exile. The scope of such displacement is enormous (4) which is proving a huge challenge for the limited resources and protection capacities of the host countries and aid organisations. The boat problem can only be understood and responded to in this context. Investment predominantly in deterrence as the solution is doomed to failure over the longer term for it ignores what drives people to put themselves in perilous circumstances at sea. Investment in more effective and robust national asylum systems and in international cooperation to collaboratively manage this multidimensional problem would be money and effort more properly and compassionately spent.

---

## References

1. Refugee Council of Australia, 'Refugee needs and trends: A statistical snapshot', 2013 <http://www.refugeecouncil.org.au/r/isub/2013-14-IntakeSub-stat-snapshot.pdf>
2. Globally, people smuggling is a massive part of the 'black economy'. The monetisation of cross-border people movement is now significantly institutionalised through links between organised crime, international money transfers and worried states criminalising cross-border people movement.
3. UNHCR, 'Refugee Protection and Mixed Migration: A 10-Point Plan of Action', 2007, <http://www.unhcr.org/protect/PROTECTION/4742a30b4.pdf>
4. The world's estimated 45.2 million displaced include some 15.4 million refugees, close to a million asylum seekers and 28.8 million people forced to flee within the borders of their own countries. The early months of 2013 saw, on average, some 2500 refugees a day crossing out of Syria into Jordan. The Syrian crisis had by beginning of October displaced over two million people externally in the region, and an estimated number of more than four million internally displaced persons. And the number of refugee producing crises multiplied more broadly, from Mali to Myanmar.

---

# Collateral damage responses when policy causes harm.

## Louise Newman

---



*Professor Louise Newman AM is Professor of Developmental Psychiatry and Director of the Monash University Centre for Developmental Psychiatry & Psychology. She is a practising infant psychiatrist studying the impact of early trauma and development. She is Vice-President of Doctors for Refugees and a member of the Immigration Health Advisory Group an independent body providing advice to the Department of Immigration and Border Protection on the health needs of asylum seekers.*

---

### Abstract

Policies of deterrence have defined Australia's response to the needs of asylum seekers for over a decade. The focus on isolation, detention in remote locations and lack of permanency of protection has had a significant negative impact on the well-being and mental health of thousands of asylum seekers. Successive Governments have attempted to dismiss or minimise the evidence of the psychological damage resulting from these approaches despite ongoing issues of mental deterioration, self-harming and suicidal behaviour in detention environments. The moral imperative to advocate for the powerless and to prevent harm has driven professionals to highlight the damage of harsh policy and the resistance to discussion of this at a political level.

### Collateral damage

Whilst current arguments circulate around the 'problem' of asylum seekers and how Australia should respond, there is seemingly little room to reflect on the plight of those dispersed and displaced forced migrants and their experience of policies aimed at deterrence. Policies focused on detention and isolation, limitation on rights to appeal, minimal community support and 'turning back the boats' have all created a system which is both dehumanising and damaging. It is in this area of psychological damage that health and mental health professionals have engaged with complex ethical issues and the need for response and opposition to potentially damaging government policy.

---

Major medical colleges and health bodies have been involved in providing expert opinion to Government on health and mental health needs of asylum seekers since 2006 and all have grappled with the issue of maintaining a focus on advocacy for reform of a policy of mandatory detention and providing advice about risk mitigation and prevention of harm to detained vulnerable groups. Over the last decade these groups have been involved in research and advocacy and contributed to an understanding of the psychological needs of asylum seekers and the factors related to recovery, trauma resolution and adaptation to a new environment. Importantly, this project has also identified a significant psychological cost both to asylum seekers and refugees and to the broader community in terms of mental disorder and treatment services. The longitudinal harm and its social impact have had little focus in current debates.

This situation raises significant questions as to the Government's awareness of the damage done to individuals, their acceptance of this, and whether this is in any way a defensible position. The argument that some may suffer, but that this is acceptable in the name of a broader goal, is both troubling and morally bankrupt. The concept of 'collateral damage' serves to minimise the human suffering and our responsibility to prevent it.

### **Detention and mental health (1)**

Indefinite detention of asylum seekers, including children, remains possible under the Migration Act. Mandatory detention has been the cornerstone of Australian deterrence policies since its introduction in 1992.

Despite concerns raised regarding vulnerable groups and children, arbitrary indefinite detention has been promoted by both major political parties and has persisted in the face of evidence of psychological harm and the view of the United Nations Human Rights Committee that it is contrary to international law.

Both major parties around the September 2013 federal election focused on increasingly harsh approaches to so-called 'unauthorised' arrivals, resulting in a widespread questioning of Australia's commitment to support displaced persons and a move to 'process' all asylum seekers offshore and under local legal frameworks. The rejection of any obligation to resettle or support asylum seekers in Australia has a profound impact on those seeking asylum and once again introduces xenophobic anxieties about 'illegal' entrants seen as having no need of protection and as a threat to the wider community. It is in this highly politicised context that the vulnerable and displaced enter the Australian immigration system. All have noted the negative impact on mental health of prolonged detention, the impact of remote detention centres in harsh environments, and the developmental impact on detained children.

The 2004 Human Rights and Equal Opportunities Commission report on children in detention noted children with clear signs of developmental compromise and trauma-related mental health problems including depression, anxiety, and attachment disorders. Children were also negatively impacted by witnessing violence, self-harming behaviours and the deterioration of the adults around them. The detention centre environment was criticised as being unsuitable for children, unable to protect children, and having little orientation towards psychological damage. The inquiry findings of a systemic lack of understanding of psychological vulnerability

---

and the needs of traumatised children and adults raised concerns about an opaque system with little external scrutiny and limited access to legal and other supports for the detainees.

The impact of isolation, uncertainty and feelings of abandonment compounds pre-existing trauma and loss and in many ways provides an ideal ‘breeding ground’ for increasing hopelessness and despair. The mass outbreaks of self-harm in the highly emotive environments of Baxter and Woomera communicated starkly to the general community that all was not well in the land of detention and that individuals were at the limits of their psychological coping. The Government’s response to those distressing scenes was one of ‘blaming the victims’ for ‘bad behaviour’ on the assumption that this was consciously orchestrated dramatic behaviour aimed at manipulating the Government.

Little understanding was evident of the complex motives underlying self-harm or the desperate need to communicate feelings of pain and abandonment in acts such as mouth-sewing and cutting. The rise of punitive interventions such as isolation and solitary confinement has received ongoing criticism from both a human rights and mental health point of view and reflects a failure to examine the underlying causes of asylum-seekers’ distress and a fundamental lack of understanding of the psychological aspects of detention. For health workers, the request to ‘approve’ punitive treatment of detainees raises fundamental ethical concerns. This issue in many ways is an example of the dilemmas facing medical and health professions in this area – the limitations of clinical efficacy in coercive and damaging environments; the resultant disempowerment of the clinician; the core dilemma of reserving the right to criticise a damaging system whilst working within it; and the need to act as an advocate for the vulnerable at the risk of conflict with

the Government. Whilst these are complex issues, the international ethical statements for professional bodies clearly state that the priority is the rights and health of individuals and that practitioners should not collude with the Government in violations of human rights.

## Clinical research

There is now an accumulated body of research documenting high rates of mental disorder in detained asylum seekers. Pre-flight trauma and loss factors interact with the trauma of flight and are compounded by experiences of detention and lack of certainty about the future. The experience of detention itself contributes in a direct way to mental disorder and deterioration over time. The experience of detainees is one of powerlessness and passivity often within isolated and remote locations, with little sense of having found a place of safety. The traumatised asylum seeker often experiences a sense of helplessness and loss of control with overwhelming anxiety about the future. The impacts of past trauma are compounded by this experience. Unable to be resolved, they may become even more intense and persistent.

Mental deterioration and breakdown of usual coping strategies are common, resulting in emotional dysregulation, frustration and states of depressive withdrawal. Forms of self-harm can strikingly communicate despair and the dilemma of the detained – mouth sewing, burial in sand, cutting the word ‘freedom’ in the flesh. Research by Steel and colleagues (2) found that major depression was universal in a detained population and that most experienced suicidal ideation. All detained children were diagnosed with at least one mental disorder with 50 per cent having Post-traumatic Stress Disorder, and many having separation anxiety related to traumatic experiences in detention. In many ways these results are not surprising; what is concerning

---

is the current commitment to policies of deterrence where psychological suffering is a core component.

The persistent and ongoing nature of detention-related mental disorder is of both clinical and ethical concern. Former detainees may experience ongoing post-traumatic symptoms related to detention centre experiences and struggle to understand why they received this treatment. There is also evidence that those granted only temporary protection also have ongoing mental disorder and are less able to resolve and recover from traumatic experience.

### **Ethical dilemmas for professionals**

The conditions of detention and a prevailing culture of dismissal of psychological concerns devalue the psychological distress of detainees. Self-harm and behavioural disturbance are easily seen as ‘bad’ behaviour which is politically motivated and dealt with by increasingly harsh and punitive responses such as so-called ‘behaviour management plans’ reminiscent of behaviour modification approaches. For clinicians in this environment it has been difficult to maintain clinical focus and to advocate for the needs of detainees when expert opinion can be dismissed and where there is suspicion of recommendations for release and external treatment. Many clinicians have felt both disempowered and traumatised in a system where they may not be able to act in the best interests of detainees. The limitations of ‘treatment’ in these environments and the difficulties of advocacy have raised clear moral dilemmas but have also forced important reflection on the responsibilities of professionals to raise concerns about harmful government policy and human rights violations.

### **Trauma and recovery**

The capacity of human beings to survive and recover from experiences of trauma and dispossession is poorly understood. The displaced forced-migrant voice is one seldom heard but often speaks of core needs for safety and security, rebuilding of relationships, maintaining cultural identity and restoration of a sense of justice and meaning. Development of mechanisms which support communities and groups who have survived massive trauma and threats to existence in telling the story of their exile contributes to recovery in a concrete way. The reality of trauma in refugee populations is a complex mixture of individual and collective experience and is very much impacted by the response of the host country in validating experiences and supporting recovery. Current politics in Australia focuses on judging asylum seekers as being not in need (economic refugees) or subverting non-existent processes (queue jumpers) or in some way posing a threat to the ‘sovereignty’ of Australia. Dehumanising discourses seek to distance us all from the reality of loss and dispossession.



---

### Recent developments (3)

The September 2013 election saw increasing focus on harsh deterrent approaches including offshore processing and resettlement. This has not been enacted within a regional protective framework but rather as a measure aimed purely at ‘stopping’ unauthorised arrivals and denying the right to appropriate assessment of asylum claims. The offshore transfers will include high-risk groups such as infants and children, pregnant women and those with medical and mental health conditions. There is an apparent rejection of any discussion of suffering or need for humanitarian response, instead a hard-line militarism and the politics of the iron fist. The risks of this approach are clear in terms of failure to meet international obligations, but even greater in terms of moral failure and breakdown of compassion. Neither of those are easy to discuss within the current political framework.

The intense xenophobia driving our treatment of asylum seekers has deep historical and cultural roots which need to be reworked. The ‘lucky country’ has become so on the displacement of Indigenous owners and with the input of waves of immigrants and refugees. To acknowledge this implies an acceptance of our responsibilities and a shift from the politics of control to those of need and response. Ignoring the psychological plight of asylum seekers and the damage caused by government approaches can and should be resisted by professionals and clinicians.

### References

1. Newman, L.K., & Steel Z., ‘The child asylum seeker: Psychological and developmental implications of immigration detention’, *Child and Adolescent Psychiatric Clinics of North America*, 17(3), 2008, pp. 665-83.
2. Newman, L.K., Dudley, M., & Steel, Z. ‘Asylum, detention and mental health in Australia’, *Refugee Survey Quarterly*, 27, 2008, pp. 110-27.
3. Newman, L., Proctor, N. & Dudley, M., ‘Seeking asylum in Australia: immigration detention, human rights and mental health care’, *Australasian Psychiatry*, 21 (4), 2013, pp. 315-20.

---

# Ethical issues in the asylum seeker debate.

## Simon Longstaff

---



*Dr Simon Longstaff AO is Executive Director of St James Ethics Centre [www.ethics.org.au](http://www.ethics.org.au). He has a PhD in Philosophy from Cambridge and his doctoral research centred on related questions arising in the areas of political philosophy, ethics and the philosophy of education. He has worked previously in the Northern Territory in the Safety Department of BHP subsidiary, GEMCO, lectured at Cambridge University and consulted to the Cambridge Commonwealth and Overseas Trusts. Dr Longstaff was inaugural President of The Australian Association for Professional & Applied Ethics and is a Fellow of the World Economic Forum.*

---

### Abstract

The principal duty owed to asylum seekers is to ensure their safety. That is, there is no general obligation to offer prosperity or other goods that people might reasonably seek in order to flourish. That said, human compassion might lead a society to do more than the minimum – but such a decision is not intrinsic to the concept of ‘asylum’. At a more fundamental level, we might also wish to consider whether or not the establishment and maintenance of borders is fair – especially given the ‘lottery of life’ where the benefits and burdens of our place of birth are distributed with no regard to merit.

### What is our obligation to asylum seekers?

It is late September 2013 as I write this article. I do so from the comfort of my seat aboard an A380 – heading home from Europe – well cared for and safe at 39,000 feet above sea level. It is impossible not to be struck by how my fortunate circumstances stand in stark and awful contrast to those drowned, just days ago, when making their way to Australia in a vessel that never should have put to sea.

The tragic loss of another group of asylum seekers is bound to prompt fresh debate about Australian government policies and what role, if any, these have played in sealing the fate of those lost to the deep. What follows does not consider the legal foundations for sound policy in this area. Rather, I wish to strip back to its bare ethical bones our national response to asylum seekers. So, to begin.

My first proposition is that there is little to be gained by questioning the sincerity of those who claim to be motivated by a compassionate desire to dissuade asylum seekers from making the sometimes fatal (and now futile) choice to come by boat. Perhaps past and present policy has been formed in hearts as brittle as Georgian glass - worn with use and easily cracked. Perhaps the dictates of conscience just happen to coincide with electoral opportunity. At least let us hope so - for the putrid alternative is that our politicians have traded the welfare of asylum seekers for political power.

---

My second proposition is that it is neither fair nor reasonable to hold the Australian Government responsible for the decisions of asylum seekers to place their lives (and those of their children) at risk. The obvious point to acknowledge here is that the choice to procure a place in a boat bound for Australia is the asylum seekers' alone. They venture all - and often lose - in the face of the clearest signals from Australia that the journey should not be attempted, that the sea-route to Australia is closed. Yet, despite the election of a Government that has pledged to 'stop the boats', still they come - at least for the time being. That is the reality - the reality against which the relevant policies of the Australian Government must be evaluated.

So, my third proposition is that the Government is solely responsible for the quality and character of its response to the decision by asylum seekers to attempt the sea-route.

My fourth proposition is that the concept of 'asylum' is, at its core, about the provision of safety to those who are at risk of harm (without just cause) and who lack the capacity either to protect themselves or to enjoy the protection of another. 'Asylum' is this - and nothing more. As a moral (rather than legal) obligation, the duty to offer asylum falls on those with the power and resources to provide for the safety of others - and in the aftermath of the genocidal horrors of the Second World War, the right to asylum extends to all persons irrespective of their nationality, race, religion, political beliefs, age, etc., whether friend or stranger. That is, it is the objective circumstances of the person seeking asylum and the capacity of those from whom asylum is sought that give rise to the relevant, reciprocal rights and responsibilities.

We should note here what the concept of 'asylum' does not entail. Specifically, it does not entail a right to prosperity or to other more refined goods associated

with human fulfilment and flourishing. And it is in this distinction that much of the confusion lies. Some critics of government policy argue as if asylum seekers are owed something more than safety. If this is so, then the critics' argument will not succeed if based on an appeal to the concept of 'asylum'. Rather, more general grounds attached to notions of human rights will need to be invoked. Even so, we should not think that the concept of 'asylum' is all too 'thin' to be of any real use. On the contrary, it offers a powerful norm against which to rate government policy.

For example, we see this norm invoked in the Coalition's policy to 'turn around the boats' when safe to do so. The Coalition knows that Australia's mariners will never ever violate the doctrine of Safety of Life At Sea (SOLAS) and that it is pointless asking (or even ordering) them to do so. But the appeal to the value of 'safety' is an overriding condition that places the policy within the definition of what constitutes asylum.

