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Submission to the Senate Legal & Constitutional Affairs Committee Inquiry into Australia's agreement with Malaysia in relation to asylum seekers

by

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Australia's agreement with Malaysia in relation to asylum seekers, with particular reference to:

a. the consistency of the agreement to transfer asylum seekers to Malaysia with Australia's international obligations;
b. the extent to which the above agreement complies with Australian human rights standards, as defined by law;
c. the practical implementation of the agreement, including:

   (i) oversight and monitoring,

   (ii) pre-transfer arrangements, in particular, processes for assessing the vulnerability of asylum seekers,

   (iii) mechanisms for appeal of removal decisions,

   (iv) access to independent legal advice and advocacy,

   (v) implications for unaccompanied minors, in particular, whether there are any guarantees with respect to their treatment, and

   (vi) the obligations of the Minister for Immigration and Citizenship (Mr Bowen) as the legal guardian of any unaccompanied minors arriving in Australia, and his duty of care to protect their best interests;

d. the costs associated with the agreement;
e. the potential liability of parties with respect to breaches of terms of the agreement or future litigation;
f. the adequacy of services and support provided to asylum seekers transferred to Malaysia, particularly with respect to access to health and education, industrial protections, accommodation and support for specialneeds and vulnerable groups;
g. mechanisms to enable the consideration of claims for protection from Malaysia and compliance of these mechanisms with non-refoulement principles;
h. a comparison of this agreement with other policy alternatives for processing irregular maritime arrivals; and
i. any other related matters.

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The Migration Law Program, within the Legal Workshop of the College of Law at the Australian National University, specialises in developing and providing programs to equip people with the necessary knowledge, skills and qualifications to register as Migration Agents. Legal Workshop also provides Continual Professional Development opportunities for Registered Migration Agents and professional short courses in migration law and New Zealand Immigration law. Legal Workshop has also been engaged in developing research into the practical operation of migration law and administration in Australia, and has previously provided submissions and presented evidence to a number of Parliamentary Committee inquiries, conferences and seminars.

Both the authors of this submission also have past experience relevant to this inquiry, as a Senator and as a policy advisor respectively, with a focus on migration and refugee issues. In particular, both authors visited the detention camps on Nauru, and the asylum seekers residing in them, a number of times between 2003 and 2006, and worked closely with most of the small number of other people who visited the camps to support or assist the asylum seekers.

Terms of Reference

Given the authors' past experience and the recent moves to amend legislation in light of the High Court decision, this submission will focus predominantly on term of reference (h): "a comparison of this Arrangement with other policy alternatives for processing irregular maritime arrivals".

However, whilst others - in particular representatives of the UNHCR - are better placed to provide evidence on the fine details of the Arrangement between the Australian and Malaysian governments and how it might operate in practice, we will make some brief comments about the Arrangement with Malaysia.

Australia's Arrangement with Malaysia in relation to asylum seekers

Much commentary has already been made regarding the High Court's recent decision on the legality of the arrangement between the government of Australia and the government of Malaysia on transfer and resettlement of asylum seekers and refugees.

Regardless of one's views about the merits of the decision, it needs to be clearly stated that this decision was not inconsistent with past decisions of any Court or Judge in Australia. Nor was the decision in any way a case of so-called 'judicial activism'.

The High Court built its decision on last year's judgment in *Plaintiff M61/2010E v Commonwealth* where the Court said:

> '… read as a whole, the Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol.'

The effect of the *M61* decision was that the entire Act must be interpreted with Australia's international obligations in mind.

As it stands now, the Migration Act allows people who arrive at, or are intercepted travelling to, Australia's excised territories (such as Christmas Island) to be taken to a specified country. In order to take them to Malaysia, the Minister is required to make a declaration about Malaysia under section 198A(3) of the Migration Act. The High Court case focused on how the Minister made his decision regarding the declaration about Malaysia.

Under section 198A a declaration states that the country in question:

> 'provides access, for persons seeking asylum, to effective procedures for assessing their need for protection … provides protection for persons seeking asylum, pending determination of their refugee status … provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country … and meets relevant human rights standards in providing that protection.'

The High Court determined that these requirements must be facts under law. The Minister cannot just be satisfied a country will act in a certain manner; instead a country must be under an obligation, either under international law or within its own domestic legislation or from a legally-binding agreement, to provide access and protection to all persons seeking asylum within its territory. The Court found that these facts were not, and could not, be established about Malaysia and therefore the declaration was invalid.

