

Australia's Responses to Asylum Seekers

Driven by fairness and fact or fear and fiction?

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I am delighted to participate in this Public Forum marking UN International Day in Support of Survivors of Torture. It is a particular pleasure to share the platform with Professor Linda Briskman. Linda and I met at Woomera back in the bad old days. I know we come this evening with a shared resolve that there be no return to those bad old days in those dreadful ad hoc, under-resourced detention centres. It is reassuring that our MC is an experienced retired politician Peter Dowding. No doubt the majority of us here this evening are Australian citizens concerned about the harsh treatment of asylum seekers. After all the organizers have tried hard but unsuccessfully to attract a speaker willing publicly to defend harsher measures against asylum seekers – measures such as those proposed by Tony Abbott.

At the height of troubles at Woomera in 2002, I recall going to Canberra and being called aside by a deep throat in the Howard government who said to me, “Frank, spare us the moral outrage. We are sick of the moral outrage from the churches on this issue. If you keep it practical you might get somewhere.” Tonight I will prescind from all moral outrage. We now know enough from both sides of politics that it is very difficult to formulate and implement a fair, humane policy for the treatment of boat people in Australia – especially when the number of boats spikes, and most especially when a spike occurs in an election year. We will not succeed this evening if we simply return to our secure homes confirmed in our sense of moral outrage. We need to see things from the perspective of those elected members of parliament seeking to do the right thing, while having to face their electors in the course of the next twelve months. To do this, we need a greater sense of the complexity of the

issues involved, while keeping a sense of proportion about Australia's woes in comparison with those of other countries seeking to do the right thing by refugees.

Last year, I was privileged to chair that National Human Rights Consultation Committee. During that inquiry we commissioned some very detailed research on Australian attitudes. A random telephone poll of 1200 Australians disclosed that over 70% of us think that the mentally ill, the aged, and persons with disabilities need greater protection from violation of their human rights. Quizzed about a whole range of minority groups, there was only one group in relation to whom the Australian population was split right down the middle. While 28% thought that asylum seekers needed greater protection, 42% thought we had the balance right, and 30% thought that asylum seekers deserved less protection. By way of comparison, 32% thought that gays and lesbians needed greater protection, 50% thought we had the balance right, and only 18% thought that gays and lesbians deserved less protection. So it is no surprise that at election time, asylum seekers become an election issue.

This evening, I want to consider how can Australia respond to asylum seekers in a way that is fair and humane? I will suggest that this cannot be done just at the Australian end. We need to do more to ensure that the needs and entitlements of asylum seekers warehoused in Indonesia are met.

Australia is a long time signatory of the 1951 Refugee Convention and the 1967 protocol. It is one of the few countries in the region having ratified the Convention. Indonesia and Malaysia are not parties to the Convention. Since the Vietnam War, there have been periodic waves of boat people heading for Australia seeking asylum. These boat people often pass through Malaysia and/or Indonesia. Under the Convention, parties undertake three key obligations (see Articles 31-4):

1. Not to impose for illegal entry or unauthorized presence in their country any penalty on refugees coming directly from a territory where they are threatened, provided only that the refugees present themselves without delay and show good cause for their illegal entry or presence.
2. Not to expel refugees lawfully in their territory save on grounds of national security or public order.

3. Not to expel or return ("refouler") refugees to the frontiers of any territory where their lives or freedom would be threatened

Given the wide gap between the first and the third world, it is not surprising that some people fleeing persecution will look further afield for more secure protection together with more hopeful economic and educational opportunities. Having the status of a refugee has never been accepted as a passport to the migration country of one's choice. Then again, the international community has never been so callous or short-sighted as to say that during a mass exodus one has access only to the country next door in seeking protection even if you have family, friends or community members living in a more distant country.

The responsible nation state that is pulling its weight will not only open its borders to the refugees from the adjoining countries but will expect some flow over from major conflicts wherever they might occur. It is no surprise that Afghan and Iraqi refugees have turned up on the doorstep of all first-world countries in recent years. Nor is it surprising that Sri Lankans fleeing the effects of protracted civil war have arrived in countries like Australia. With the ease of international travel and the services of people smugglers, it has become very difficult to draw the distinction between refugees who are coming directly from a territory where their life or freedom has been threatened and those refugees who, having fled, have already been accorded protection, but have now taken an onward journey seeking a more durable solution or sustainable migration outcome. First-world governments say they cannot tolerate the latter because they would then be jeopardising their own migration programs and weakening their borders every time there was a refugee-producing situation in the world no matter how close or how far it occurred from their own shores. This problem is not solved by drawing careful legal distinctions, because one person's preferred migration outcome is simply another person's first port of call where they thought there was a realistic prospect of getting protection for themselves and their families.