The application of the core value of 'safety' is not confined to conduct at sea. Equally, it applies to all aspects of the treatment of asylum seekers from the moment they enter into the effective domain of Australian decision-making. For example, it could be the case that Nauru and Manus Island are already (or can be made) safe places. But this is not solely a matter of subjective judgement. If asylum seekers are at risk of harm, then these risks must be mitigated not exacerbated by Australian government policy.

In saying this, I should be clear that the Government has no obligation to make life idyllic for those seeking (or granted) asylum. Safety does not involve the complete absence of trial, tribulation or even of risk. However, there are some trials, some tribulations and some risks that are intrinsically at odds with any reasonable understanding of safety. For example, placing people in

---

a form of detention that is known to cause mental illness and self-harm is not consistent with the concept of asylum. Whatever else is done, the conditions for asylum must be safe - that is all.

If asylum seekers are safe in countries such as Indonesia, Malaysia and other so-called 'transit' countries then, in principle, from the point of view of asylum-seeking, there is no good reason for asylum seekers to move on. Nor is there any good reason for them not to be returned to such places - providing that the means for doing so are also safe. Equally, if Australia can divert boat-borne asylum seekers to Nauru or Papua New Guinea - in conditions of safety - then this would be consistent with the core ethical duty.

Yet, there is one further point to be made. If coming by boat was actually safe, then there would be no ethical basis for turning asylum seekers away. This is because the concept of 'asylum' is indifferent to the means by which people arrive at your 'metaphorical door' seeking protection. Again, as noted above, 'it is the objective circumstances of the person seeking asylum (not the means by which they present) and the capacity of those from whom asylum is sought that gives rise to the relevant, reciprocal rights and responsibilities.'

All of this leads to a final consideration - could the Australian Government make the sea-route safe (or redundant)? Some commentators have certainly proposed measures to achieve this end; for example, by arranging flights for all asylum seekers or by providing ships that offer safe passage, etc. Realistically, it seems unlikely that even such generous measures would stem the flow. Rather, there would likely be that small additional group willing to hazard it all rather than wait.

However, there is one significant structural issue that has not yet been addressed - namely, the ethical status of borders. In this day and age we simply take it for granted that nations have an established right to set and protect their borders. Certainly, international law recognises such a right. However, are national borders ethically defensible? In particular, are they fair - especially given the 'lottery of life' that sees some people fortunate enough to be born in regions of plenty, while others (through no fault of their own) are born into a state of desolation and deprivation. Given that none of us 'deserves' to be born in one place or another, perhaps it is time to review our policies through John Rawls' 'veil of ignorance' - in which we are required to develop policies without knowing, in advance, our place in the world (1). If we could not know where we might be born (for good or for ill), what status might we then accord the idea and practice of establishing national borders?

Unfortunately, the challenge presented by 'boat people' is likely to remain for as long as we have oppression in the world. We would do well to play an active role in remediating the conditions under which people flee. At the same time, we are obliged to stand ready to offer asylum to those who claim it. How we do so should be assessed against a core criterion - is what we offer and what we demand of others safe?

## Reference

1. Rawls, J. A 'Theory of Justice', Harvard University Press. 1971

---

# Both sides of politics are failing us and the asylum seekers: There is a better way. Julian Burnside

---



*Julian Burnside AO is a barrister based in Melbourne. He specialises in commercial litigation. He joined the Bar in 1976 and took silk in 1989. He is a former President of Liberty Victoria, and has acted pro-bono in many human rights cases, in particular concerning the treatment of refugees. In 2003 he compiled a book of letters written by asylum seekers held in Australia's detention camps entitled *From Nothing to Zero*. In 2004 he was elected as a Living National Treasure.*

---

## Abstract

Australia's Pacific Solution is flawed and cynical. It is also hugely expensive. It is unlikely to work as a deterrent. The reason people embark on a risky boat journey has more to do with what they are fleeing than what they are fleeing to. So far - after more than a year in operation - it has not 'stopped the boats', and it is unlikely to provide a durable response to the arrival of boat people. However there is a cheaper way of addressing the 'problem', one which would do good rather than harm.

## A better way

In June 2012 Prime Minister Gillard convened an expert panel to provide recommendations on how best to address the problem of asylum seekers risking their lives on boats to Australia. In response to the Houston Expert Panel recommendations, Australia revived the Pacific Solution, with a twist - the 'no advantage principle'.

There are two contradictions at the heart of the Government's plan to use Nauru and Manus Island again as places for processing boat people in order to deter people from getting in dangerous boats.

The first contradiction - trivial by comparison with the second - is that the plan only operates after the danger, from which we want to protect them, has passed. The terms of reference for the Expert Panel concerned preventing people from risking their lives at sea in an attempt to seek protection in Australia. But to be taken to Nauru or Manus Island for processing, they must first get on a boat in Indonesia and be intercepted successfully by the Australian Navy or Customs. Protecting a person from a risk which has come and gone looks a bit silly.

---

The deeper contradiction however lies in the central element of the new plan. The central element is the principle that no asylum seeker should gain an advantage by getting on a boat and heading for Australia. That means that they won't be resettled more quickly if they come by boat than if they come in whatever other way the Government considers preferable. The idea is that, faced with the prospect of a prolonged stay in Nauru or Manus Island, an asylum seeker would choose to face down their persecutors, in the hope that government bureaucracies will supply a more efficient outcome than a people smuggler.

Right now, an asylum seeker who decides to wait it out in Indonesia rather than get on a boat faces a wait of between 10 and 40 years. While they wait in Indonesia, they face being thrown in jail if found, and they can't work or send their kids to school in the meantime. It is not hard to see why genuine refugees prefer to take a chance and hop on a boat.

It follows that we would need to hold them in Pacific limbo for quite a long time for the prospect of being processed on Nauru or Manus to influence their choices.

But there's a problem. Nauruan Foreign Minister Dr Kieren Keke and Papua New Guinea Prime Minister Peter O'Neill have both announced that asylum seekers sent to Nauru or Manus Island should stay for as short a time as possible. The Memorandum of Understanding signed by Nauru and Australia includes a commitment to place those assessed as refugees in 'permanent settlement as soon as possible'. This is not surprising, but it sits uncomfortably with the Australian Government's 'no advantage' objective.

Nauru and Papua New Guinea have good reason to insist that refugees should stay only as long as necessary to decide their refugee status. Their reasons are easily understood.

Both Nauru and Manus Island are tiny, and have tiny populations. Any non-trivial arrival rate of refugees will represent, for them, a very significant increase in their population and a consequent burden on their infrastructure. For example, Nauru's population is 10,000 people. It has set a limit of 1500 refugees (i.e. a population increase of 15 per cent). At an arrival rate of 12,000 a year (this year's likely arrival rate of boat people), Nauru's quota will be filled in 7 weeks. Until some of them are moved on, Nauru will not be able to warehouse any more refugees.

Manus Island has a population of 43,000. If it sets a limit equivalent to 15 per cent of its population, it will take 6,450 boat people. At current arrival rates, Manus Island's quota will be filled in 7 months. Until some of them are moved on, it will not be able to warehouse any more refugees.

So, for perfectly legitimate practical reasons, Nauru and Papua New Guinea will want refugees moved on as soon as possible. For its own practical reasons, Australia should want them moved on as soon as possible, or its Pacific warehousing capacity will run out in just 9 months. But where to move them to? People assessed as refugees on Nauru or Manus Island will have to be resettled somewhere: they can't be sent back to the country they are fleeing.

The 'no advantage' principle, if carried into effect by the Governments of Papua New Guinea and Nauru, will create an additional problem for them: their local politics make it impracticable to allow refugees to live in the community.

---

In addition, both countries have a Constitutional Bill of Rights. Holding a refugee in detention indefinitely in order to implement Australia's 'no advantage' principle is almost certainly unconstitutional.

In any event, both Nauru and Papua New Guinea have finite, limited capacity to warehouse refugees for us. To cope with a spike in arrivals, Australia has filled its onshore detention centres to capacity, and is releasing some people into community detention, with no right to work, and minimal welfare rights.

Each of these responses involves Australia in breaches of various international human rights standards but, more importantly, they sit badly with our vision of ourselves as a generous, decent nation.

However, there is an alternative. If I could re-design the system, it would look something like this. Boat-arrivals would be detained initially for a maximum of one month, for preliminary health and security checks. That detention would be subject to extension but only if a court was persuaded that a particular individual should be detained longer.

After that period of initial detention, boat arrivals would be released into the community on an interim visa with a number of conditions that would apply until the person's refugee status was decided:

- they would be allowed to work;
- they would be entitled to Centrelink and Medicare benefits;
- they would be required to report regularly to a Centrelink office or a post office, to make sure they remained available for the balance of their visa processing;

- they would be required to live in a specified rural town or regional city.

A system like this would have a number of benefits. First, it would avoid the harm presently inflicted on refugees held in detention. Prolonged detention with an unknown release date is highly toxic: experience over the past 15 years provides plenty of evidence of this.

Second, any government benefits paid to refugees would be spent on accommodation, food and clothing in country towns. There are plenty of towns in country areas which would welcome an increase in their population and a boost to their local economy. According to the National Farmers Federation, there are about 96,000 unfilled jobs in rural areas. It is likely that adult male asylum seekers would look for work, and would find it.

However, even if every boat person stayed on full Centrelink benefits for the whole time it took to decide their refugee status, it would cost the Government only about \$500,000 a year, all of which would go into the economy of country towns. By contrast, the current system costs about \$4 billion a year. We will have saved about \$3.5 billion a year, and we would be doing good rather than harm.

This approach would take a bit of political selling, although I suspect that rural and regional Australia would be quick to see the benefits. If further political persuasion was needed, we could spend a billion dollars a year from the savings to construct public housing for homeless Australians.

However it should not be too hard to persuade the community that we can do better than we are doing now. The present system is supported by lies. Of course criminals should be treated as criminals, but when you

---

see that boat people are not criminals it is more difficult to understand, much less accept, our treatment of them.

I believe most Australians are decent, generous people. Our record in both world wars stands as a tribute to our national character; our response to the Asian tsunami did likewise. It was tragic to see our national character brought down by the Howard Government's deceptive rhetoric about boat people (most of it calculated to win back voters who had drifted to One Nation). It is being damaged further now by the fanatical rhetoric of Scott Morrison who is determined to persuade Australians that boat people are criminals from whom we need protection.

Morrison has regularly referred to boat people as 'illegal'; he has suggested that those who are placed in community detention should be required to report regularly to police; he has said that they should not be placed in the community near 'vulnerable people'. In October 2013 he directed staff in his Department to refer to boat people as 'Illegal Maritime Arrivals'. The Department is now officially the Department of Immigration and Border Protection.

It is impossible to escape the conclusion that this rhetoric is calculated to induce the false impression that boat people are criminals, dangerous and undesirable, from whom we need to be protected. It is a bizarre inversion of the fact that more than 90 per cent of them are ultimately assessed as entitled to be protected by us from persecution.

Unfortunately the Labor party, both in Government and in opposition, has failed to expose the deceptive rhetoric of the Coalition. Apparently neither major party in Australia is willing to point out to voters that we have been misled for years; that there is another way; that we are better than this.



---

# Asylum seekers: Does our approach reflect our character? The lessons that must be learnt.

## Mick Palmer

---



*Mick Palmer AO APM is a former career police officer and barrister at law, who served as Commissioner of Police with the Northern Territory Police and the Australian Federal Police. Since his retirement from policing in 2001 he has conducted a range of corporate governance related inquiries including inquiries into prison management in Victoria and Tasmania and the inquiry into the Immigration Detention of Cornelia Rau. He is a Director of Australia21.*

---

### Abstract

This essay examines treatment of asylum seekers in Australia against the background of two notorious cases, Cornelia Rau and Vivian Alvarez, and seeks to illustrate the critical importance of due process, competence and integrity to a just and effective asylum-seeker management and handling system. The emotional and psychological impacts that are likely to be caused by immigration detention and the damage that can be caused by inadequate inquiry are illustrated and the questions asked: have the lessons of Rau and Alvarez been learned and are current practices and procedures likely to lead to just and humane outcomes? Are we comfortable as a society with our current approach? Do our treatment and handling processes reflect expected Australian values? Assessment criteria are suggested which as decent Australians, we should expect to apply in the treatment of people in Australian immigration detention.

### The moral aspect of current policy

There are fundamentally two dimensions to a government asylum-seekers policy. The first governs the arrangements aimed at preventing or deterring unauthorised 'asylum seekers' from entering Australian territory, whilst the second governs the way in which those people who breach our border security and reach Australian waters and Australian shores or airports are treated during their detention.

In regard to both aspects of government policy, a missing ingredient in the continuing dialogue surrounding the asylum-seeker dilemma is genuine and meaningful public debate about the human face – the personal reality and cost – of the policy: the moral question rather than the legal question.

Such debate, it is suggested, could focus on testing and answering questions such as: who are these people; what are the circumstances which drive or cause them to take such risks and face so much danger and uncertainty; what are the realities of their treatment while in our custody; are we as Australians comfortable

---

with the manner of their treatment while in immigration detention? Are we satisfied that the operation of Australia's unauthorised arrivals immigration policy accords with our own standards of decency and fair play?

Australia is a humanitarian country and its people have a history of generosity and a willingness to help those in need. Of course, there has to be limits: it is not possible for any country to open its borders to all who may wish to come. The issue of asylum-seeker policy requires Australia to consider and decide how best to determine and manage this situation and its many challenges. This requires examination of both the ways by which the numbers of unauthorised immigrants arriving in Australia's waters can be reduced, and the ways in which those who do so arrive are treated.

It is not the fault of the Australian Government that people take inordinate risks to seek asylum in our country. It is, however, the responsibility of our Government to determine the quality and decency of the way in which asylum seekers who arrive in Australia's jurisdiction are treated.

This essay seeks to personalise the second dimension of Australia's asylum seeker-policy, to examine –against the background of two notorious cases - the emotional and psychological impacts that are likely to be caused, and to ask: are we comfortable, as a society, with this approach? Is it justified? Does it reflect our character? Is there a better way?

On the 31 March 2004 a young woman named Cornelia Rau was detained in north Queensland as a suspected unlawful non-citizen, in accordance with section 189 of the Migration Act of 1958. Section 189 essentially required an officer who knew or reasonably suspected a person found in Australia to be an unlawful non-citizen, to detain that person in immigration detention.

Ms Rau, a German born Australian resident, had been a permanent resident in Australia since 1983, a period of over 20 years. She had a history of mental illness and had gone missing from Manly Hospital Sydney on 17 March 2004, whilst receiving treatment for erratic and unstable behaviour. She had variously been diagnosed as suffering 'bipolar disorder', 'chronic schizophrenia' and 'schizoaffective bipolar'. She was clearly a very vulnerable person.

When apprehended on 31 March 2004, Ms Rau falsely identified herself as both Anna Brotmeyer and Anna Schmidt, a German tourist who had overstayed her tourist visa. Neither person, it seems, existed. Her undiagnosed mental illness and false stories combined to increase the difficulty of establishing her true identity, but the refugee assessment system should have the capacity and rigour to recognise and deal with these challenges.

Ms Rau remained in immigration custody for some ten months, six months in a mainstream prison in Queensland and four months at the Baxter Immigration Detention Facility outside Port Augusta, in South Australia.

When finally identified as Cornelia Rau and released from detention, her identification resulted from the actions of refugee advocates, rather than official inquiry. For the entire ten-month detention journey she remained undiagnosed with mental illness.

At the time of her identification Ms Rau was still in 'indefinite detention' and the main focus of inquiries was still on attempting to identify her country of origin so as to enable her lawful removal from Australia.

---

Cornelia Rau's case bears disturbing similarities to the matter of Vivian Alvarez, a Philippine-born Australian citizen who came to the attention of immigration officers in April 2001 as a destitute, frail, Filipino woman found wandering the streets of Lismore, New South Wales. Alvarez was admitted to psychiatric care in Lismore and during interview told various and conflicting stories of her arrival in Australia. Immigration officials had concerns Alvarez may have been a sex slave but during later recorded interviews she claimed to have married an Australian and to be an Australian citizen.