Malaysia is not a signatory to the Refugee Convention. It hosts huge numbers of asylum seekers, but while it tolerates the UNHCR presence whilst asylum seekers are processed and allows refugees to be sent on to settlement countries, Malaysia does not grant refugee status or have in place any legal protections for those assessed to be refugees by UNHCR. Neither does it allow asylum seekers or recognised refugees lawful access to work, housing or education. In addition there have been real and long-standing concerns about the mistreatment of asylum seekers and refugees by police, government officials and others, including – at least until quite recently – credible evidence of forcible deportations.

Similarly, Nauru does not process asylum claims or recognise refugee status under its domestic law. Whilst Papua New Guinea has ratified the Refugee Convention - albeit with significant reservations (i.e. exceptions or modifications to its obligations) - it does not have specific domestic legislation that relates to the determination of refugee status. It is therefore unlikely that any of the countries currently touted as part of a solution to Australia's perceived problems would qualify under the Act as it now stands.

It is clearly open to this or a future Parliament to amend the Migration Act to better reflect the aims or intentions of the Parliament of the day. However changing the Act to remove or amend section 198A is problematic.

The High Court's decisions clearly highlight Australia's obligations under international law and the way they are reflected within the entire Migration Act. These obligations are not restricted to the Refugee Convention and could include other treaty obligations such as the UN Convention on the Rights of the Child. In this context, it is appropriate to note the terms of reference for this inquiry

which highlight the obligations and protections that should be in place for any moves to process asylum claims offshore.

Amending the Migration Act may make it possible for the Australia-Malaysia Arrangement to be lawful, but unless further safeguards are put in place, it is hard to see how it can be guaranteed that there will be adequate protection of some fundamental human rights standards which Australia has long upheld and in many cases been instrumental in initiating.

At an absolute minimum, there must be categorical safeguards against non-refoulement and also against human rights abuses of any asylum seekers transferred from Australia to Malaysia. The current Australia-Malaysia Arrangement does not provide this, although it is appropriate to acknowledge the view expressed by the UNHCR in their submission to this inquiry that the Arrangement was "workable"[1], and the recent statement made by Erika Feller, the UNHCR Assistant High Commissioner for Protection, that the UNHCR was "happy enough with the final text".[2]

However, our view is that whilst it may be that the Arrangement is potentially "workable", that is far from guaranteed. Indeed, given recent past history with respect to other examples of offshore processing by Australia and to the well documented, frequent and serious human rights abuses in Malaysia of asylum seekers and recognised refugees in recent years, it would require substantial independent oversight before it would be reasonable to assert that the potential "workability" of the Arrangement has been achieved in practice.

As the UNHCR appropriately emphasised, their

> "position is and remains conditioned upon: proper protection and vulnerability safeguards determining the pre-transfer/pre-removal assessment process in Australia" and "the Arrangement being implemented with full respect for human rights standards." [3]

As Ms Feller said "the ultimate test of that arrangement would have been how it was implemented."[4]

Equally important views expressed by the UNHCR are that there should be "equal importance on the realisation of durable solutions for *all* persons recognised as refugees coming within the ambit of the Arrangement" (their emphasis) and that "the UNHCR's preference has always been an arrangement which would enable all asylum seekers arriving by boat into Australian territory to be processed in Australia.'[5]

The non binding nature of the Australia-Malaysia Arrangement remains of concern and was instrumental in the High Court decision. Whilst the Arrangement and the 'solution' effectively abandons those who are seeking asylum to an uncertain future, all the costs associated with

[1] Submission 7, page 1.
[2] Ms Erika Feller, ABC Radio Sunday Profile, broadcast 11 Sept 2011. Transcript at http://www.abc.net.au/sundayprofile/stories/3314682.htm
[3] Ibid.
[4] Ibid
[5] Submission 7, pages 2 and 1.

ensuring any human rights obligations are fulfilled remain the responsibility of Australia. Given the long wait times for resettlement of recognised refugees from Malaysia, these costs could extend over periods of many years. The monitoring mechanisms to ensure the ongoing arrangements regarding education, health and welfare being paid for by Australia are carried out are not laid out within the Arrangement.

Any amendments to the Migration Act which may be proposed in response to the High Court decision should be considered through the prism of the UNHCR's comments.