The problem cannot be solved by refugee advocates pretending that it does not exist or hoping that it will simply go away. Neither can it be solved by governments pretending that all persons who arrive on their shores without a visa are secondary movers. When mass movements occur during a conflict, it is necessary for

governments to cooperate, ensuring that adequate protection can be given to persons closer to their home country before then closing off the secondary movement route except by means of legal migration. When countries of first asylum are stretched and unstable, other countries must be prepared to receive those who travel further seeking protection.

Prior to 2001, the Australian government took the view that refugees fleeing even faraway countries via Indonesia or Malaysia were “coming directly” and were thus not to be penalized for their illegal entry or unauthorized presence in Australian territory or waters. That presumption which underpinned Australian refugee policy was abandoned in 2001 with the increased influx of boat people from Afghanistan, Iraq and Iran. The Australian government decided to penalize boat people arriving without a visa by imposing mandatory detention and by replacing the permanent protection visa (which carried the right of family reunion and sponsorship) with the temporary protection visa (which was for three years only and which did not carry the right of family reunion and sponsorship). The government also decided to reduce the access for these persons to judicial review of their status determination decisions. The government took the view that these boat people were no longer engaged in direct flight from persecution. Rather they had fled persecution, found a modicum of protection in another country, and then decided to engage in secondary movement seeking a more benign migration outcome. The government indicated that if ever there were persons engaged in direct flight to Australia, those persons would be accorded proper treatment under the Convention including the non-application of these new penalties for illegal entry and unauthorized presence. However when a boatload of asylum seekers arrived directly from West Papua, the government applied the same policy.

Attempting to stem the flow of refugee boats, the Howard government was anxious to address both push and pull factors – both at source and on the route to Australia. Usually little could be done in the short term to neutralize the push factors. Given that Australia would always be a popular migration destination, the government sought to make the refugee determination process more grueling for prospective boat people. The flow of boat people was arrested, in part because the pull factors were rendered less attractive. There is room for prudent disagreement about how much of a

disincentive the new measures were – other than forcing women and children onto boats rather than awaiting family reunion with male family members entitled to sponsor family members.

As well as revising its routine assessment of when persons were engaging in direct flight, the Howard government created a nexus between the number of successful onshore asylum claims and the number of places available for humanitarian offshore cases. Advocates like myself unsuccessfully argued that even those countries without a net migration program would be required to provide a durable solution for refugees within their jurisdiction, and that therefore there should be no nexus. We need to admit that there is presently no strong community demand for the nexus once again to be broken. The nexus is judged by the community to be morally acceptable as well as politically expedient. This means that every successful onshore asylum seeker takes a place which otherwise would have been available to an offshore humanitarian applicant. Offshore humanitarian applicants do include very needy, deserving refugees without access to people smugglers. This means that the Australian system without discrimination gives preference to three groups of onshore asylum seekers over offshore humanitarian applicants. Those three groups are transparently honest visa holders whose country conditions deteriorate after they have arrived in Australia, visa holders who make less than full disclosure about their asylum claims when applying for a visa to enter Australia, and unvisaed refugees who arrive by boat often having engaged the services of a people smuggler. Strangely it is only the third group which causes great community angst even though most of that group, unlike the second group who come by plane with visas, are transparently honest about their intentions and their status.

The Rudd government improved the time lines for mandatory detention claiming that detention was only for the purposes of identity, health and security checks. In fact, detention was to last as long as the refugee determination process took, but with the assurance that it would usually be complete within 90 days. The permanent visa was restored. Boat people intercepted before arrival on the Australian mainland were processed on Christmas Island without access to the courts for the usual raft of appeal procedures. Australian government officials were to conduct the assessments and there was to be a review of unsuccessful claims by a panel of retired professionals. A

successful non-statutory refugee status assessment (RSA) would result in the Minister considering that it is in the public interest that he lift the bar and permit the successful asylum seeker to apply for a visa. There might still be some recourse to the courts were government officials purporting to make decisions consistent with the Refugee Convention but without following due process, but that is a matter yet to be tested fully in the courts. The Australian government claims that the RSA process “builds in common law requirements of procedural fairness throughout the process”.

Though benign treatment of boat people is not a vote winner in Australia, their adverse treatment might not be either. There is now a well-educated section of the public and an active civil society sector in Australia anxious to move beyond the simplistic “out of sight, out of mind” mindset with boat people. I presume that section is well represented in tonight’s audience. For a mixture of motives the Australian government now wants to be sure that the accommodation and living circumstances for boat people waiting in Indonesia are humane and that the processing of asylum claims is transparent and compliant with UNHCR requirements.