Regardless of this information, and despite the Queensland Police making a missing persons inquiry of the Immigration Department on 19 July 2001 concerning a woman named Vivian Solon also known as Young who had a date of birth the same as that provided by Alvarez, and an Immigration response to police identifying the missing person and using the name Alvarez and the same date of birth, Vivian Alvarez was removed from Australia the next day, 20 July 2001, as an unlawful non-resident, and flown to Manila.

Following publicity arising from an inquiry into her removal, conducted in 2005, Vivian Alvarez was found living in a Manila refuge and returned to Australia.

It is not suggested that any immigration officer involved in the removal of Vivian Alvarez was aware at that time that Ms Alvarez was an Australian citizen or a reported missing person, but it is clear that a competent management system and any thorough and objective inquiry would have established these facts.

The immigration detention journeys of Cornelia Rau and Vivian Alvarez raise a range of questions regarding current asylum-seekers policy, including the quality and nature of enquiries which should be conducted to verify a person's refugee status, the conditions under which

asylum seekers are likely to be held whilst in Australian immigration detention, and the quality of medical and mental health care and review and assessment detainees are likely to receive while in detention.

Several issues were identified as at the core of the problems associated with the handling of both Cornelia Rau and Vivian Alvarez. The principles and processes they gave rise to are critical to good asylum-seeker detention management and should be at the heart of current operational practice. They include:

- Holistic 'cradle to grave' case management of a comparable standard to that expected in mainstream corrections facilities.
- Sufficient training to ensure compliance officers and other relevant officers have the skills and understanding to conduct competent identification inquiries.
- Corporate review and audit practices sufficient to test the continued validity of the basis of the initial detention.
- Mental health care and assessment arrangements that adequately address the mental health profile of the immigration detainees.
- Effectively connected immigration-related data bases and information systems to manage and oversight persons in immigration detention through their period of detention.
- An executive and operational culture which understands its accountabilities and self-initiates review and critical assessment of detainee management practices.

---

These principles and processes are at the heart of the ongoing effective management of any government asylum-seeker policy and should be subject to frequent reassessment.

It is unacceptable that Cornelia Rau, despite quite extensive inquiry, was not identified and was held in indefinite immigration detention for a period of ten months before being identified as a bona fide Australian resident and released, and that Vivian Alvarez was removed from Australia on a walking frame despite being an Australian citizen and having told immigration officials she was a citizen during formal interview.

These situations should be cause for concern for fair-minded Australians, particularly when it is remembered that Cornelia Rau's release was the result of actions by volunteer advocates and concerned citizens rather than official action and Vivian Alvarez was only located after publicity in the Philippines arising from an independent inquiry.

The editorial of the Brisbane Courier Mail on 7 October 2013 emphasised and reinforced the issue of accountability, so graphically identified in the Rau and Alvarez cases. The comments raise concerns that lessons may not yet have been fully learned:

'A representative democracy allows the people to delegate its decision-making power to governments, while governments, because of the scale of public activity, are forced to delegate programs to other groups such as industry contractors.

But a delegation of duty does not equate to a delegation of responsibility. Governments remain responsible for the programs they administer, and for the safety of workers in those programs regardless of how many hands the paperwork passes through. As Coroner Barnes wrote

in July 'an employer's responsibility to provide a safe workplace is not negated by simply labelling workers as contractors'.

A Government has every right, within its electoral mandate, to implement and enforce a strong immigration policy but nothing will bring it undone more quickly than excessive, negligent or uncaring delivery. Whatever our immigration policy, it should be enforced with decency and fairness. As Australians we should demand no less.

---

# A win-win welcome.

## Anne Kilcullen

---



*Anne Kilcullen's family background was in semi-rural North Queensland; she was an infant wartime evacuee from Cairns. She organised doorknock collectors in a Brisbane suburb for the first World Refugee Year in 1959/60. Awards include a University of Queensland gold medal (1962), a Commonwealth Scholarship to Canada (1964) and a PhD (1968) in English Literature from the University of Toronto. For 30 years she worked as an editor for CCH Australia Limited, a Sydney tax and business law publisher. Retired in Canberra, she enjoys sharing the activities of her family, church and neighbourhood.*

---

### Abstract

What is suggested is a win-win welcome, where local (especially rural) communities can determine their own specific needs and resources and make an offer or 'tender' to receive a matching group of refugees or asylum seekers. Mutual respect is key. The process would be supported by a panel of match-makers and a committed source of funding for specific infrastructure.

### Identifying benefits for both sides

Any durable arrangement for the happy long-term resettlement of refugees will contain elements of perceived mutual benefit to both the newcomers and the receiving community.

Needs of asylum seekers and refugees include:

- Safe, reliable accommodation
- Food and clothing
- Health support

- Opportunities to maintain the familiar language and culture while adjusting to the new
- Purposeful activity that is valued by the one performing it and by others.

Communities have needs too, of many different kinds. What if we could be clever about finding and supporting the right match?

Imagine these scenarios:

- Country town A has 6 vacant houses that are falling into disrepair. It needs a motor mechanic, and 7 children to make the local school viable. Town A's representatives ask for 30 refugees, including 10 children, a motor mechanic, and some skilled carpenters, and enough cash for materials for repairs to the houses and the school.
- Region B needs 20 labourers to clear land of unviable fruit trees. It offers a welcome for a group of young men, and two mature couples who speak the newcomers' language and some English. The cleared land will afterwards be available for aquaponic food production (1) and a trial crop of *Jatropha curcas* L

---

(a highly productive version of a dry-land oilseed plant). New residents will be housed in a recently closed cannery. The region needs funds to convert the cannery to residential use.

- The agriculturalists around Town C need seasonal workers who can be relied on to work year-by-year once they have been trained. Newcomers who are recruited will spend their time in the off-season improving their English literacy and working towards Australian recognition of their overseas qualifications. A disused orphanage is available; funds will be needed to repair and upgrade it to provide accommodation (2).

The idea has fore-runners, some described by Ann-Mari Jordens in her 2012 book, *Hope: Refugees and their Supporters in Australia since 1947*. The Commonwealth Government's Good Neighbour Movement (1950) and Community Refugee Resettlement Scheme (1979) are examples. Rural Australians for Refugees inspired some local towns around Australia to declare themselves Welcome Towns, beginning in 2001 with Armidale, Bellingen and Mount Isa. With Department of Immigration funding, community-based organizations currently tender for contracts to provide settlement services, but they can serve only those already accepted as refugees, and only for 6 months. The ABC TV program (2012), *Country Town Rescue*, illustrated some pitfalls and successes, and the need for clear guidelines in any such scheme.

Some principles for a win-win welcome, to be explicitly stated from the beginning, might be:

- The welcoming community is autonomous in its decision-making.
- The newcomers understand and accept the roles they are being asked to fill.

- Mediation services, in case of agreement breakdowns, are in place from the beginning.
- There is a clear agreed time-frame for each project.
- The external funding is secured long-term and in full.
- Minimum and maximum numbers of newcomers are set for any one project (say no fewer than 10, no more than 30?): enough for the newcomers to have someone who shares their background language and culture, not so many as to swamp the receiving community.
- Support for the health (including dental and mental health) of newcomers is readily and consistently available.
- Asylum seekers and refugees are protected from economic exploitation (3).
- Participation in this initiative is open to anyone of goodwill, but the project is not aligned with any political party, faith community, ethnic group, or socio-economic profile.

Care must be taken in the design of each specific project to avoid the perception that unfair advantage is being given to newcomers over existing community members. In fact, a system of supported tender-and-matching could become the basis for regional development Australia-wide, for old and new inhabitants alike.

What about people who are not allowed to work under present immigration rules? Sporting and leisure activities should be acceptable. Depending on the rules in force at the time, it should be permissible to work without pay to feed oneself (in the informal and tentative opinion of migration agent Marion Le AM).

---

Some other possible scenarios are:

- Inland centre D has one doctor who is ready to retire. She will employ an overseas trained practitioner in a subordinate capacity while he obtains Australian registration, and he will then work part-time with her until she retires. Three new families will attend school and maintain the viability of the local pharmacy business. In return a local airstrip will be upgraded to permit Royal Flying Doctor Service landings.
- Farmer E needs labourers to rebuild flood-damaged fences and fight weeds; he will house the people in disused shearing sheds. Funds are requested to fit out the accommodation and for maintenance works to make roads and bridges flood-proof.
- Remote area F looks for 20 newcomers including musicians and artists who can work with local young people to set up bands, perform concerts and present art shows. It requests the supply of 20 sustainable dwellings like those produced for refugee camps by the Ikea Foundation, half to be used for housing existing community members, plus a basic medical centre that will be visited once a month by medical staff providing maternal and child welfare, mental health and dental services with Royal Flying Doctor Service support.
- Town G has an aging population who have moved into town from their outlying properties. They are still in reasonable health but increasingly need help with mobility and interesting small-scale activities to keep their minds alive. They offer to provide accommodation in their former houses and to share their craft and cooking skills with 6 families with young children. An addition to the school bus run is needed to bring the newcomers into town daily. Equipment and training will be required to build

up enterprises like making Backpack Beds for the organisation Swags for Homeless, or designing and producing fashion clothing and accessories as does No Sweat Fashions in Canberra. These businesses will keep the town centre viable for pedestrian shopping.

- Regional city H has a sustainable greenhouse project in the vicinity (like SunDrop Farms at Port Augusta). Building and operating the expanded plant will require workers who are willing to stay. In return the region will be guaranteed funding for an expanded plant.
- State I becomes the primary destination for unaccompanied minors. They are initially boarded in private homes. As they settle and grow up, they care for themselves in share houses, with continuing adult mentoring. The model is then extended to enable more local high school students to continue to matriculation level by spending the week in larger centres and the weekends in their more remote home communities. Rental or building of group houses improves economic activity. Extra funds are requested to support the recruitment of additional high-school teachers, as well as skilled trainers in woodwork, catering, beekeeping, and other occupations compatible with the local economy (4).

And so on The dream is for a thousand projects, glorious in their differences, blooming like wildflowers all over the country. Realistically, there should probably be one or two pilot projects for a start! The advice from Emerita Professor Dorothy Broom, for any pilot project that is designed for replication, is 'Have concrete objectives and measurable outcomes. Measure before and after, and keep records.'

The initiative must grow out of open consultation and decision-making by the welcoming community itself. Any vested interests that are affected need to be openly

---

acknowledged and balanced against concerns of others. It can be done: all over Australia communities are successfully organising themselves to speak with a concerted local voice. Deliberative democracy initiatives exist already, and new tools are being developed, eg at the ANU Centre for Dialogue. The West Belconnen Health Co-op Ltd is now operating at five locations after beginning as a community initiative in 2004. Independent Federal MP Cathy McGowan was elected in 2013 because the local group Voice for Indi methodically gathered intelligence on what the electorate actually wanted.

‘Matchmakers’ who would link appropriate newcomers to community opportunities are an important element of the scheme. Among other possibilities, existing effective Settlement Service Providers, such as Access Community Services in Logan, Brisbane, might extend their work into this role. A co-ordinating body would also be needed.

In the absence of government support, funding for materials and infrastructure could come from philanthropists and/or crowd funding. The Social Stock Exchange is an example of how capital markets may be used for social good.

Where enlightened self-interest is engaged, in an imaginative, open-hearted, tough-minded way, durable solutions can emerge. We can offer a win-win welcome.

## References

1. John Brummell, of Fusion, successfully worked with Karen refugees in Canberra for 10 years on this ‘sustainable, profitable and labour-intensive’ project.
2. See John Thistleton’s article <http://www.canberratimes.com.au/comment/a-resettlement-solution-20130804-2r7l0.html>
3. Canberra Refugee Support subjected members working directly with refugees to police checks; trained, supervised and mentored them; and provided a Good Practice Guide: see Geoff McPherson’s interview in Hope, <http://halsteadpress.com.au/site/?p=980>, p. 198.
4. Cf. Julian Burnside on the ‘Tasmanian solution’ <http://www.abc.net.au/news/2013-09-13/asylum-seeker-advocate-julian-burnside-suggests-27tasmanian-so/4955436>.



---

# Ten incremental steps to transform refugee protection in the Asia-Pacific region.

## Paul Power

---



*Paul Power has been Chief Executive Officer of the Refugee Council of Australia (RCOA), the national umbrella body for 175 agencies working with refugees and asylum seekers, since 2006. Since 2008, he has served on the Australian Government's Refugee Resettlement Advisory Council. He had prior experience as a media officer, trainer, researcher and manager and as a journalist and editor. He has been involved with projects in international aid, community development, mental health support, volunteer training, social research and advocacy.*

---

### Abstract

In Australia, debates on asylum policy lack an international perspective with discussions focused on domestic political concerns about people smuggling and unauthorised entry to Australian territory. The harsh realities for refugees seeking sustainable protection are rarely acknowledged. The Refugee Council of Australia argues that Australia will not develop worthwhile and effective responses to displacement in the region while it unilaterally pursues policies of deterrence. A more sustainable approach must involve cooperation between States to protect refugees at risk. While change will happen slowly, there are ten incremental steps which could transform the protection of refugees in the Asia-Pacific region and end the situation where many refugees see people-smuggling networks as their only hope of getting to a place of genuine safety.

### A better way forward

As Australian politicians were arguing in mid-2013 about whether Australia should withdraw from the Refugee Convention in the face of 25,000 asylum-seeker arrivals

by boat in twelve months, the public discussion in the Middle East focused on much more pressing questions. Could Lebanon, Jordan, Turkey, Iraq and Egypt continue to provide shelter, food, water, sanitation, health services and education for the ever-growing numbers of Syrians displaced by their nation's civil war? Could the region cope as the number of refugees passed two million?

In June, 125 agencies combined for the largest global humanitarian appeal ever launched, seeking US\$2.9 billion for their work with Syrian refugees. The amount sought was remarkably similar to the A\$2.97 billion allocated in May by the Australian Government for immigration detention and 'offshore asylum seeker management' in its 2013-14 Budget. In August, as the global appeal for Syrian refugees was struggling to meet half its target, the Australian Government increased its allocation for detention-related services by \$351 million, the largest additional expense being its new plan to send asylum seekers (including Syrians) to Papua New Guinea, never to return.

---

One of the clearest aspects of the Australian debate about asylum seekers is the pervading lack of international perspective. The issues are primarily discussed in light of the battle between Australian political parties, viewed overwhelmingly from Australia's perspective alone and presented as being about people smuggling and unauthorised entry to Australian territory. The protection of refugees is rarely discussed.

In June 2013, asked at his agency's global consultations with non-government organisations in Geneva about the debate within Australia, United Nations High Commissioner for Refugees, Antonio Guterres, spoke about 'the Australian paradox'. Praising Australia's generous resettlement program, Mr Guterres said there was something 'deeply rooted in the collective psyche of the country' about boat arrivals. He said that it was impossible to convince his agency (UNHCR) that a few thousand people coming to Australia was a big refugee flow in view of the crisis in Syria and the number of refugees hosted by countries such as Pakistan. While accepting the necessity of some mechanism of deterrence for smuggling networks, Mr Guterres said those who reach Australia should be received and given access to Australia's asylum process.

Few people seem to disagree with the notion that action is necessary to change the dynamics which result in thousands of asylum seekers paying large sums of money for dangerous boat journeys to Australia. However, because opinion is deeply divided as to whether this is a border protection crisis or a refugee protection crisis, there is little common ground on the most appropriate responses. The Refugee Council of Australia (RCOA) has argued for some years that Australia will not develop worthwhile and effective responses to displacement within our region while it largely ignores the difficulties many refugees face in getting access to protection.

The global trends for refugee protection are bleak. The majority (6.4 million) of the 10.5 million refugees under UNHCR's mandate are classified by UNHCR as being in 'protracted refugee situations' with no durable solution in sight. The average length of displacement for these refugees is around 20 years. Rates of voluntary safe return to countries of origin are declining, integration is not available for refugees in many countries of asylum, and fewer than 90,000 (less than one per cent) of the world's refugees get access to resettlement in any year. UNHCR has noted that, in response to such ineffective action to protect refugees, more refugee families are doing what they can to protect themselves. The increased movements by boat to Australia are part of a growing global trend of refugees travelling further afield to seek safety and sufficient income to get relatives out of situations where they remain at great risk.