Other policy alternatives

Previous Inquiries

The issue of how best to deal with asylum seekers arriving by boat is one that has been examined and debated repeatedly in the Australian Parliament and many of its Committees over the last twenty years. There is extensive evidence on the Parliamentary record on these issues, and rather than repeat it here, we would urge the Committee to examine the key submissions, verbal evidence and reports from these inquiries.

Given that much of the current political debate is focusing on issues relating to offshore processing, we particularly suggest an examination of the evidence provided to, and the report from, the Senate Select Committee on A Certain Maritime Incident[6], which dealt extensively with many facets of the establishment of offshore processing, excision zones, and the use of Australian Defence Force personnel to intercept asylum seeker vessels.

Another valuable source of information can be found in the evidence provided to the inquiry conducted by the Senate Legal and Constitutional Affairs Committee into the *Migration Amendment (Designated Unauthorised Arrivals)* Bill 2006[7]. Of particular value is the evidence provided by Ms Marion Le (submissions 115 (with 8 attachments) & 115A) and Professor Mary Crock (submissions 66 & 66A plus verbal evidence on 6 June 2006). Ms Marion Le has extensive experience examining details of the many contentious, and in some cases clearly flawed, decisions made as part of the assessment of refugee claims of those detained on Nauru.

The danger of assessing protection visa applications outside of the protections built into the Migration Act was a key reason why the attempt in this legislation to extend this form of offshore processing generated significant concerns. These concerns led to this legislation being one of the only government Bills not supported by the Senate during the time when the Coalition parties had a majority in that chamber.

Whilst people may draw different conclusions from this evidence to the conclusions made in the majority or minority reports of these Committees, the key point is that extensive evidence of how these policies operated in practice is already available and it would be far better for the quality of public debate if there was greater familiarisation with this material, rather than relying predominantly on assertions or assumptions made in the absence of this knowledge.

[6] Tabled 23 Oct 2002
[7] Tabled 13 June 2006

There are a range of other reports and inquiries which also provide ample material for the purposes of this Committee's examination of policy alternatives to the proposed Arrangement with Malaysia.

For example, for a general overview:

- The report by the Senate Legal and Constitutional Affairs Committee into the Administration and Operation of the Migration Act 1958, tabled on 2 March 2006. This Inquiry included an examination of the impact of Temporary Protection Visas and other Bridging Visas applied to refugees and/or asylum seekers.

For a specific focus on detention:

- Reports by the Joint Standing Committee on Migration on their Inquiry into immigration detention in Australia, reports tabled 1 Dec 2008, 25 May 2009 and 18 Aug 2009
- - *A report by the* Joint Standing Committee on Foreign Affairs Defence and Trade *on visits to immigration detention centres*, tabled 18 June 2001
- - the Australian Human Rights Commission's report: A Last Resort? The Report of the National Inquiry into Children in Immigration Detention, tabled 13 May 2004

Whilst the detention of offshore entry persons under the Migration Act is not mandatory, the eventual detention of all offshore entry persons has been used administratively to process claims and politically to portray an impression of deterrence. We are not aware of any evidence provided to the above mentioned inquiries (or any other) to back up any claim that mandatory detention serves as a deterrent to asylum seekers arriving by boat, or that it is anything other than a very expensive approach which almost inevitably causes harm (sometimes very serious harm) to those who are subjected to it for prolonged periods of time.

The current processing arrangements and unnecessary length of detention can and do cause harm. In the long term they also seriously compromise the effectiveness of settlement programs.

The length of time in detention is increased by processing both time of application criteria and time of decision criteria for a protection visa *before* offshore entry persons are able to lodge an application for a visa. This results in those determined prima facie as refugees being held for up to six months or longer in detention whilst security checks are carried out.

<u>A uniform method of onshore assessment of all asylum claims made in Australia</u>

Our preferred alternative approach, for reasons of consistency, fairness, cost, humaneness, openness, efficiency, predictability and maximising the effectiveness of settlement programs is to see all asylum claims made in Australia assessed onshore, with claimants detained for a minimum time period and as a last resort.

The reasoning supporting such an approach has been outlined many times over the years. Whilst some details and circumstances have changed over the years, the basic rationale remains the same. For a very recent, succinct outline of the justifications and benefits of such an approach, we

recommend the report A New Approach: Breaking the Stalemate on Refugees & Asylum Seekers, produced by Mr John Menadue and others on behalf the Centre for Policy Development.