The intention of the Australian government is to do whatever it can to create conditions in Indonesia such that the Australian public (including government critics) will be convinced that any asylum seeker landing in Indonesia will be assured humane accommodation and transparent processing of their claim in compliance with UNHCR standards. That is why the Australian government has been channeling significant funds to IOM. But for Indonesia to be rightly characterized as an adequate country for asylum, there will also be a need for proven refugees to be extended the usual rights of refugees (including work, health, education, and social welfare), especially given that Indonesia refuses to provide local integration as a durable solution and the waiting list for resettlement is so long that it now takes years for a refugee to find a new home. Deliberately, the Australian government will not consider prompt, wholesale resettlement of proven refugees from Indonesia for fear of setting up a magnet effect with asylum seekers heading for Indonesia in the confident expectation that they will be resettled promptly in Australia once their refugee claims are established. On average, Australia takes only about 50 transit refugees a year from Indonesia. In January when I last visited Indonesia there were 2509 refugees registered with UNHCR in Indonesia according to information from DEPLU (the

Indonesian Department of Foreign Affairs). More than half of these were from Afghanistan.

The 2009 annual report of the Australian Department of Immigration gives a clear overview of the present policy in relation to secondary movement and the accommodation and processing of asylum seekers in Indonesia:

The department pursued strong regional and international arrangements to deter secondary movements of asylum seekers by:

- continuing cooperation with the Indonesian Government and IOM in providing humanitarian assistance (including food, accommodation, and medical care) for irregular migrants in Indonesia intercepted en route to Australia. Intercepted persons who have protection claims are referred to UNHCR for assessment.

The department continued to provide support for countries of first asylum by:

- providing \$10 million in 2008–09 to help address the protracted situation of displaced Iraqis, help create protection space and assist Iraqis outside Iraq find settlement options pending long-term resolution. Through UNHCR, IOM, CARE Australia and ActionAid Australia (formerly Austcare), this additional funding has been spent on projects assisting displaced Iraqis in neighbouring countries (Egypt, Jordan, Lebanon, Turkey and Syria) and transit countries (Indonesia and Malaysia). Activities supported by the funding included: skills development to improve livelihoods and prospects for sustainable return, UNHCR refugee assessment and registration, and psychosocial assistance to displaced Iraqi children and youth.

The department continued to engage with relevant agencies in other countries to increase awareness of new and emerging people movement issues, and to anticipate future movement opportunities and security challenges.

The 2008 report of IOM Indonesia states:

The issue of intercepted migrants is addressed in the framework of the tripartite agreement – the Regional Cooperation Model (RCM) established by the governments of Indonesia, Australia and IOM. Within this framework, the Indonesian authorities are responsible for determining the intention of intercepted migrants. Those identified as transiting through Indonesia on their way to Australia or New Zealand are referred to IOM for assistance. In addition to providing material assistance, IOM informs migrants of their rights to claim asylum and refers those who wish to submit such requests to UNHCR.

IOM continues to provide care and maintenance services while migrants are being considered by UNHCR for refugee status. IOM also facilitates assisted voluntary returns should the migrants opt to return home.

Even if IOM were to provide appropriate accommodation for asylum seekers in Indonesia and even if the UNHCR processes were sufficiently expeditious and transparent for the determination of claims, proven refugees would still languish for years without the provision of basic refugee rights and failed asylum seekers would still be armed with the knowledge that applicants in Australia have a higher success rate, even when they are able to access only the non-statutory RSA process.

Though these failed asylum seekers and proven refugees still resident in Indonesia are not Australia's responsibility, it is still in Australia's interests that their concerns be addressed. Otherwise they will end up in Australia, becoming Australia's responsibility. Given the risky sea voyage involved, many Australians do want to extend their concern to these persons before they risk the voyage, given that Australians will only avoid responsibility for them later if they perish at sea.

I propose the following:

An asylum seeker is presumed not to be engaged in secondary movement unless they have reached a country where they:

1. Can be humanely housed
2. Can have their refugee claim processed transparently and in a timely manner
3. Can be assured rights to work, health, social security and education commensurate with the local population once their refugee claim is successfully determined
4. Can be offered a durable solution in a timely manner.

Despite the best efforts of IOM and UNCHR to address condition 1, UNHCR was limiting the number of registrations to 60 per week back in January. The Indonesian government has done nothing to address condition 3 and the Indonesian government in co-operation with UNHCR has done nothing to address condition 4. Thus Australia should continue to view asylum seekers coming from Indonesia as persons engaged in direct flight, entitled to be accommodated and to have their claims decided

in Australia without any adverse penalty imposed upon them. It would be unconscionable to turn boats back unless conditions 1-4 could be fulfilled in Indonesia.