Despite popular belief in Australia, few refugees (only 28 per cent as at December 2012) live in camps. Most live in deep poverty in cities and villages, with little or no outside assistance and often without basic forms of legal protection. Refugees living in urban slums in South East Asia have told me that, while they may have escaped the persecution that forced them out of their country of origin, they now struggle with a set of problems they never imagined they would face. Despite UNHCR's recognition of their refugee status, they have no legal status in the country of asylum and no choice other than to work illegally in order to survive. Regarded as 'illegal immigrants', they live in constant fear of arrest and detention. Refugee parents have broken down as they have told me about their fears for their children growing up in a country which offers them no security, no access to the local education system, and no future.

---

While we recognise that neither major political party in Australia seems seriously interested in effective action to improve refugee protection in Asia, RCOA believes that an overwhelming focus on deterring people from seeking asylum will not achieve what the Australian Government hopes it will. Ultimately, Governments in the region will be forced by circumstances to take greater account of the protection needs of the most vulnerable. When that time comes, bilateral or multilateral discussions between States should begin with discussion about how refugees' most basic needs for security can be addressed first, with future steps to occur gradually and incrementally.

For some time, RCOA has been suggesting that the cooperation between States could, over a period of years, include the following ten steps:

1. Removing barriers to existing refugee determination processes – Action is needed to address the situation in which many asylum seekers in countries such as Bangladesh, Thailand, Malaysia and Indonesia are denied access to either the UNHCR or domestic asylum systems or have to wait years for initial interviews.
2. Creating space for and supporting NGOs to provide vital services to refugees – The support given to refugees and asylum seekers by under-resourced NGO programs – in emergency assistance, health care, education and legal representation – is often vital to stabilising their situation in countries of asylum. Host Governments should be encouraged to allow NGOs to conduct this work unhindered and NGOs should be provided international support to expand their work.
3. Granting legal permission to remain while refugee status is determined – A third step should be the promotion of legal recognition of asylum seekers and refugees, allowing them permission to remain in the country while their status is determined and a durable solution found.
4. Developing alternatives to immigration detention – Freedom from arrest and detention is critical to building a sense of safety and security for refugees living in an unfamiliar country. Policies should be developed which enable refugees and asylum seekers to avoid immigration detention and facilitate the rapid release of those who end up being detained.
5. Granting the right to work – Having legal permission to work is fundamental to a refugee's ability to survive and to live free from fear in a country of asylum.
6. Providing access to basic government services – As the domestic support for refugees and asylum seekers develops, each State should be encouraged to provide access to critical government services such as education and health care, reducing pressure on UNHCR and NGOs which often step in to provide basic services when host Governments are not prepared to do so.
7. Providing refugees with access to durable solutions – As the process builds, host States, UNHCR and resettlement States involved in the cooperation process would work together to assist refugees to find durable solutions, whether assisted voluntary repatriation (where appropriate), integration into the host country or resettlement to a third country. This regional approach would be based on a clear understanding that different countries have differing national capacities to provide long-term protection to refugees. Less would be expected of countries with limited economic opportunities such as Indonesia than of middle-income countries like Malaysia and Thailand or high-income countries such as Australia.

- 
- 
8. Developing national asylum legislation – A next step would be to encourage the development of national legislation for refugee status determination, including avenues for independent review. National systems could be based on models developed in countries such as the Philippines and the Republic of Korea.
  9. Promoting ratification of the Refugee Convention – With domestic legislation in place, countries could be encouraged to sign the Refugee Convention and Protocol. This would be seen as a much smaller step if taken after legislation and other basic protections are in place.
  10. Building regional consistency in asylum processes – As each nation develops its domestic asylum system, work could begin on building greater consistency in processes across the region. The goal would be to work towards a situation where an asylum seeker would not be significantly advantaged or disadvantaged by seeking asylum within a particular country in the region.

Australian politicians have told us that such goals are naïve and unachievable. They are certainly aspirational, but not as naïve as expecting Australia can sustainably cut itself off from global realities by relying solely on policies of deterrence.

---

# Is there a fair, just and effective policy approach to asylum seekers?

## Frank Brennan

---



*Frank Brennan AO is a Jesuit priest, professor of law at Australian Catholic University and Adjunct Professor at the Australian National University College of Law and National Centre for Indigenous Studies. He is a board member of St Vincents Health Australia. He has been honoured for services to Aboriginal Australians, particularly as an advocate in the areas of law, social justice and reconciliation. The National Trust has classified him as a Living National Treasure. In 2009, he chaired the Australian National Human Rights Consultation Committee. In 2013, he received the Migration Institute of Australia's 'Distinguished Service to Migration' Award.*

---

### Abstract

Both sides of Australian politics are committed to stopping the boats but disagree as to how it might best be done. The minor parties (Greens, Palmer United and DLP) have some ethical objections. The Abbott Government has been elected with a strong mandate to stop the boats. For the next few months, the new Government will not be much interested in public discussion about the ethics of the policy. It will be more a matter of 'whatever it takes'. If the boats do stop, it might then be opportune to commence discussion about how Australia might contribute to better processing and protection of asylum seekers upstream in Indonesia and Malaysia. If the boats do not stop, the Government will need to engage the community about the ethical bottom line for long term detention and banishment of refugees to countries such as Nauru and Papua New Guinea. Now is the time to set down a few incontrovertible ethical parameters.

### How we got to where we are

Though most of our neighbours are not signatories to the Refugee Convention, Australia should remain a party to the Convention, and refugee advocates should stop overstating or misstating the rights protected by the Convention and the UN Declaration of Human Rights (UNDHR). Article 14(1) of the UNDHR provides: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.' Back in 1948, the drafters had suggested that a person have the right to be 'granted asylum' – a legal right to just turn up here by boat! Australia was one of the strong, successful opponents, being prepared to acknowledge only the individual's right 'to seek and enjoy asylum', because such a right would not include the right to enter another country and it would not create a duty for a country to permit entry by the asylum seeker. That's why article 31(1) of the Refugee Convention deals as it does with the illegal entry or presence of an asylum seeker who has entered or is present without authorisation. It provides: 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where

---

freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’ The immunity from penalty is restricted to refugees ‘coming directly from a territory where their life or freedom was threatened’. The Australian government website is correct when it states: ‘International law recognises that people at risk of persecution have a legal right to flee their country and seek refuge elsewhere, but does not give them a right to enter a country of which they are not a national. Nor do people at risk of persecution have a right to choose their preferred country of protection.’ There is a right to leave your country. There is a right to re-enter your country. There is a right to seek asylum. But there is no right to enter another country of which you are not a national – even to seek asylum. Should you have succeeded in entering another country not your own, whether legally or illegally, you have a right to enjoy asylum if you are a refugee.

Of course, the moral argument is another matter. However it is important to be clear about Australia’s international obligations under the UNDHR and the Convention on Refugees. Unfortunately even the website of the Refugee Council of Australia is wrong when it states: ‘The UN Refugee Convention (to which Australia is a signatory) recognises that refugees have a right to enter a country for the purposes of seeking asylum, regardless of how they arrive or whether they hold valid travel or identity documents.’ Given that most of our neighbours are not signatories to the Refugee Convention, there is no point in over-stating our legal obligations when we come to the moral arguments and the diplomatic negotiations that will be required to enhance the processing and protection of refugees in our region. It would be folly to abandon the international

legal instruments and just rely on moral argument and diplomatic negotiations. We should maintain the safety net of law. The political atmosphere is such that the safety net will become so frayed as to be useless if refugee advocates continue to overstate and mis-state the law.

There is no doubt that the reforms of July 2008 instituted by the Rudd Government and not opposed by the Nelson opposition contributed to a sharp increase in the arrival of boat people (1). The annual arrivals continued to spiral upwards – from 2,856 to 6,689, a brief drop to 4,730, then up to 17,271, and then up again to 25,145. By the time Kevin Rudd had become prime minister for the second time in June 2013, the boat arrivals were running at 3,300 per month (40,000 per annum). There was intelligence available that the people-smuggling networks were now so adept at plying their trade in Indonesia that the numbers could escalate even further. These increases were not related to increased global refugee flows nor to new refugee-producing situations in the region. There had been at least 900 deaths at sea since the 2008 reforms were instituted. Something had to be done – not just for crass political gain but for sound ethical reasons.

Since the High Court’s rejection of the Gillard Government’s Malaysia solution, there has been a need to consider how ethically and practically to stop the boats. The lack of bipartisan agreement meant that the recommendations of the Houston Panel could be only partially implemented (2). In the medium term, it might be possible to negotiate a regional agreement involving at least Australia, Indonesia and Malaysia. An agreement, with UNHCR backing, could provide basic protection and processing for asylum seekers transiting Malaysia and Indonesia. Asylum seekers headed for Australia could then be intercepted and promptly

---

screened to determine that none was in direct flight from persecution in Indonesia. They could then be flown back safely to Indonesia and placed at the end of a real queue. Provided the necessary screening was done, it could then be appropriate to adopt Alexander Downer's suggestion: 'Australia would fly back to Indonesia anyone who arrived here by boat without a visa. In exchange, Australia would take, one for one, UNHCR approved refugees from refugee camps in Indonesia.' Such an agreement would take many months, if not years, to negotiate and implement. Admittedly, it would not provide a short-term solution to stopping the boats.

Kevin Rudd's pre-election agreements negotiated with Papua New Guinea and Nauru and first announced on 19 July 2013 were aimed at stopping the boats (3). It was the equivalent of a 'shock and awe' measure, threatening dreadful outcomes for people, hopefully deterring them from even considering getting on board a boat. During the election campaign, both major political parties tried to convince the electors that they would be able to design policies which stopped the boats.

During its last year in office, Labor had increased the humanitarian component of Australia's migration program from 13,750 to 20,000 places - with 12,000 of those places being allocated to refugees offshore, 8,000 being available for refugees onshore and the special humanitarian program. The Coalition initially supported the increase but reversed this commitment during the election campaign. The Abbott Government says it will provide only 2,750 places for onshore applicants.

## **What the Abbott Government should do**

If adopting the key planks of the Rudd plan, the Abbott Government could give the 'shock and awe' response greater ethical coherence if they took the following seven steps.

First, Tony Abbott should continue discussions with Jakarta with an eye to a negotiated agreement with both Indonesia and Malaysia aimed at upstream improvement of processing and protection.

Second, the Abbott Government should return to its previous commitment to increase the humanitarian quota to 20,000.

Third, Scott Morrison should order an ethical reassessment of the plight of those who came by boat to Australia after the Rudd announcement of 19 July 2013 without notice of the 'new shock and awe' policy, bearing in mind that many of those who arrived immediately after 19 July had received no notice of the new policy. This was admitted by Minister Tony Burke when he told the media on 22 August 2013: 'First week after the announcement, the figures remained very high, but let's not forget those figures include people who are already at sea'.

Fourth, Scott Morrison should undertake to care for unaccompanied minors who arrive in Australia's territorial waters until they can be safely resettled or safely returned to their family or to the guardians in transit from whom they were separated.

---

Fifth, Scott Morrison should institute safeguards, including a transparent complaints mechanism, in Papua New Guinea and Nauru consistent with the safeguards recommended by the Houston Panel for both Pacific processing countries and for Malaysia under the Malaysia Solution.

Sixth, Tony Abbott should promptly introduce a bill to Parliament detailing the measures aimed at stopping the boats, thereby putting beyond legal doubt the ‘shock and awe measures’ implemented on the eve of the election campaign without parliamentary scrutiny, and locking in the major political parties so that petty party point-scoring might cease. The debate on the bill will allow both sides of the Chamber to purge themselves of the hypocrisy that has accompanied Labor’s unctuous condemnation of John Howard’s Pacific Solution and the Coalition’s unctuous condemnation of Julia Gillard’s Malaysia Solution. The bill would undoubtedly win the support of the major political parties, restoring a more bipartisan approach as existed in July 2008 when Minister Chris Evans announced ‘the seven key immigration values’ then unanimously embraced by the Parliament’s Joint Standing Committee on Migration. (4)

Seventh, the Government should commit itself to the prompt processing onshore of Papuan asylum seekers in direct flight from West Papua. The Coalition’s Policy on asylum seekers published during the election campaign states, ‘The Coalition will work with our regional partners to address the secondary movement of asylum seekers into our region as a transit point to illegally enter Australia through the establishment of a comprehensive Regional Deterrence Framework’. Papuans fleeing persecution at home are not engaged in secondary movement. If refugees, they are in direct flight from persecution. The Abbott Government should recommit to Australia’s obligation under the Refugee Convention to grant asylum to refugees who have entered Australia in direct flight from persecution.

While waiting to see if the boats do stop, all Australians can consider how better to contribute to protection and processing of asylum seekers in the region.



---

## References

1. C Evans (Minister for Immigration and Citizenship), 'New directions in detention: restoring integrity to Australia's immigration system', speech delivered to Centre for International and Public Law, ANU, 29 July 2008; see: [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1311498/upload\\_binary/1311498.pdf;fileType=application%2Fpdf#search=%22library/prspub/1311498%22](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1311498/upload_binary/1311498.pdf;fileType=application%2Fpdf#search=%22library/prspub/1311498%22) at pp. 11-12
2. See [http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert\\_panel\\_on\\_asylum\\_seekers\\_summary\\_of\\_recommendations.pdf](http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_summary_of_recommendations.pdf)
3. The MOU was signed on 6 August 2013 and is available at <http://www.dfat.gov.au/geo/png/joint-mou-20130806.html>
4. 'Immigration detention in Australia: A new beginning', First report of the inquiry into immigration detention in Australia, Joint Standing Committee on Migration, Australian Parliament, December 2008, Recommendation 9, p. xxi, available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=mig/detention/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=mig/detention/report.htm)

---

# Beyond the magic bullet: Why the asylum-seeker problem is like the drug problem. Desmond Manderson

---



*Professor Desmond Manderson is Future Fellow in ANU College of Law, and Research School of Humanities and the Arts, Australian National University. He is the author of 'From Mr Sin to Mr Big a history of Australian drug Laws' and 'Groundhog Day: Why the Asylum Problem is like the Drug Problem' in Griffith Review 41: Now We Are Ten.*

---

## Abstract

While the specifics of Australian policies regarding the treatment of 'irregular maritime arrivals' vary from month to month, the general trajectory of those policies has not been challenged by either of the two major parties in the Australian political system. Through a combination of punitive detention on-shore, lengthy processing delays off-shore, and (at best) a calculated indifference while asylum seekers are at sea, the Australian Government intends to make the arrival of refugees by boat as unattractive a proposition as possible.

## The asylum-seeker problem is like the drug problem

The cruelty and violence of these policies are well known, but it is their stupidity that makes me angry. Australia's attempts to 'stop the boats' will not work. The reason is simple: the asylum problem is like the drug problem. Both problems are couched in the same overheated rhetoric. The same search for villains who can be blamed, like drug traffickers and people smugglers. The same belief that users should 'just say no'. All this misses the

point. In both cases, underlying causes cannot be simply waived away through legal prohibition.

People on boats come to this country not because they are dupes or fools but because they face intolerable conditions. There are 200,000 irregular migrants in Malaysia living in dire poverty: adults cannot work; children cannot go to school; all risk being sent back to the countries that persecuted them. In Malaysia and Indonesia the UNHCR system has broken down. Only ten per cent of refugees in our region are processed, and only one per cent of those are resettled to countries like Australia in any single year. In other words, the so-called 'queue' is one thousand years long. In fact, it would be more accurate to call it a 'lottery'. After a while and not surprisingly, many thousands of refugees stop waiting to see if their lucky numbers will come up.

---

Faced with a growing international problem, increasing international instability, and the ineluctable forces of demand, it is as naïve to think that Australian policies could prevent the arrival of asylum seekers as it is naïve to think that border protection can ever stop more than a small percentage of illicit drugs from coming into the country. Trying to ‘stop the boats’ is like beating the waves to calm the storm. Heavy-handed enforcement measures will not work, because they insist on looking at the symptom not the cause. In fact, harsher deterrents often make things worse, not better. This is the law of unintended consequences. As we know, drug prohibition has not stopped drug use. Instead it has increased crime and corruption, death and disease, locked up many people – especially young people – for little reason, and systematically undermined the rule of law. In North America similar laws have destroyed whole cities; in Central America whole countries. None of this was the fault of drugs. Our counter-productive policies are to blame.

Australia’s asylum policies are similarly counter-productive. We lock up thousands of people in cruel and unsanitary conditions, generate sickness, depression, suicide, violence and riots, and undermine the rule of law. Recent policy initiatives have included the decision to prohibit accepted refugees from accessing the family reunion provisions of the special humanitarian program, with the direct result that more children than ever before are placed on boats for the dangerous trip to Australia. The recent sinking off Agrabinta Beach in West Java cost the lives of over 50 people, most of them children.