One recommendation in that report which we particularly believe needs fresh consideration is to "de-link the counting of asylum numbers in Australia from the offshore resettlement program," (recommendation 6) as this would remove an unnecessary distortion and strengthen the effectiveness of Australia's admirable efforts with our offshore program.

Pacific Solution

The Pacific Solution was built around sending a message to asylum seekers that they could not find permanent safety in Australia. The proposed Malaysia solution is said to be aimed at people smugglers by taking away the product they sell. Inevitably both solutions hurt the most vulnerable.

Turning back boats

One aspect of the suite of measures adopted by the Howard government in the post-Tampa era which received surprisingly little attention at the time was the use of Australian Defence Force personnel to forcibly return asylum seeker boats (with the asylum seekers still on board) back to Indonesian waters. This practice was detailed in the Certain Maritime Incident inquiry. The evidence given during that inquiry outlined the negative impact this measure had upon the Defence forces and Navy personnel.

Whilst it is plausible to argue that this practice did have an impact in 'stopping the boats', it is not an approach which can be applied in conjunction with genuine efforts to develop a cooperative regional framework with neighbouring countries, which in our view is the only likely viable long-term solution. It also almost certainly leads to increased risk-taking behaviour by asylum seekers aboard their vessels, in attempts to prevent those vessels from being turned back. Having our Defence personnel abandoning vessels crowded with asylum seekers in Indonesian waters with no oversight of their fate or future treatment is also an unacceptable practice.

Offshore processing: Nauru & Manus Island

The authors visited asylum seekers in detention centres on Nauru a number of times from 2003 to 2006. The enormous additional financial expense involved in providing the necessary services and support to remote locations such as Nauru or Manus Island, where the local infrastructure and amenities are far from ideal, is obvious. Whilst we did not visit the detention centre on Manus Island, we again draw attention to the informed judgement of Ms Erika Feller of the UNHCR, who recently stated that

> *We were not particularly enthusiastic … of the Manus Island arrangement that existed at the time of the so-called Pacific Solution. Manus Island is a very remote place, it doesn't offer the greatest prospects for people who may have health difficulties. Solutions are rather elusive when people are in a place like that and it's not clear to me how this arrangement would actually work in the long run.*[8]

[8] Ms Erika Feller, Sunday Profile ABC Radio, 11/9/11, op cit.

Our first visit to the camps on Nauru in 2003 was the first authorised 'outsider' visit most of the detainees had experienced, when they had already been detained for up to two years. There were large numbers of children there over this time, including many who were quite young. It should be noted that the former government's determination to prevent independent scrutiny of the conditions on Nauru even extended to not authorising the then Human Rights Commissioner to examine the Nauru detention centres as part of their inquiry into the effects of immigration detention on children. A later request made by the Joint Standing Committee on Migration at the time to make an official visit to inspect the centres on Nauru were also not supported by the Minister at the time.

The camps on Nauru were set up in late 2001 at very short notice and in the early stages the physical conditions the refugees had to endure were clearly unsatisfactory. It is true that over time the conditions provided for the asylum seekers improved, in particular in the final years when people were allowed outside the camps during daylight hours. The operation of the camps was overseen by the International Organisation for Migration (IOM) as part of a contract with the Australian Government. The attitudes of IOM staff towards the refugees kept in the centres were in many ways preferable to the jailor attitudes displayed both then and now by the private firms contracted to run immigration detention centres in Australia.

However, as how been demonstrated time and time again, while the quality of the physical conditions and care is clearly important, the serious health impacts of prolonged indefinite detention are almost inevitable. This was clearly evident with the refugees kept on Nauru. In the final years of the camps' operations on Nauru there were relatively small numbers of refugees remaining, all of whom had been there for 4 or (in a couple of notorious cases) over 5 years. Despite the relatively small numbers of people remaining, the mental health of those people had deteriorated so badly that a qualified mental health professional had to be maintained full-time on the island.