When boats are not turned back, those asylum seekers arriving without visas should be detained only for the purposes of health, security and identity checks. Once those checks are successfully completed with a decision that the known applicant poses no health or security risk and if there be too great a caseload for final determination of claims within that time, these asylum seekers should be humanely accommodated while their claim process is completed. Community groups should be invited to assist with the provision of such accommodation to those applicants most likely to have a successful refugee claim.¹ Those unlikely to succeed should continue to be accommodated by government or its contractor being assured availability for removal on final determination of an unsuccessful claim. I continue to concede that their refugee claims need not be subject to full judicial review provided we have in place a process which complies with the requirements set down by UNHCR. Given that we are a net migration country, those who establish a refugee claim should be granted a permanent visa, thereby being able to get on with their lives. There should not be any suspension of claims on the basis that a change in country circumstances is confidently expected. I see no reason for the prompt processing of all Sri Lankan claims now, taking into account the recent past changes there including democratic elections and the cessation of civil war. There is no evidence of similar improvement for Hazaras in Afghanistan and neither is any to be expected in the foreseeable future. Everyone concedes that Australia's leading academic commentator on Afghanistan is Professor Bill Maley who recently stated:²

The Government's claim that 'The Taliban's fall, durable security in parts of the country, and constitutional and legal reform to protect minorities' rights have improved the circumstances of

¹ My advice to church groups has been: "It is only because of the overcrowding of Christmas Island that the government is contemplating bringing some people on shore prior to the finalisation of their claims. Those brought on shore should be those more likely to have successful claims. Of those brought onshore, those entrusted to church care should be primarily those persons who would be most adversely affected by ongoing detention - family groups, unaccompanied minors, and those in need of special care for past trauma and stress. Before a church group provided assistance to an unaccompanied minor, there would be need for formal clarification of who is guardian and the guardian's consent would be required for any activity proposed for the minor. If churches were to provide accommodation to persons other than those meeting the above criteria, there could be questions about material co-operation in evil, namely augmenting a policy which kept those meeting the above criteria in offshore detention, when they would not be so kept but for the church co-operation."

² Professor William Maley, "Abbott's policy has little to do with border control", *Canberra Times*, 9 June 2010

Afghanistan's minorities, including Afghan Hazaras' is frankly bizarre. The rule of law is so weak in Afghanistan that 'constitutional and legal reform to protect minorities' rights' is virtually meaningless, and the Taliban, of course, are back with a vengeance, emboldened by the fraud that marred the August 2009 presidential election.

Most serious of all, the reference to 'durable security in parts of the country' is flatly contradicted by the travel warning for Afghanistan issued by the Department of Foreign Affairs and Trade in Canberra, which states that 'The security situation in Afghanistan ...remains extremely dangerous.'

Until the treatment of asylum seekers in transit countries such as Indonesia is enhanced, we Australians must expect that some of the world's neediest refugees will engage people smugglers and come within reach of our authorities. For as long as they do not excessively skew our migration program, we should allow those who are proven to be genuine refugees to settle permanently and promptly so they may get on with their lives and make their contribution to our national life. The suspension of claims is unprincipled and unlikely to achieve any reduction of successful claims. Community partnerships with government could assist with the accommodation and transition needs of those asylum seekers most likely to succeed in their claims. In hindsight, we know that proposals such as temporary protection visas and the Pacific solution are not only unprincipled; they fail to stem the tide nor to reduce the successful claims. As the election lather on the issue commences, let's always ask, "Why is it right to treat the honest, unvisaed boat person more harshly than the visaed airplane passenger who fails to declare their intention to apply for asylum?" If the answer is based only on consequences, then ask, "Would not the same harsh treatment of the visaed airplane passenger have the same or even greater effect in deterring arrivals by onshore asylum seekers?" The Qantas 747 does not evoke the same response as the leaky boat, does it?

The long term work still needs to be done in Indonesia. Meanwhile both sides of politics know that the vulnerable will continue to arrive on our shores uninvited. As the election lather works its populist effect, let's maintain the faith of Petro Georgiou who told our Parliament in his valedictory speech.³

³ Hansard, 3 June 2010

I believed that politics was a tough business. There were two dominant parties, they were in conflict, they had power and they had resources. They were strong and evenly matched. They punched and they counterpunched, and sometimes low blows were landed. In my view, however, scapegoating the vulnerable was never part of the political game. I still believe this.