Laws passed in September 2012 prevent asylum seekers from undertaking legal work in Australia, but while we can say that those on ‘temporary protection visas’ cannot work, that will not stop them. What choice do they have? Our laws will just create a black market, more criminal

involvement, and new opportunities for blackmail, exploitation and corruption. We are creating a new underclass in our cities. Sound familiar? The so-called ‘war on drugs’ did the same thing. There too, harsh deterrents aimed at low-level users only exacerbated the very problems of crime, violence, and sickness that they purported to address.

We know what happens when we attempt to crack down on drug traffickers. Profit goes up and safety goes down. Increased profit gives smugglers more incentive to get involved in the business, not less, but they seek to maximise their profit by increasing violence and secrecy and outsourcing the risks. Yet the Bali Process adopts the same failed strategy in relation to people smugglers. The result there too will be higher profits, more criminal activity and secrecy, and more unseaworthy vessels handled by less experienced crew. More deaths at sea, not less, will probably be the result.

Attempting to contract out our responsibilities to whichever countries are poor enough to take the cash merely creates a ‘race to the bottom’, as this country attempts to replicate on purpose conditions which Malaysia and other transit countries have achieved by accident. By openly endorsing poor conditions for Australian asylum seekers, we only encourage worse conditions in source and transit countries. Funding detention centres and interdiction efforts against people smugglers in neighbouring countries is a classic example of this twisted logic. Making conditions worse for asylum seekers in Indonesia and Malaysia drives more of them to try to reach Australia, not less.

Prime Minister Tony Abbott was Minister for Health in John Howard’s Government. He was a key figure in his ‘tough on drugs’ policy. Abbott’s policy now is to be equally ‘tough on boats’. But it is not the fault of the review system in Australia that 90 per cent of boat

---

people are, as a matter of inconvenient fact, genuine refugees. Attempting to give the legal system the run-around is like shooting the messenger.

Nonetheless, drug history offers much more than a cautionary tale of misplaced zeal. In recent years there has been a gradual shift in this country from a policy of 'zero tolerance' to one of 'harm reduction'. Zero tolerance assumes that any level of drug use in society is unacceptable. Policies that help drug users live better lives or avoid prison are seen as misguided; illegal drugs are framed as a law and order problem. However harm reduction strategies start from very different assumptions. They presume that some level of drug use in society is inevitable. Policies should therefore not aim to eliminate drug use entirely, but instead concentrate on modifying the dangerous conditions under which drugs are taken. Illegal drugs are reframed as a health problem.

In this trend, Australian policy has led the world. The moral panic of the recent past has notably subsided. The possession or growing of cannabis for personal use has been decriminalised in three Australian jurisdictions, with significant benefits to users and to the legal system. Elsewhere, conviction for small levels of personal use is becoming uncommon. All Australian jurisdictions now make extensive use of 'cannabis cautioning schemes' to avoid prosecution and/or divert users to education or counselling programs. In May 2013, a NSW Parliamentary Committee unanimously recommended the legalisation of the medical use of cannabis. Such a move would have been unthinkable ten years ago.

Meanwhile, despite the continuing illegality of heroin, needle exchanges have been running successfully in Sydney, Melbourne and elsewhere for years. The public health outcomes have been impressive. Australia has one of the lowest rates of HIV/AIDS prevalence among injecting drug users in the world. Clearly these programs

do not attempt to prohibit drug injection; instead they intend to regulate it better and make it safer. Australia's harm reduction policies have without doubt saved thousands of lives. In 2011, the Supreme Court of Canada unanimously held that denying addicts access to similar life-saving services violates the Canadian constitution. It is beginning to look like prohibition is losing the war it started.

So what would a 'harm reduction' policy in relation to illegal maritime arrivals (IMAs) look like? It would not seek to 'stop the boats', but to stop the conditions which lead to them, and to alleviate the conditions of those on them. In the face of increasing refugee populations in the Asia-Pacific, and given the doubtful effectiveness of deterrence strategies, Australia is more dependent on best practices in other countries than they are on it. There can be no alternative but for the Australian Government to do as it would be done by – increasing the size of its resettlement program from transit countries such as Malaysia and Indonesia, while encouraging those countries to accept more of the refugees now within its borders. Likewise, Australia must abandon the deterrence measures that have proven to be largely ineffectual. Mandatory detention facilities, off-shore processing centres, and the denial of the right to work and education are empty gestures that do not protect Australia and do not discourage asylum seekers. They are mind-bogglingly counter-productive not only in terms of refugee health and safety, but also in terms of building viable regional relationships.

Taking a leaf out of the harm reduction handbook, Australia should increase its support for UNHCR operations and capacity-building in transit countries, and advocate to improve conditions for refugees in those countries, including by the legal recognition of the status of refugees and asylum seekers and supporting their

---

right to work, education, and health. The irony is that only by treating IMAs better once they reach Australia can these arguments be credibly advanced, and the underlying causes behind their actions addressed. On the other hand, the logic of ‘no advantage’ – of ‘zero tolerance’ – drives conditions on Australia’s off-shore ghettos down and down, but creates political pressures which ultimately import unhealthy and discriminatory conditions back into our cities and suburbs. At the same time, the costs of zero tolerance spiral out of control, preventing money being spent more wisely. Each turn of the screw only amplifies the errors. We have been down that road before.

Australia’s global leadership in the field of drug policy illustrates a lesson of enormous pragmatic importance: compassion and understanding are not just feel-good options. They are more effective social policy settings than anger and ignorance. The growing acceptance of harm reduction strategies provides a template to reframe the asylum debate by changing its goals and expectations. But what were the factors that allowed the seemingly interminable ‘drug wars’ to subside?

Two factors help explain the widespread acceptance that harm reduction has gradually begun to enjoy in Australia. The first element was the monstrous cost of the law enforcement system. Many economists, conservative as well as left-leaning, have extensively documented the irrationality and expense of drug prohibition. In a political climate dominated by economic concerns – not moral or legal ones – such arguments are hard to ignore.

The second element was the ‘normalisation’ of drug users. Stereotypes create anxiety, but personal contact reduces it. Throughout the 1980s and 1990s, not only in Australia but in places like the United States, Canada, and Great Britain, many people came in close contact with young people, in particular, suffering from the

real physical and social consequences of drug laws. These people were not strangers; they were colleagues, friends and loved ones. Our assumptions began to falter; punitive measures and a demonic rhetoric did not seem to accurately reflect what we knew to be true. Groups became radicalised; the call for a more humane approach became more urgent. There is nothing so powerful as personal experience, even tragic experience, to wean people off the false comfort of conventional wisdom.

To what extent are these two elements present in relation to the ‘asylum problem problem’? The extortionate economic cost of asylum policy seems incontrovertible. The cost of mandatory detention and bridging visas is estimated at \$375 million per year. Deterrence and interdiction will cost Australia around \$654 million over the next four years. Nauru will cost \$2 billion over that time; Manus Island one billion more. In comparison Australia contributed \$48 million to UNHCR in 2012, a reduction of 13 per cent on the previous year.

On the other hand, Australia’s current political discourse does not provide much opportunity for the kind of personal experience that was critical in tempering drug rhetoric. By excising the whole country from any relationship with asylum seekers, segregating them behind razor wire and holding them thousands of miles off-shore, Australians find it almost impossible to even see or hear them. Quarantining asylum seekers, as if they were strange fruit, is not only expensive and cruel. It helps perpetuate a culture of ignorance in which stereotypes proliferate unchecked, ratcheting up the very anxiety which fuelled the hysteria to begin with. This is yet another example of our counter-productive policies.

The irony is that the debate over asylum seekers in Australia is typically characterised as pitting woolly-headed idealists against hard-headed

---

pragmatists. With this characterisation I heartily agree. The problem is that the labels are affixed to the wrong sides of the debate. It is the zero tolerance crowd who want to impose an idealistic fantasy of ‘sovereign borders’ and ‘no more boats’ on a regional problem whose complexity does not admit of such simplistic outcomes. The language of harm reduction, on the other hand, is firmly rooted in the real world, and in finding small, marginal ways of gradually responding to an international challenge which Australia can never hope to fix by itself. There is no magic bullet.

Australian asylum policy is a classic example of the fantasies of zero tolerance. Drug policy history not only shows us the characteristic failures and dead-ends of this kind of thinking. It also points the way to alternative approaches in which compassion and pragmatism are revealed not to be opposites but complements. Yet the recent federal election campaign shows how vigorously we are intent on repeating the mistakes of our past. In 1927, during a debate on new drug laws in the NSW Parliament, one MP called out, ‘Why not just shoot them?’ The Premier responded that while this ‘might be desirable ... it is not done in civilised countries’. The debate on asylum seekers in this country seems stuck in the same mentality – although it less and less clear how civilised we are.

---

# An inclusive vision.

## Arnold Zable

---



*Arnold Zable is a writer, novelist, educator and human rights advocate. He has a doctorate in creative arts, Melbourne University, where he is currently a Vice Chancellor's Fellow. His books include Jewels and Ashes, The Fig Tree; three novels, Café Scheherazade, Scraps of Heaven, Sea of Many Returns; and most recently Violin Lessons, a collection of stories spanning the globe. He is president of the Melbourne Centre of International PEN, an ambassador of the Asylum Seeker Resource Centre, a patron of Sanctuary and a former member of the Immigration Museum's advisory committee. He was recently awarded the 2013 Voltaire prize for human rights advocacy and the advancement of freedom of expression.*

---

### Abstract

**We need to change the national conversation about asylum seekers and recount tales that neutralise the divisive politics that have infected the nation since the Tampa affair. The 15 million British emigrants of the latter half of the nineteenth century constituted the largest Diaspora of modern times. The Irish famine and ruthless land clearances created an exodus of unparalleled proportions. The SIEVX sinking on 19 October 2001 was the largest maritime disaster off Australian waters since the Second World War. October 19 should be a day of remembrance, conversation and storytelling, a national sharing of ancestral journeys. We would understand that then, as now, ships sank on these perilous voyages and people perished in their quest for a better life.**

### An inclusive vision

This is a tale I have recounted many times over the past decade: In February 1847 the American writer and social reformer, Elihu Burritt, travelling through County Cork Ireland, came upon a settlement of hovels, half buried

in earth, covered in rotting straw, seaweed and turf. He stooped low to enter one and found two children lying in straw. They had not eaten for more than twenty-four hours. They lay with their eyes open staring vacantly into space. Their mother had died; their father was out searching for food. In a second hovel he saw five persons laid out with fever, close to death from starvation. So it was throughout the destitute settlement.

As he travelled he noted that people's mouths were green from their diet of grass. The years of potato blight and mass starvation between 1845 and 1852 became known as the Great Famine. Out of a population of eight million, an estimated one million died and one and a half million took to boats. Some fetched up on the shores of America and some found their way, in the 1850s, to distant Australia, lured by gold and the promise of new lives.

In all, over three million people left Ireland between 1845 and 1870, and 15 million left the British Isles in the second half of the nineteenth century. It was the largest exodus in modern times driven, in part, by ruthless land clearances and an agrarian revolution that saw millions dispossessed of their farmlands.

---

Then, as now, ships sank on these perilous voyages.  
Then, as now, people perished in their quest for a better life. Then, as now, tragedies did not deter people from risking the voyage.

Fast-forward one hundred and fifty years. On 19 October 2001 an unnamed fishing boat, now known as SIEVX, sank en route to Christmas Island. The unseaworthy vessel, measuring 19.5 by 4 metres, went down in international waters: 353 men, women and children drowned; 45 survived; seven eventually settled in Australia. It was the largest maritime disaster off Australian waters since the Second World War.

Each year as the day approaches I visit SIEVX survivor, Faris Shohani, in his one-bedroom Melbourne flat. I have known this gentle, warm-hearted man for eleven years. 'It is good to see you my brother', he says, whenever we meet. Faris lost his wife Leyla and daughter, seven-year-old Zahra. They disappeared from his grasp into the ocean. The tragedy will haunt him for the rest of his days.

Faris has come to dread the date, his distress heightened by a sense of isolation, yet he would do it all again. As Iraqi Kurds living in Baghdad, his family was summarily deported by the Saddam Hussein regime in 1980. Faris was twelve at the time. He lived in a succession of Iranian refugee camps. He remained stateless for 28 years. 'My brother', he says, 'my life was nothing. Even death was better than what I had.'

If there is one single incident that marks the origins of our current malaise it is the Tampa affair. In August 2001, when the Norwegian freighter lay anchored off Christmas Island with 438 rescued asylum seekers on board, Prime Minister Howard ordered the boat be boarded by Special Australian forces, the SAS.

As David Marr and Marion Wilkinson write in their book, *Dark Victory*:

'Once the SAS was on board, Canberra would decree anything to do with the Tampa involved 'operational security' and declare a 'no-fly' zone around the ship. No one on board was to be allowed ashore and civilians on the island – especially doctors, lawyers and journalists – were not to be allowed out to the ship. No cameraman would get close enough to the Tampa to put a human face on this story. The icon of the scandal was to be a red-hulled ship on a blue sea photographed through a heat haze by a very long lens.'

We saw no individual faces. We heard no individual voices. We did not know that the Hazaras, the major group among the rescued, had fled the horrors of the Taliban. Instead, we received images of a horde of people crammed on the deck of a steel freighter. A horde is a threat. A horde is easily demonised. In contrast a story is specific, based on the premise that each individual is unique. Stories humanise rather than dehumanise. They require the act of listening. They provide an antidote to prejudice, the act of pre-judging.

Carl Jung once said that we all have a story to tell, and the denial of this story can lead to despair. Such despair is reflected in the tale of Palestinian refugee, Aladdin Sisalem. Aladdin was imprisoned in the Manus Island Detention Centre between 2002 and 2004. He spent the final ten months alone – as the sole detainee. His only companion was his cat Honey.

I first met Aladdin not long after his release. He was living in a house in Coburg. That day, by coincidence, Honey the cat had been released from quarantine. Honey fell asleep under the kitchen table and for the next three hours, as the rain beat down upon the roof, Aladdin told me his epic tale.



---

At one point, Aladdin said he had experienced his worst nightmare on Manus Island. Having heard the tales of his escape and the traumas he had endured as a stateless person, I could imagine a number of scenarios. But this nightmare was triggered by something else. After months of being alone in the Centre Aladdin was finally allowed to meet SBS journalist, Olivia Rousset. She filmed some of his story on her first visit and said she would return to continue the conversation. That night Aladdin dreamt that Olivia was not allowed back into the Centre. He had been waiting, so long, for someone who would listen to his story – and the thought that this would now be denied him was his worst nightmare. For the first time in many months he had felt like a human being.

In mid 2011 I asked Kon Karapanagiotidis, the founder and CEO of the Asylum Seeker Resource Centre, for a story celebrating its tenth anniversary. Kon said that the Centre had helped over 7,000 asylum seekers in that time – with legal aid, medical aid and material aid, among many services and, above all, in providing a space where asylum seekers could feel at home and find relief from their sense of despair and isolation.

‘How do you know the numbers?’ I asked. In reply, Kon showed me a notebook in which he had written the names of each person and the date he had first met them. There were over 7,000 names. I chose various names at random scattered throughout the book and Kon was able to recount the details of each individual case. I contacted him recently for an update and he says the names in the notebook are now approaching 9,000. Kon knows them all. He knows too that thousands of asylum seekers currently on bridging visas, awaiting a decision on their status, are destitute – without work, without a future, without hope. Like the detainees now languishing on Nauru and Manus Island, many of whom live in tents

in searing heat, they remain nameless and invisible – robbed of their stories. Denied their humanity.

The Tampa affair broke a tradition of bi-partisanship on asylum-seeker policy adopted during the Fraser-Whitlam era when Australians faced the challenge posed by Vietnamese boat people. Since Tampa the name of the game has become ‘no matter how cruel you can be, I can be crueller’, supported by polling that confirms the political advantage of this approach.

We need a change in the national conversation about asylum seekers. We need tales that can heal the divisive politics that have infected the nation in recent years. We need stories that communicate an inclusive vision of who we are, like the tale of Green Lips and the British diaspora, tales that indicate that except for Indigenous people we are a nation of boat people.