Offshore processing inherently allows for processing practices outside of Australia's legal and administrative scrutiny. Assessments of refugee claims on Nauru and Manus Island were carried out by DIMIA officers. Some of these assessments were later found to be flawed, with files mixed up, and claims that were supported by evidence provided by UNHCR being ignored. It was only after our second visit following hunger strikes which occurred amongst the refugees, and refugee advocate and experienced migration agent Marion Le was able to communicate with and provide direct assistance to many claimants that some of the serious flaws being made in the assessment of refugee claims started to become apparent.[9]

Whilst it is regularly stated that a number of asylum seekers on Nauru returned voluntarily to Afghanistan, it is important to note the circumstances surrounding these returns. Efforts by community and legal representatives to enter the country in order to visit the asylum seekers were routinely denied. Vulnerable asylum seekers were deliberately kept isolated from independent

[9] As noted earlier in this submission, Ms Marion Le provided detailed evidence about this to the Senate Legal & Constitutional Affairs Committee's inquiry into the *Migration Amendment (Designated Unauthorised Arrivals)* Bill 2006. See also Ms Le's submissions 211, 211A, 211B (confidential) & 211C (confidential), plus verbal evidence on 7 Oct 2005 to the Senate Legal & Constitutional Affairs Committee inquiry into the administration and operation of the Migration Act.

support or advice and were subjected to continuing pressure and inducements to return. Mental health deteriorated and it was our experience that staff as well as detainees were affected.

Most damningly, there is credible evidence that a number of those who 'voluntarily' agreed to return to Afghanistan subsequently experienced significant persecution, with many needing to flee again or in some cases, reportedly being killed[10]. Most recently, *The Age* newspaper reported it had "spent six months tracking "Tampa returnees" who were sent back to Afghanistan from Nauru." This report stated

> *Many Tampa returnees have simply disappeared: walked to work one day and never come back. Others have fled again, to Iran, Pakistan, Tajikistan, on to Europe or back to Australia. Some - it has been reported as many as 20 - have been killed by the Taliban in their homes and villages. Others have died trying to escape again.*[11]

This directly implicates Australian authorities in acts of *refoulement*: returning people to face serious persecution and even death. This is the most serious and egregious breach of the Refugee Convention's most fundamental tenet.

It has been argued that, regardless of all of the above, Nauru was none the less successful in helping to reduce the flow of boat arrivals in Australia. On the face of it, this may seem to be plausible, although as stated above our view is that the direct interception and return of boats to Indonesian waters had the main influence in this regard. But in as much as there is any substance to this claim about the impact of Nauru, it could only have had an impact whilst people believed the frequently repeated rhetoric of the time that asylum seekers would not be resettled in Australia even if they were recognised as refugees.

Indeed, it did occur that many people who had been assessed as refugees initially found themselves remaining detained on Nauru for some time whilst other resettlements possibilities were explored. Not surprisingly, beyond the early assistance provided by New Zealand for significant numbers of refugees from the Tampa and with a few other special cases, there were few cases where other governments were prepared to take refugees from Nauru, seeing them as being Australia's responsibility.

Once it became clear that in fact refugees on Nauru were being resettled in Australia, it was not surprising that those who remained felt their best option was to continue waiting rather than return to danger. This was doubly so once word began to filter back about the fate of some of the 'voluntary' returnees and the fact that things were nowhere near as 'safe' as they had been led to believe. The fact that the IOM would not be involved in assisting with the involuntary removal of people added to peoples' assessment that waiting things out was the safest option. As history has

[10] See "Deported to Danger: A study by the Edmund Rice Centre in conjunction with the School of Education, Australian Catholic University, September 2004; "Following Them Home: The Fate of the Returned Asylum Seekers", David Corlett, Black Inc books, July 2005.

[11] "Lives dogged by poverty, danger and uncertainty, the struggle continues for Tampa's returnees", Ben Doherty, The Age, 20 August 2011. (accessed online on 14/9/11 at http://www.theage.com.au/national/lives-dogged-by-poverty-danger-and-uncertainty-the-struggle-continues-for-tampas-returnees-20110819-1j22q.html)

shown, almost all of those who remained on Nauru after the first few years ended up being resettled in Australia, albeit after great financial expense and in most cases at significant cost to their health and wellbeing.

It is hard to see why there would now be any deterrent effect in warehousing refugees on Nauru for a certain period of time if it was widely known that any asylum seekers recognised as refugees would end up being settled in Australia, or at 'worst' perhaps New Zealand.

Temporary Protection Visas

Whilst it is at least plausible to point to evidence to support a case that processing on Nauru & Manus Island and/or turning back asylum seeker boats had an eventual impact of reducing boat arrivals, there is absolutely no evidence to back up the widely repeated claim that Temporary Protection Visas (TPVs) had such an impact or would have such an impact if reinstated. TPVs were introduced in 1999, two years prior to the 'Pacific Solution'. In that time, the number of asylum seekers arriving by boat not only increased, but most significantly - particularly for all who express concern about the need to stop refugees risking their lives on dangerous boat journeys - there was a major increase in the number of women and children on board those boats. This is perhaps most starkly demonstrated by looking at the 353 people who lost their lives in the sinking of the SIEV X on 19 October, 2001 - consisting of 146 children, 142 women and just 65 men.

The other major negative consequence of TPVs which needs to be strongly expressed is the fact that it is quite explicitly aimed at making it more difficult for a recognised refugee to settle properly in Australia, even though that person is living in and eligible to work in the community. There is currently a separate inquiry being conducted by the Joint Standing Committee on Migration which is examining ways to improve settlement and participation, including "Innovative ideas for settlement programs for new migrants, including refugees, that support their full participation and integration into the broader Australian society; and Incentives to promote long term settlement patterns that achieve greater social and economic benefits for Australian society as a whole."

It should be obvious how enormously counter-productive it is to be looking at ways to improve our settlement programs while simultaneously advocating a measure which is explicitly designed to stop refugee settlement from working. Even more so when all the available evidence shows that this measure had a less-than-zero deterrent effect, but a very real negative health impacts on many recognised refugees, almost all of whom eventually received permanent visas in any case.

The legislative regimes that evolved around temporary protection were complex and constantly changed the outcome for those subjected to them. By 2006 the range of visas and those caught up within the network they created was remarkable. Depending on the time one arrived the outcome could be radically different.

The aim of a TPV was two fold:

- To prevent a recognized refugee from achieving a durable solution to their homeless state and to access settlement support services; and
- To prevent family reunion for a recognized refugee.

The unintended outcomes of the TPV were:

- An increase in women and children traveling by boat;
- An increase in separated families (either through the lack of family reunion, the holding of women and children on Nauru and Manus or the different end time of temporary visas);
- Difficulties in TPV holders finding work; and
- Continued mental health issues in TPV holders who could not resolve their status (in some cases people held a TPV for over 5 years).

Common Ground?

The asylum seeker debate in Australia has frequently been rancorous and vitriolic, and often made worse by widespread misunderstandings of the nature and extent of the asylum seeker 'problem', as well as how that fits in with the wider operation of our migration system.

Given that asylum seekers arriving by boat usually comprise less than 1% of the people seeking a residency visa in Australia each year, the level of attention and concern this area gets is disproportionate with its overall significance. This often means less attention being paid to how to improve other aspects of the migration system which can create ambiguous or unfair outcomes for very large numbers of people.

The widespread misconceptions and level of rancour can not only inhibit the prospects for identifying areas of common ground, but can also be directly harmful to the wellbeing of refugees, particularly newly arrived ones, seeking to settle in Australia. This impairment of settlement ends up harming our entire society through less effective social and economic integration, increased costs, missed opportunities and damage to the social fabric.

As people who work directly with aspiring and current practitioners in the area of migration law, we regularly see how it can also make practicising in this field much less appealing and rewarding, particularly for those who seek to work in assisting refugee claimants; an area which is already the least financially rewarding, but where the need to get it right is especially great.

In amongst the strongly opposing views on this topic, it is worth identifying a few areas where there does seem to be a large degree of common ground. We suggest the following:

a) Reducing the need for refugees to take high risk boat journeys

Almost all sides of this debate agree that it would be preferable if refugees did not have a need to take high risk boat journeys or enter into debt with unreliable people smugglers. Of course, there are major differences in how people feel this can best be achieved. In our view, any approach which focuses solely on deterrence or punitive measures will not only inflict further suffering on people who are already vulnerable and traumatised, it is also unlikely to work in the long-term.

It *may* mean some refugees will take a different high-risk option which might lead them somewhere other than Australia (depending on how many other countries choose to follow a similar road), but if the concern of wanting refugees not to risk their lives in dangerous boat journeys is genuine, then clearly we have to also actively look to ways to reduce or eliminate that danger. The only

approach which is likely to be effective long-term is to provide a greater prospect of a durable realistic solution to the dangers refugees face, whether that be safe resettlement or safe return.