Here is a suggestion. Let us mount a national campaign for a special day in which all boat people are remembered, a day on which their journeys to new lives are acknowledged, their stories recalled. I suggest October 19, the day of the SIEVX sinking, be this day. On this day we would recall the forces that drove our forebears to make the journey. We would acknowledge this is the inclusive story of who we are. Give or take a few generations we too were once strangers who approached this continent by boat.

Faris became an Australian citizen in 2008. It was celebrated at a party with those who had come to admire this modest, warm-hearted man. We saluted his courageous search for a sense of belonging that many Australians take for granted. ‘The past is finished for me,’ he says. ‘Australia is my home now.’

---

# Who we are not is not who we are: Moving on from Australia's exclusionary approach to citizenship.

## Kim Rubenstein and Jacqueline Field

---



*Kim Rubenstein (left) is Professor and Director of the Centre for International and Public law at the Australian National University. She is an acknowledged expert on citizenship law. Jacqueline Field (right) has been working with Professor Rubenstein on the Australian Research Council project: Small Mercies, Big Futures (ARC Linkage LP100200596) since 2012. She is currently based in Singapore, with an NGO that advocates migrant workers' rights.*

---

### Abstract

Contemporary Governments' treatment of asylum seekers and refugees is symptomatic of an enduring focus on excluding outsiders in immigration and citizenship policy. Australia's constitutional history illustrates that the process of defining the nation itself was grounded in a social and political climate of racism and exclusion. It is significant that in the years since Federation, immigration and citizenship legislation in Australia has largely been based on the Commonwealth's power to make laws for 'naturalisation and aliens'. The distinction between citizens and aliens is the foundation of Australian immigration law, which has led to the use of Australian citizenship as a political device of exclusion. But we, as Australians, should not let our history define us. We can engage with the question of what it means to be Australian. We can seek to address the missed opportunities of the past, and reclaim the politicised debates in the refugee and asylum-seeker context.

In 2013, both major Australian political parties took radical steps to prevent asylum seekers and refugees from reaching and remaining on Australia's shores. The treatment of asylum seekers and refugees by current Governments is symptomatic of an enduring focus on excluding outsiders in immigration and citizenship policy. Since the creation of Australia as a Federation, the exclusion of outsiders has been a fundamental policy attitude. This exclusionary focus is grounded in an Australian Constitution that defines its members not by who they are, but rather by who they are not. It reflects a history of Australian citizenship law that has created a community defined by those it excludes. From a constitutional and legal point of view, Australia has never really come to terms with who its members are. In order to move the discourse on asylum-seekers and refugees away from one of exclusion, we as Australian citizens must depart from our historical fixation on who we are not, and seek to define what it means to belong to the Australian community.

---

Australia's constitutional history illustrates that the process of defining the nation itself was grounded in a social and political climate of fear, racism and exclusion. The enactment of the Australian Constitution created the Commonwealth of Australia, uniting the six state colonies under a federal legal system. At the heart of the federalist movement was an intention to establish a new nation defined in racial terms. Anti-Chinese sentiment had intensified during the gold rush, when Chinese men arrived in the colonies to replace labour lost to the goldfields:

'In all the six Colonies a strong feeling prevails in opposition to the unrestricted introduction of Chinese, this opposition arising principally from a desire to preserve and perpetuate the British type in the various populations.' (1)

The exclusion of Chinese migrants was an 'Australian' issue: it concerned the whole Commonwealth, not just the individual colonies. Each of the colonies had separate laws about aliens, yet their treatment – or more precisely, their exclusion – was one of the motivating forces behind Federation. In fact, one of the first pieces of legislation introduced into the Commonwealth Parliament was the Immigration Restriction Bill 1901 (Cth). Prime Minister Edmund Barton stated:

'The fear of Chinese immigration which the Australian democracy cherishes is, in fact, the instinct of self-preservation, quickened by experience. We know that coloured and white labour cannot exist side by side; we are well aware that China can swamp us with a single year's surplus of population'(2)

Attorney-General Alfred Deakin also described the Bill as touching on 'the profoundest instinct of individual or nation – the instinct of self-preservation – for it is

nothing less than manhood, the national character, and the national future that are at stake' (3).

Fear and antagonism towards Chinese migrants was one of the key reasons for the absence of the concept of Australian citizenship in the Constitution. The framers of the Constitution failed to include the concept, in part because they were concerned to avoid defining citizenship in terms of a person's status as a British subject in case this would entitle Chinese people from Hong Kong to claim Australian citizenship. The framers did, however, ensure that they created a Commonwealth power – the 'naturalisation and aliens' power – to legislate for those Chinese migrants who were already in the country.

It is both symbolically and legally significant that the 'naturalisation and aliens' power in s 51(xix) of the Constitution forms the basis of Australia's current citizenship law. In the years since Federation, immigration and citizenship legislation in Australia has largely been based on this power. While the Constitution also gives the Commonwealth power to make laws with respect to 'immigration and emigration', this power is potentially narrower; it may not extend to cover someone who has become 'absorbed' into the Australian community. In contrast, the power to regulate aliens has been interpreted very broadly:

'as long as a person falls within the description of 'aliens', the power of the parliament to make laws affecting that person is unlimited unless the Constitution otherwise prohibits the making of the law' (4).

Further, 'it is for Parliament to decide who will be treated as having the status of alienage, who will be treated as citizens, and what the status will entail' (5). Citizenship is thus a legislative concept, with one's membership of the Australian community determined by meeting the

---

criteria set out in the Australian Citizenship Act 2007 (Cth). ‘Absorption’ and normative notions of membership have become irrelevant to determining who is an Australian citizen: a person may be an ‘alien’ even if they were born in Australia, have spent most of their life here, or have strong ties to the community.

The distinction between citizens and aliens has become the foundation upon which Australian immigration law is built. Non-citizens who are present in Australia, whether they are newly arrived asylum seekers or people who have lived most of their lives here, can validly be deported under the Migration Act 1958 (Cth) as ‘aliens’. In this way, that Act allows Governments to determine membership of the community.

Successive Governments have progressively narrowed the avenues to Australian citizenship, thus extending the reach of the ‘aliens’ power. Governments have deemed it necessary to prevent ‘exploitation’ of the citizenship process. For example, a 2009 amendment limiting the application of provisions that previously allowed all children under the age of 18 to apply for Australian citizenship was considered necessary to:

‘prevent children who are in Australia unlawfully, or, who along with their families, have exhausted all migration options, from applying for citizenship in an attempt to prevent their removal from Australia’ (6).

This has led to the politicisation of Australian citizenship, and its use as a device of exclusion. Throughout its history, Australian citizenship discourse has focused on those we want to keep out. But this has come at the cost of a discourse on what Australian citizenship should include, a discourse on what it means to be Australian.

Australia’s historical quest to exclude outsiders has had a lasting and negative impact on the Australian identity. We as a nation define ourselves by our fear of outsiders. Our Australian citizenship – the status that unifies us and secures our right to remain in Australia – is based on our Government’s power to regulate the ‘aliens’ who we are not. Our citizenship laws are used to exclude.

It was thus, perhaps, inevitable that we ended up here; where hostility and suspicion towards refugees and asylum seekers pervades the policies of both of the major political parties. But we, as Australian citizens, can and should look beyond the limits faced by the framers of the Constitution and the current legislation and engage in a positive discourse about who we are as Australians.

Our understanding of what it means to be an Australian citizen can help us reclaim the debate. We can seek to address the missed opportunities of the past, and secure our identity as a proud and fair nation of Australians – an identity that encompasses the lives of those who were here originally, those who came in the past, and those who arrived more recently, including as asylum seekers and refugees.

---

## References

1. Memorial to Secretary of State for Colonies, Westminster, from the Colonial Secretary's Office, Sydney, 25 January 1881, quoted in A. T. Yarwood, *Attitudes to Non-European Immigration* (1968) 19.
2. Edmund Barton, 'Immigration Restriction Bill', House of Representatives, Debates 7 August 1901, 3497, quoting from Professor Charles Henry Pearson, *National Life and Character: A Forecast* (1893) 36.
3. Commonwealth Parliament Debate 1901 (1st Parliament, 12 September 1901) 4804.
4. *Re Patterson; Ex parte Taylor* (Patterson) (2001) 207 CLR 391 at 424 (McHugh J).
5. *Koroitamana v The Commonwealth* [2006] 227 CLR 31, 38 (Gleeson CJ, Heydon J).
6. Commonwealth, Parliamentary Debates, Senate, 25 June 2009, 4264 (Penny Wong).

For a more detailed account of the ideas in this piece see Kim Rubenstein, 'Australian Citizenship Law in Context' 2002.

---

# Who's jumping the queue? Fairness and the asylum-seeker debate.

## David Corlett

---



*David Corlett is a writer and researcher who has worked on refugee and asylum seeker issues for about two decades. He is the author of *Stormy Weather: Climate Change and Displacement* and *Following Them Home: The Fate of the Returned Asylum Seekers*. He was the host of SBS Television's *Go Back to Where You Came From*, which in 2012 won a prestigious Rose d'Or, as well as a number of other awards.*

---

### Abstract

Australia's response to asylum seekers and refugees is situated within a 'fairness' discourse. At its most incendiary, this is articulated as 'queue jumpers' who 'steal the places' of the 'most vulnerable' refugees. While there are important questions of equity and vulnerability to be addressed in our responses to refugees and asylum seekers, the framing of Australia's response to asylum seekers and refugees is almost always only partial. While the vulnerable are pitted against the more vulnerable and while we judge who is worthy of care and assistance, Australians' own safety and security (and wealth and privilege) remain invisible. A more ethical approach to asylum seekers and refugees would place us in the picture. Such an approach does not need to be prescriptive or require unrealistic selflessness. Difficult policy decisions that would include some people and exclude others would still be required, and the needs, interests and rights of Australia and Australians would remain important considerations. But a fuller framing of these issues would mean that policy and political debates about asylum seekers and refugees might become not just more ethical, but also more evidence-based and effective.

### Framing ourselves into the ethical debate

'If I come across a person who hasn't eaten for a few days,' Darren said, 'then I should feed that person. But what if I then come across someone who hasn't eaten for some weeks, shouldn't that person be the priority?' Darren, one of the participants in SBS television's first series of *Go Back to Where You Came From*, was grappling with how Australia ought to respond to asylum seekers and refugees. His dilemma, based on an ethics of fairness, is at the heart of Australia's public discourse around asylum seekers and refugees. At its most incendiary, it is said that asylum seekers arriving in Australia by boat are 'queue jumpers' who 'steal the places' of the 'most vulnerable'. The most vulnerable in this equation are those who live in refugee camps and cannot afford to get on leaking Indonesian fishing boats bound for Australia.

The 'queue' metaphor, in which refugees are imagined to exist in some sort of orderly line waiting their turn to be selected for resettlement in a country like Australia, is deeply misrepresentative of the reality of refugees throughout the world. The international protection

---

system, important as it is, is at times and in varying degrees, ineffective, inefficient, arbitrary, corrupt, and even non-existent. I have suggested elsewhere that a more accurate metaphor might be that of a heap from which refugees are plucked (1).

Notwithstanding this reality, fairness is a common underlying theme in Australian debates about asylum seekers and refugees. For example, former Immigration Minister, Amanda Vanstone, argued recently that ‘opening the door’ to people who arrive in Australia by boat with a ‘sad story’ ‘will do nothing to end the oceans of sadness and unfairness that cluster around our globe,’ including those with ‘even sadder stories in camps in Africa and northern Thailand’ (2). Similarly, according to Deakin University’s Dean of Law, Mirko Bagaric, ‘Every asylum seeker who arrives in Australia and is granted refugee status takes an offshore refugee place from a more destitute displaced person’ (3).

The dominance of the fairness discourse in Australia’s response to asylum seekers and refugees was also evident in the report by the Expert Panel on Asylum Seekers. According to the panel appointed by the Gillard Government to devise a means of stopping asylum seekers from drowning at sea, new policies were needed ‘to reinforce a basic principle of fairness – that those who continue to choose irregular maritime voyages to Australia to claim asylum should not be advantaged for doing so over those who pursue regular mechanisms’ (4). Never mind that there often are no effective ‘regular mechanisms’ through which refugees might gain protection in Australia.

The widespread appeal to fairness suggests that there is something compelling to it. On the face of it, it makes sense. Shouldn’t those whose existence is the most precarious be prioritised over those in better circumstances?

The 1951 Refugee Convention does not address the relative vulnerability of refugees. Rather its response to the dilemma of differing capacities of refugees to access protection is relatively straightforward: If you have a well-founded fear of persecution, then, regardless of your wealth, status or mode of travel, you are entitled to protection. But this response, even if it is the cornerstone of the international protection system, is also limited.

The issue of international protection, because the need is so vast and the protection space so small, necessarily engages questions of fairness and justice beyond the threshold test of whether or not a person is in need of protection from persecution. This is a space in which we are dealing not only with rights, but also needs. We are dealing with vulnerability, and comparative vulnerability, in a context where options are extremely limited. It is right that questions of fairness be brought to bear in this discussion, and in practice, the United Nations refugee agency does prioritise some refugees over others for resettlement on the basis of their particular circumstances and needs. Yet the conceptualisation of the ethics of fairness in Australian debates about refugees and asylum seekers is almost always partial. The part that is left out is ‘us’ – Australians.

In order to understand this more clearly it is useful to imagine a continuum of vulnerability: at one extreme are the most vulnerable and at the other, the least. Somewhere towards the ‘most vulnerable’ end of the continuum are the ‘more vulnerable’ and a little further towards the centre, the ‘vulnerable’. Refugees and asylum seekers exist somewhere at this, the more/most vulnerable, end of the continuum. We, the Australian nation, exist at the other extreme, at the not-very-vulnerable end. (This is not to deny that there are Australians who are very vulnerable in their own

---

ways, but as a nation we are not compared with people who live in or near situations of civil strife.)

While discussions about refugees rightly focus on the more vulnerable end of the continuum, in Australian debates, different categories of vulnerable people in need of protection are often pitted against each other – the merely vulnerable against the more vulnerable, and the more vulnerable against the most. Asylum seekers, most of whom are eventually found to be in need of protection and yet are disparaged as somehow morally corrupt, are contrasted with the ‘good’ refugees who wait in refugee camps for their turn at resettlement – a turn that will most likely never eventuate. And even when they are not understood to be competing against and taking the places of the ‘good’ refugees, asylum seekers are compared against ‘our’ own disadvantaged Indigenous peoples or ‘our’ own poor and homeless: why should ‘we’ be spending all this money on refugees and asylum seekers when we have problems of our own?

This false contest occurs at the same time as the least vulnerable, those of us who live in relative safety and security, are framed out entirely from the moral picture. That is, the debate in Australia focuses entirely on the most vulnerable end of the continuum and leaves the not-very-vulnerable end out entirely. We – the least vulnerable – are invisible while, at the same time, setting the discourse. We are the judges, determining whether or not someone is worthy of protection, whether they deserve our care and attention, whether they are more vulnerable or merely vulnerable. (And we do this, at least in popular discourse, largely on the basis of their mode of arrival.) While we make judgements about the comparative needs of those with less than we have, our own safety and security (and wealth and privilege) go unseen, unchallenged, undiscussed. Or, to return to Darren’s dilemma, we question the comparative claims

of someone who hasn’t eaten for three days against those who’ve not eaten for weeks while never reflecting upon, or even acknowledging, the relative banquets we confront each time we eat.

This is not to suggest that we ought to feel guilty for the good fortune in which we find ourselves. Collective guilt for things that are the product of mere chance – such as where we were born – is not very productive. Nor should a nation like Australia aim to place the wellbeing of its citizens at risk through an unrestrained response to those in need of international protection. Such a saintly response would be as unreasonable and undesirable as it is unlikely. Nor should we believe that, because of where we sit on the vulnerability continuum, we have no place to engage in the ethical debate about how to assist those who are truly vulnerable. Rather, we need to have the debate more fully and honestly. To do so, we need to position ourselves within the moral dilemma, to frame ourselves in. This will not always be comfortable because to do so will be to acknowledge that some of the claims that we might make are not as compelling as higher order entitlements to freedom from the most serious human rights violations.