Having already escaped danger, often at high risk and cost, refugees do not and will not further risk their lives to get to safety if they believe there is another viable alternative in the foreseeable future. Achieving such an outcome would not be easy and will take many years, but it is the only one which is likely to work in the long run - as well as being the only one which is consistent with an approach that reflects a respect for human rights.

b) The need to build a long-term effective cooperative approach across our region

The only viable solution is one that involves adopting a framework which is accepted and applied consistently across our geographic region.

Whilst there has been widespread and understandable concern expressed about the risks of removing 800 asylum seekers from Australia to Malaysia, this should not be interpreted to mean that assessing refugee claims in offshore locations is always a bad thing. It is the returning of vulnerable people to the prospect of less safe conditions and less adequate assessment processes with no chance at family reunion or accessing a viable settlement opportunity which is the concern.

In the wider sense of the term, refugee claims have been "processed" offshore for many years, in part funded by Australia. One of the more rarely acknowledged aspects of the Howard government's post-Tampa approach was to provide increased funding to both the UNHCR and the IOM to increase the ability to assess refugee claims and to assist in meeting the immediate needs of claimants in countries such as Indonesia.

However this didn't extend to increasing the prospects of those persons then gaining a durable settlement outcome - as evidenced by the fact that amongst those who have undertaken high risk boat journeys to Australia have been people who have already had their refugee claim assessed as valid by the UNHCR.

We emphasise the recent comments of Ms Erika Fuller, speaking on behalf the UNHCR,

> *we have never condemned the concept of offshore processing in its entirety, but we have said that it has to be fully embedded in a regional cooperation framework and it must ensure two things; it must lead to fair adjudication of claims, it must be based on effective protection being available where that processing would take place and* ***it must be linked to the availability of solutions.*** *Solutions such as resettlement, solutions such as returns, solutions such as local stay and proper conditions.* (our emphasis)

Without the availability of such solutions, no regional cooperation framework will succeed in the long run, no matter how much money is poured into it. This is certainly much easier said than done, and it is not solely on the shoulders of Australia to provide such solutions in every case, but we can and should do more. Most importantly, we should recognise that an approach to regional cooperation which is focused solely on stopping boats, rather than providing viable long-term solutions to asylum seekers, will eventually fail on both counts.

We support the work done by the Australian government to raise the issue of people smuggling and trafficking within the forum of the Bali Process and were encouraged by the initial moves to focus on a regional approach within this forum.

c) Increasing our overall annual intake of refugees

There is perhaps slightly less consensus on this issue, compared to the other two we have just mentioned, but it is nonetheless something which has been regularly voiced by a range of people from across the political spectrum who have differing views on many other aspects of this issue.

We believe that the number of refugees settled annually in Australia should increase, and that the focus of where our refugee intake comes from should shift. Within our region, it is sensible that Australia leads the way with accepting and resettling refugees currently in countries such as Indonesia and Malaysia.

Whilst it is true that in the short-term refugees are most cost-intensive, as they tend to have higher needs, greater disadvantage and generally take longer to adjust as part of the settlement process, it is also widely recognised that in the medium to long-term, Australia benefits greatly economically, socially and culturally from the contribution refugees and their offspring provide.[12]

The resilience and determination of refugees to make the most of their new chance at a safe future is well documented, as is the high value they place on education for their children and their willingness to work in lower-skilled, lower-paid or seasonal jobs which are sometimes difficult to fill (thus also playing an important role in alleviating capacity constraints in the employment market and providing our overall economy with greater resilience in times of potential downturn).

If nothing else can be presently agreed on out of this debate, it would be a positive for refugees and for Australia if there could at least be unanimity on agreeing to increase Australia's overall annual intake of refugees.

Recommendations

- Process all asylum claims onshore
- Ensure any Arrangement Australia enters into regarding offshore processing upholds our obligations under international instruments pertaining to human rights and refugee law.
- Ensure any amendments to the Migration Act that relate to Australia working with countries that provide offshore processing of asylum claims upholds obligations under international instruments pertaining to human rights and international law.
- Remove the link between onshore claims for asylum and offshore resettlement numbers
- Increase funding to UNHCR and IOM to assist with processing of refugee claims in Indonesia
- Increase the intake of refugees from countries within our region

[12] See report on the Economic, *Social And Civic Contributions Of First And Second Generation Humanitarian Entrants*, by Prof Graham Hugo. Published by the Dept of Immigration and Citizenship, June 2011.