Such a framing does not suggest policy prescriptiveness. Even with a more honest and accurate framing of the debate, there are still difficult decisions to be made. How do we respond to a situation in which there is a greater need for international protection than there is a capacity to meet that need? How might we engage constructively, as a small country, to address the complex, intersecting and often intractable root causes of displacement? How do we balance the ‘ethics of proximity’ (5) – obligations that arise from knowing the suffering of refugees and asylum seekers within our midst and having the capacity to do something about it – and any broader obligations that we might have to the



---

many millions of refugees and displaced people around the world who do not have the means or opportunity to engage us thus? How do we encourage countries in our region and around the world to share the burden of refugee protection more equitably? What obligations, if any, do we have to those who, reasonably enough, seek to migrate to enjoy better economic prospects – equivalent to what we enjoy – for themselves and their children? How do we address the fact that for every one hundred people who make it to Australia by boat in search of protection, at least four drown on the way? How do we deal with a situation in which a significant number of Australians feel disempowered and dislocated in an increasingly globalised world and where asylum seekers arriving by boat have come, in part, to symbolise their fears? These are real issues, and it is possible for people of good will to disagree on answers to them. By framing ourselves into the ethical equation, however, it is possible for our responses to asylum seekers and refugees to be at the same time more politically realistic, more evidence-based and more ethical.

## References

1. David Corlett, 'Politics Symbolism and the Asylum Seeker Issue,' *UNSW Law Journal*, vol.23.,no.3 (The Refugee Issue), December 2000.
2. Amanda Vanstone, 'Media-savvy asylum seekers play hardball,' *The Age*, 7 October 2013, available online at <http://www.smh.com.au/federal-politics/political-opinion/mediasavvy-asylum-seekers-play-hardball-20131006-2v26z.html#ixzz2h0QzGosl>.
3. Mirko Bagaric, 'Time for refugee policy to take hard rejection line in favour of helping the most desperate,' *SMH*, July 15, 2013, available online at <http://www.smh.com.au/comment/time-for-refugee-policy-to-take-hard-rejection-line-in-favour-of-helping-the-most-desperate-20130714-2py0x.html#ixzz2cNFgpRBP>.
4. Report of the Expert Panel on Asylum Seekers, August 2012, available online at [http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert\\_panel\\_on\\_asylum\\_seekers\\_full\\_report.pdf](http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf), p.12.
5. Robert Manne with David Corlett, 'Sending Them Home: Refugees and the New Politics of Indifference', *Quarterly Essay* 13, 2004, pp.81-83.

---

# A place of refuge: Responses to international population movements. Arja Keski-Nummi

---



*Arja Keski-Nummi PSM is a Fellow with the Centre for Policy Development in Sydney. She has had extensive policy and service delivery experience in the Department of Immigration and Citizenship, starting with the establishment of settlement support services in Sydney following the Galbally report in 1978, working on regional refugee resettlement under the CPA, and policy adviser to several Ministers of Immigration between 1987 and 1993, her last position being First Assistant Secretary of the Refugee, Humanitarian and International Division 2006-2010. She was awarded the Public Service Medal in 2010 for her outstanding service in the development and delivery of Australia's refugee and humanitarian policies and programs. She is now engaged in volunteer work with asylum seekers in Canberra and is a co-author of the 2011 CPD publication *A New Approach: Breaking the Stalemate of Refugee & Asylum Seekers*.*

---

## Abstract

**This essay examines the phenomenon of international population movements in the context of asylum and refugee policies and the contentious public discussion that has emerged. The main focus is on the evolving regional and international discourse and how protection in the region could be strengthened. Three approaches are discussed: strengthening dialogue through a track 2 diplomacy process, using extant visa programs to ease pressure on secondary movements, and building a robust regional processing framework.**

For over 60 years Australia has played a vital role in the development and strengthening of a system of international protection for refugees. It was one of the earliest signatories to the 1951 Refugee Convention. It has been an active member of the Executive Committee of the UNHCR and has held

the Chair on several occasions. Australia was one of the key countries in the development and implementation of the Comprehensive Plan of Action for Indo Chinese Refugees (CPA). Two Australians have been awarded the UNHCR Nansen Award for Refugees: Sir Tasman Heyes in 1962 and Major General Paul Cullen in 1981.

Australia has one of the largest humanitarian resettlement programs globally and contributes substantially to international efforts in support of displaced people and refugees. Despite this, in the past decade, Australia, like other developed countries, has grappled with the increasingly contentious nexus between asylum, irregular migration and secondary movements. The public debate is now so polarised that it has become difficult to have a rational and constructive dialogue on the best ways to respond to such movements.

---

Globalisation is testing the tolerance levels of developed countries regarding population flows, immigration and asylum. We know we need immigration, but in the asylum context we just don't like the apparent self-selection that occurs. It offends both our sense of a fair go and an orderly process. Alongside this concern is the emergence of organised people-smuggling activities (a low risk / high profit venture) that facilitate the movement of people when migration systems fail them or do not accommodate their needs. Finally we are often suspicious of the motivation for such population movements, particularly secondary onward movements. Is it opportunistic? Is it out of fear for safety or merely economic? Is it because legal channels have been cut off? The answer probably lies in a complex mixture of all of these.

These various strands of concern have coalesced into a sense of crisis regarding the perceived uncontrolled onward movements, especially by boat, and the capacity of the international protection system to respond effectively in a way that addresses both States' legitimate concerns and individual protection needs. In our domestic policy context we see this being played out with ever-changing and often more restrictive policies on asylum, immigration, border control, interception and attempts at disruption, arrest and prosecution of people smugglers.

While such policy responses may temporarily have some impact, they fail in essence to tackle what is at the heart of the issue – the need by people forced to flee their countries to find a place of safety.

This has been compounded further by the shrinking protection space for displaced people globally. For the past 60 years the complementary elements of an international protection system have been:

- asylum - the obligation under the Refugee Convention that States provide protection to refugees who are in their territory; and
- burden-sharing – the concept expressed in the preamble of the Convention whereby States contribute to the protection of refugees who are in the territory of other states.

However after thirty years of mass outflows of people because of wars and civil unrest, from the Vietnam War to Syria today, the international system has struggled to find an effective way to balance these dual responsibilities.

We do know it can be done. The Comprehensive Plan of Action for Indo Chinese Refugees in this region, and in Europe the airlift from Kosovo, show what is possible when national and international interests come together. Despite being controversial and contentious at the time, both achieved their objectives of keeping borders open and providing at least some protection in the region until durable solutions were available.

However the examples of failure to act quickly are horrific: the hesitation to intervene in Rwanda that saw over one million people killed; and the current indecisiveness on Syria where over two million have fled across the borders and where, the UNHCR estimate, there are some 4.25 million people internally displaced.

---

For over a decade there has been intense discussion on enhancing international cooperation and yet no consensus on a framework has been achieved, largely because Governments have not seen what is in it for them (1). The reality is that any framework that is developed must take account of States' national interests or it will not succeed. This is not Australia's 'problem' to fix but, as in the past, we have an important role to play in finding regional solutions because until we do we cannot hope to reach a reasonable response to the complexities of such population movements.

To achieve this, three complementary approaches that build on current arrangements are examined here.

## **1. Building a strategic policy dialogue**

The foundations already exist, but they often appear ad hoc and uncoordinated with little appreciation by others of what is being done. This includes the Bali Process and its various working groups as well as the Regional Support Office; the Regional Cooperation Framework endorsed at the last two Bali Process Ministers conferences, and in civil society, the work of the Asia Pacific Regional Refugee Network (APRRN) (2).

The missing link in these arrangements is a mechanism that engages Governments and civil society in a strategic policy dialogue. There is an urgent need to start the work of establishing such a process and creating a framework that brings Governments and civil society in the region into a structured and constructive policy dialogue.

One approach could be modelled on the 'Track 2 Diplomacy' dialogue that has been effectively used in the Asia-Pacific region on security related issues. The objective of this unofficial dialogue would be to develop a shared understanding and a shared acknowledgement of the problem and the role of diverse players. This would include people working in immigration, security, intelligence and border protection areas of Government as well as refugee and asylum experts in civil society.

Done well, this approach has the potential to be transformational in breaking down the unproductive suspicions of the different parties, the current dynamics of which are self-perpetuating and so reinforcing of the stalemate that exists.

While building a track 2 dialogue takes enormous effort and commitment the dividends can be many:

- It can remove the discussion on asylum, people smuggling and displacement from public contention to a neutral space;
- It can give greater freedom to explore alternative perspectives and formulate new (joint) ideas as well as giving all players a stake in the partnership and responsibilities in addressing the issues;
- It can present an opportunity for those players outside Government to influence new policy thinking and for government officials, often stuck in rigid roles and with less flexibility, to explore and test new policy models which gives them the opportunity to 'think aloud';
- It can promote a rational public discourse using facts and reason and can strengthen the voices of moderation;

- 
- It can kickstart a process that could lead to a new framework balancing the complementary concepts of asylum and burden sharing regionally.

If successful such a dialogue could conceivably be expanded into a regional approach sitting alongside or under the Bali Process.

## 2. Alternative migration options

A central focus of the international discussion on population movements and asylum has been the concept of mixed migratory movements. The literature and research on such movements highlights the complexities inherent in making simple assumptions. A migration path that on the face of it might have started principally for ‘economic’ reasons might, when more fully probed, have compelling refugee dimensions as well. In a 2004 study on mixed migration the absence of alternative migration pathways was cited as one possible reason for the growing ‘asylum’ populations because no other alternatives existed (3). We should understand these dynamics better and examine ways to use extant visa programs as one way of easing the pressure on asylum systems as the only migration option available.

We have faced such dilemmas before and responded with arrangements such as the Orderly Departure Program from Vietnam or the Special Assistance Category visas created for specific circumstances to release migration pressures that could otherwise have moved into an irregular migration pathway.

The Government, therefore, has in its toolkit a number of visa options that could be considered, and there is a persuasive case for the creation of a negotiated Orderly Departure and/or Special Assistance Category program from targeted countries such as Afghanistan or Sri Lanka. In the case of Afghanistan it could be incorporated into the discussions on the changing nature of Australia’s engagement with Afghanistan in the wake of the draw-down of our military presence. Other vulnerable populations that could be considered are, for example, the Tamils in Sri Lanka or Rohingya in Burma.

While there will always be difficult bilateral issues with such arrangements these can be addressed through robust diplomatic engagement and discussion, as they have been in the past.

## 3. Building a regional protection space

Most people displaced by war and conflict will largely remain within their region of displacement (4). People continue to move when the protections in the country of first asylum become precarious or where processing is taking so long that they start to lose faith in return.

It is important to provide a humane and responsible way to stabilise population outflows and minimise the incentive for people to search for alternative protection arrangements elsewhere. We need to work with host countries along the displacement corridors to support populations so as to minimise the need to move on or use smugglers for their onward movements. Such support includes timely registration and processing of claims, access to shelter, education and health services, as well as some capacity for self-sufficiency pending a durable solution.

---

In this context the need to pursue regional processing arrangements through which resettlement or return can occur is urgent. Such an arrangement needs to be regarded in the broader context of supporting the continued development of a regional framework. If done well, it could assist in developing a common asylum processing system and infrastructure in the region.

Balanced with a commitment to resettlement and appropriate alternative migration pathways, as well as safe and transparent return for people who are not refugees or who do not qualify for other visa programs, this would go a long way to restoring the spirit of international cooperation envisaged in the Refugee Convention.

## References

1. See for example James Milner, Refugee Studies Centre Working paper No4 'Sharing the Security' Burden: Towards the Convergence of Refugee protection and State Security, May 2000.
2. A key NGO umbrella organisation that brings together civil society and regional NGOs to identify and work out practical ways to support the development of a protection framework in the region for displaced people.
3. Crisp, Jeff and Christina Boswell 'Poverty, International Migration and Asylum'; Policy Brief No.8, UNU-WIDER 2004.
4. See for example UNHCR Global Report 2012.

---

# There is a better way.

## John Hewson

---



*John Hewson AM is an economist and company director and former federal leader of the Liberal Party of Australia from 1990 to 1994. He has a particular interest in corporate social and environmental responsibility.*

---

### Abstract

We have wasted billions of dollars in the futile and irresponsible attempt to score short-term political points without creating a sustainable long-term solution. Of course, the recent deterioration in our relations with Indonesia over the 'spying/intelligence' issue makes the task even more difficult. Yet, ironically, it may provide a unique opportunity to start with something of a blank sheet of paper, to build a more effective long-term relationship between our two countries on a number of fronts, including asylum seekers. It is rare that circumstances provide an opportunity to start from scratch and, with the benefit of experience, to get it 'right' the second time. Australia should be willing to fully fund an effective processing unit in Indonesia that meets UNHCR criteria and embark on bilateral discussions with a number of key source countries.

The management of the asylum-seeker issue in recent years has been nothing short of a national disgrace.

Our hard-earned international reputation, built up over decades, for punching above our weight in terms of the humanitarian treatment and resettlement of refugees has been squandered in what has been a most unedifying 'race to the bottom' between the two major political parties, each attempting to demonstrate at every opportunity over the increasingly frenetic daily media cycle how 'tough' and 'discouraging' they can be with people who are mostly fleeing persecution, or even death, in their home country.

The bottom line is that the issue has run away from both of them. Although the 'boat arrivals have slowed' under the threat of Manus/Nauru detention, and many direct actions against people smugglers, none of these 'solutions' is sustainable in the longer term.

---

For example, assume Manus detention ‘works’ with genuine refugees ultimately achieving permanent residency/citizenship in Papua New Guinea. How long will it be before they seek to move on from there to Australia? In the meantime, the Manus situation is very politically and socially divisive in Papua New Guinea, essentially a poor, Christian country being forced to accommodate Muslims with perhaps a better standard of living than many Papua New Guinea nationals.

The essence of a sustainable/longer-run solution has two key elements: first, a Regional Agreement that sets the ‘overarching framework’ and clearly specifies rights and responsibilities between Source, Transit and Destination countries in a manner consistent with the UN Refugee Convention (perhaps updated); and, second, a number of bilateral agreements between Australia and key Source and Transit countries in the ‘refugee chain’.

Unfortunately, the situation is now much more complex and the prospects of the types of agreements required are now substantially reduced, due to the shenanigans of the last decade or so, with the politics being played out for our domestic consumption largely ignoring the fall-out in terms of the impact on the attitudes and capabilities of our regional neighbours.

However, the situation cannot be left to drift in the hope that, as effectively occurred at the time of the Howard Pacific Solution, the ‘push factors’ in the Source countries will wane. What is called for is significant and sustained leadership, both regionally and bilaterally, and Australia has a particular opportunity and responsibility to provide this.

While most of the detail naturally will be the outcome of negotiations, there are certain important points that will need to be addressed. For example, agreement

must be reached with Source countries concerning the repatriation of those found not to be genuine refugees.

It may also be necessary to assist Source countries in patrolling their waters to minimise the exits by boat, as the Abbott Government has attempted with Sri Lanka in recent days.

In some cases, it may be preferable to expand onshore UNHCR-controlled processing near source, requiring some financial support from us.

Similarly, the agreement(s) with Transit countries must involve the tightening and policing of tougher visa requirements for those originating from identified Source countries, to minimise the scope for asylum seekers to transit those countries, as well tightening and enforcing laws, with increased penalties, against people smugglers.

While Transit countries may well agree to the ‘spirit’ of such requirements, they may fall short of delivering the desired outcomes against what has been a ‘practice’ by many of them, for several decades, to ‘push the boats off and on’ wherever possible.

Against this general background, the most important requirement for Australia is to negotiate a sustainable bilateral agreement with Indonesia, the key Transit country from our point of view. As the Manus/Nauru deterrents are probably not long-term solutions, even if we could, but of course we shouldn’t, ignore their basic inhumanity, it is imperative that we ‘stop the boats’ at the principal Transit country from our point of view.

There are a number of fundamental requirements of such an agreement with Indonesia (which may also serve as something of a blueprint for agreements with other Transit countries):



- The establishment of an ‘offshore processing centre’ in Indonesia, operated by us, and the Indonesians, in conjunction with the UNHCR, and fully funded by us. This should minimise the need for any form of mandatory detention, with those who can afford it funding themselves while being processed, although there may be some need for support for those genuinely in need.
- Stricter visa restrictions on arrivals in Indonesia from designated Source countries.
- Stricter Indonesian laws and ensuring their enforcement with significantly increased, virtually automatic, penalties against people smugglers, which would again require the provision of additional policing resources, training, etc., again heavily funded by us.

The thrust of this approach is to discourage/stop asylum seekers leaving Indonesia in the first place, which in turn would require an agreement that any that did leave and were intercepted at sea (by whomever, and irrespective of considerations of ‘territorial waters’, etc.), or were to actually reach Australia, would be automatically returned to be processed at the processing centre.

This would require, of course, significant effective co-operation between the Indonesian and Australian coastal patrol authorities that, with a few exceptions, has been particularly difficult to achieve to date, even setting the politics aside. However, the key point is that with an effective processing operation in Indonesia, the need for such a coastal patrol arrangement should be minimised.

One other key element of such a bilateral agreement would be a willingness on our part to expand significantly our annual refugee intake.

Our recent political debate has seen various commitments of some 20,000-30,000 annually. Given the extensive skill shortages that we face, and the limited success of so-called ‘Skilled Migration Programs’ in the past, I suggest that we could easily agree to increase our refugee intake to about half our annual immigration intake, currently planning towards some 200,000 annually.

However, an immigration level of even this order of magnitude is still only some 0.8 per cent of our annual population increase which some, including myself, think is far too low, especially given the longer-term challenges of an ageing population, prospective skill shortages, and so on.

Over and above this, we could presumably place many asylum seekers determined to be genuine refugees in training and higher education institutions, with considerable benefits both to them and to our economy and society.

Some will of course baulk at the potential cost of this sort of approach. The fact is that we have already spent (wasted) billions in the futile and irresponsible attempt to simply score short-term political points in our domestic political debate, without creating a sustainable long-term solution.

I am reminded of the Irishman stopped on a rural country lane by a tourist seeking directions to Dublin: ‘If I be goin’ to Dublin, I wouldn’t want to be startin’ from ‘ere.’

Unfortunately, with the issue of asylum seekers we are ‘startin’ from where we would least have wanted to begin. The politics of the last decade has cost us, and our national standing, significantly. But we can dramatically improve the situation with clear, decisive and sustained leadership from us, offering the possibility of at least

---

partially regaining our previously hard-earned reputation for the humanitarian treatment of those decidedly less fortunate than ourselves.

Of course, the recent deterioration in our relations with Indonesia over the 'spying/intelligence' issue makes this task, on face value at least, even more difficult. Yet, ironically, it may actually provide a unique opportunity to start with something of a blank sheet of paper, to build a more effective long-term relationship between our two countries on a number of fronts, including asylum seekers.

The bottom line is that the Indonesia/Australia relationship is a very important relationship to both sides. We need each other going forward. It is rare that circumstances provide an opportunity to start from scratch and, with the benefit of experience, to get it 'right' the second time.

---

# Why the need for a compassionate policy on refugees?

## Besmellah Rezaee

---



*Besmellah Rezaee is a Solicitor who has a strong background in humanitarian work. He gained a Bachelor of Law and International Studies from the University of Adelaide and spent time working in Malaysia. Besmellah is currently completing a Masters of International Law and Masters of Diplomacy at the Australian National University. Besmellah has been part of the organising committees of two international conferences namely the Asia Pacific Model United Nations Conference and the Asia Pacific Youth Conference. He has served on a number of governmental and professional bodies, including the Youth Advisory Committee of South Australian Multicultural Affairs Commission, Member of Multicultural Youth SA (MYSA), President of the Association of Australian Tertiary Students from Afghanistan (AATSA), Advisory member of The Australian Youth Affairs Coalition (AYAC) and Plan International.*

---

### Abstract

Having lived the life of a refugee as an 11-year-old child, I see compassionate policy for refugees as the only encompassing policy worthy of Australia. Before a persecuted person becomes refugee, s/he is a human like everyone else. Refugee status is not a choice it is a compulsion. Every year, millions of people are forced to flee their habitual place of residence, almost always through no fault of their own. In the global world of today, a threat to mankind in one corner of the world is a threat to mankind in every corner of the globe. It is with this in mind that one needs to appreciate that a compassionate and humane policy is what Australia should adopt when it comes to refugees and asylum seekers. Australia has voluntarily undertaken human rights obligations that are directly relevant to refugees as well. The fulfilment of these obligations can only be achieved through a compassionate policy.

### The human face of refugees

Refugees are the most vulnerable people in the world as they lack the effective protection of any State until and unless they are afforded protection. Their desperate situation should oblige others to treat them with compassion. Refugees are human beings and their vulnerability should not be politicised for unethical ends, because this will portray a demonised image of refugees. Refugees do not embark on dangerous journeys out of choice. Australia has voluntarily ratified human rights treaties to uphold human rights both domestically and internationally and advance its international standing in this arena. Australia's policy on refugees damages its standing in the international community as its uncompassionate attitude is contrary

---

to its human rights obligations. The threats that cause people to flee their homeland and become refugees are threats against the whole of humanity. Australia has consistently recognised this and has been involved in wars thousands of kilometres away to protect others. However the very victims of terror who have arrived in our shores have been treated inhumanely.

Compassion lies at the heart of all ethical, spiritual and religious traditions, which preach the principle of treating others as you wish to be treated yourself.

I have personally lived the life of a refugee, like millions of others. It was not a matter of choice for me and for millions of other Hazaras forced away from home, family, friends and loved ones. I did not choose to be born a Hazara, and Hazaras did not choose to be persecuted by Taliban.

In Australia, a western liberal democracy where people have freedom of choice in most matters that shape their lives, it is often hard to imagine not having any choice in life and only playing the cards you are dealt. Therefore, commentators and the public at large describe asylum seekers as illegals, and queue jumpers.

As a former refugee, for me there was no choice of legal or illegal path to safety, and there certainly was no choice of a queue. There was only one way to escape the persecution of the Taliban.

As a refugee lawyer today, this lack of choice applies to most of the asylum seekers I deal with, no matter which country or region they're fleeing. They have no option as they are desperate, and desperate people will do desperate things, such as paying people smugglers and piling their family on leaky boats. Thus, the start of a compassionate policy has to be the understanding that refugees who flee their home countries and board leaky boats have no choice but to flee by any means possible.

Being or becoming a refugee is not a choice or a voluntary act. It is what circumstances force upon a person or a group. But more importantly, the debate on whether or not one chooses to become a refugee is completely irrelevant. What should be considered in the debate on refugees is the fact that it is a vulnerable state to be in; and seeing a human being in a vulnerable state raises a moral and legal demand to treat that person with compassion.

The notion that asylum seekers have no choice but to board leaky boats has been missing from our political discourse and media coverage of the issue. This is evidenced by the persistent use of language such as 'illegals', 'boat people', 'queue jumpers' and more recently 'detainees'. The use of such language helps to promote anti asylum-seeker sentiments, dehumanises asylum seekers, and portrays them as unworthy of our compassion. Refugees are human beings like anyone else. They are men, women and children with hopes, dreams and aspirations. In the political debates, our politicians often forget the very crucial point - that the definition of human beings is not centred on place of origin, colour, race or faith. As the great Persian poet Sa'adi puts it:

---

‘Human beings are members of a whole, in creation of one essence and soul.

If one member is afflicted with pain, other members uneasy will remain.

If you have no empathy for human pain, the name of human you cannot retain’

Those who use negative language to describe asylum seekers are either ill-informed about or do not understand Australia’s international obligations. The international and national human rights conventions and laws that protect human beings do not define or discriminate against particular classes of human beings such as refugees. In fact the whole purpose of the Refugee Convention is to extend extra human rights protections to the most vulnerable group of human beings - refugees.

Australia has voluntarily undertaken to respect, protect and advance human rights in its jurisdiction and internationally. According to the Department of Foreign Affairs International Treaty-making kit, Australia as a sovereign State has recognised and ratified international treaties in order to participate in the international system of law and maintain its position among the community of nations. In so doing, Australia has agreed to be bound by the scheme of international responsibilities and rights that regulates the actions of sovereign States.

For instance, take the example of refugee children and their human rights under international law and our domestic law. In this regard Australia ratified the Convention on the Rights of the Child (CRC) on 17 December 1990, the International Covenant on Civil and Political Rights (ICCPR) on 13 August 1980 and the Refugee Convention on 22 January 1954. The ratification of these conventions by Australia is an explicit agreement to ensure that existing laws are applied in a manner that gives proper expression to the treaty obligations and convention provisions with effect under domestic law. Certain provisions of these treaties are mirrored in domestic legislation. For example article 1A (2) of the Refugee Convention is reflected in sections 91R and 36 of the Migration Act. In addition all States of Australia have child protection legislation which in most cases reflects article 19 of CRC; the protection of children from abuse. Further, common law has confirmed that the legislative provisions should be interpreted by courts in a manner that ensures, as far as possible, that they are consistent with the provisions of treaties to which Australia is a party.

---

In the light of the above and despite the presence of State and Commonwealth legislation, Australia has frequently failed to meet its human rights obligations when it comes to CRC and ICCPR in regard to children in its jurisdiction. It is argued that Australia's immigration detention law is fundamentally inconsistent with CRC provisions. As per article 37, CRC only allows for detention of children as 'a measure of last resort' while s189 of the Migration Act makes detention of unlawful non-citizen children the first and only resort. Australian authorities have insisted that the initial detention of children who arrive in Australia without a visa is not unlawful because it is prescribed in the Migration Act and it is so-called preventive detention for reasons of public interest and national security. The loophole in such an argument is that a child would hardly pose a risk to national security, as has never been the case in Australian immigration history.

It is therefore manifest that despite deficiencies in the implementation of our human rights obligations, we have voluntarily taken on the responsibility to protect and respect the human rights of children out of good will, compassion and ethical obligation. There is no force or coercion to the undertaking to ratify the above named conventions, because we can always pull out.

In an increasingly globalised world, Australia's geographical isolation does not mean that we are not affected by events around the world. This is evidenced by the Bali Bombings, David Hicks training with the Taliban, and Australia committing to the war on terror. More specifically Australia's role along with other international forces in Afghanistan has affected the situation in Afghanistan and Australia.

For Hazaras like me the international forces including Australia removing the Taliban from power in 2001 meant that we would not be persecuted anymore. However this optimism proved to be short-lived as the Taliban regrouped a few years later and started targeting Afghanistan's Hazara population once more. The resurgence of the Taliban in Afghanistan and the target killing of Hazaras in neighbouring Pakistan by Lasker-e-Jangvi saw a hike in the number of boats carrying Hazaras seeking asylum in 2007. This shows how we live in an interconnected world where our actions and deeds have inadvertent consequences that we sometimes do not appreciate.

---

More inadvertent consequences can be seen in the association Hazaras have had with the western forces in Afghanistan. In a recent message the renowned Mujaheedin leader Gulbadin Hekmatyar, the leader of the Hezb-e Islami political party, threatened to exterminate the Hazaras because they welcomed and sided with foreign forces in Afghanistan. He accused the US of supporting the Hazaras and said that 'The time will come when the oppressed people of Afghanistan will stand for taking their usurped rights and then the (Hazaras) will have no safe havens in any corner of the country' (1).

As is evident, Hazaras are threatened with extermination because they welcomed foreign forces including Australian forces to Afghanistan. Now if Australia's justification to go to war in Afghanistan and Iraq was to save human life, to uphold human rights and dignity and to advance the rule of law and democracy, one wonders why we can't do the same on our shores when the very victims of human rights violations arrive here to seek refuge? This is especially so when it is the Australian presence that has implicated these victims because they welcomed us.

Australia has recognised the significance of association with western forces for Afghans by proposing to grant 800 visas to Afghans who assisted the Australian defence force directly. However Afghans who have helped and sided with the foreign troops morally and politically, and who managed to escape persecution and find their way to Australia by boat, are not afforded the same recognition and compassion even though as evidenced by Hekmatyar's threat the Taliban do not make a distinction between those who directly supported the international forces and those who supported them morally and politically.

Those who do not see justification for a more compassionate policy on refugees based on the moral and international legal obligations outlined above may be more inclined by the contribution that refugees make to this country. The contribution of refugees, I believe, can be grouped into two categories, cultural and economic. The contribution that refugees make to Australian culture in the way of enhancing multiculturalism and increasing cultural diversity is hard to quantify. However the economic contribution that asylum seekers make and could make is more readily quantifiable and has been studied.

Refugees engage intensely in job searching and vocational education. In his analysis, Graeme Hugo suggests that refugees face substantial obstacles in employment in the early stages but are highly successful in the long run (2). This view is echoed by the Refugee Council of Australia, who have stated that there may be short-term cost as refugees are resettled and adjust to their new surroundings but once successful integration has occurred refugees are able to quickly make permanent cultural, social and economic contributions (3). In his article 'Refugees in a Region; Afghans in Young NSW', Emeritus Professor Frank Stilwell estimated that Afghan asylum seekers have contributed between \$2.4 million and \$2.7 million to regional development (4). Refugees like me are eager to work, to get educated and to contribute both culturally and economically. What is holding refugees back is an uncompassionate policy.

---

In conclusion, the refugee and asylum-seeking issue cannot be morally or legally addressed by keeping it contained in one geographical area and out of sight. It is a human issue and has always been so. Since the dawn of history human beings have always had to migrate for one or the other reason. This should be recognised and addressed in a humane way. Taking the human face away from the refugee or asylum-seeking issue is the first step in eliminating any chance of compassionate treatment towards them; disregarding international and legal obligations is much easier after that.

## References

1. Ghanizada Hekmatyar accuses foreigners and minorities for dividing Afghanistan, Khaama Press, <http://www.khaama.com/hematyar-accuse-foreigners-and-minorities-for-dividing-afghanistan-2322> at 4 November 2013
2. Graeme Hugo, 'Economic, social and civic contributions of first and second generation humanitarian entrants'. Report of the Department of Immigration and Citizenship, 2011
3. Refugee Council of Australia, Economic, civic and social contributions of refugees and humanitarian entrants: A literature review. Report for the Department of Immigration and Citizenship, 2010
4. Stilwell, Frank 'Refugees in a region: Afghans in Young, NSW'. Urban Policy and Research, 21(3), PP.235-48, 2003.



---

# Acknowledgements

---

This project has been made possible by a crowd-funding initiative hosted by [www.pozible.com](http://www.pozible.com). We warmly acknowledge the contributions of 91 Pozible donors including 40 anonymous donors and the following:

Johanna McBride, Kaeleen Dingle, Bella Stevens, Annalisa Koeman, Jo South, Alison Kershaw, Arnie Kendall, Robyne Laird Jones, Lynne Reeder, Wendy Malycha, Kristin Alford, Jack Knownforlaugh, Paul Barratt, Daniel Carr, Tom Barratt, Shelley Schreiner, Gratton Wilson, Susan Wilson, Joe Longman, Christy Filipich, John and Elizabeth Bennett, Shane Fisher, Gaz Pozible, Annette Spooner, David Lang, John and Jenny McGee, Gael Howell, Filomena Barzi, Megan Lamb, Deb Lavis, Derry Finkeldey, Anthony McMichael, Anne Kilcullen, Honey Nelson, Hester Gascoigne, Bronwyn Jewell, Philip Bailey, Colin Campey, Meg Evans, Leanne Craze, Tom Merrett, David Farmer, Lyle Rogan, Claire Parkes, Rory Spreckley, Maryann Long, Andrew Farran, Philippa Rowland, Jessica Kirby, Peter Hallams, John Langmore.

We are warmly appreciative of the 25 contributing essayists and to Ms Annalisa Koeman who undertook background research and distributed materials to board members, steering group members and contributors.

We also acknowledge the contributions of the Australia21 steering group and Board members and advisors including Paul Barratt, Lyn Stephens, Lynne Reeder, Deb Lavis, Annalisa Koeman, Molly Harris Olson, Tom Merrett, Mick Palmer, Alex Wodak and Steve Cork.







---

#### **Australia21 Ltd**

Australia21 is an independent, non-profit organisation whose core purpose is multidisciplinary research and enquiry on issues of strategic importance to Australia in the 21st century.

Australia21 offers the excitement of new thinking about the linkage between research and policy. We believe that ideas matter and that they can be harnessed effectively in the interests of Australian society by extending public discourse across research and policy boundaries.

Our capacity to convene expertise from across the nation means that we are able to delve into issues differently from a conventional university or research institution. We also provide a unique way for business, industry and Government to meet socially responsible goals and promote long-term Australian public good and well being.

[www.australia21.org.au](http://www.australia21.org.au)

---