Asylum policies: How we got into this mess and how we can do better

This paper was developed to provide background information for the *Our Voice Their Safety* campaign launched by the Victorian Women's Trust. The campaign aims to equip and empower Victorian women to raise their voices against the unacceptable violence that is occurring against women being held in Australian detention centres, particularly in the Nauru offshore detention centre. As an active campaigner against domestic violence and a strong advocate for the rights of Australian women, the Trust could not remain as a silent bystander to the appalling harm being done to women detained in those centres. Through promoting the Six Point Safety Plan the Trust aims to bring about a more humane approach for all people seeking asylum in our country.

Introduction

Across both Coalition and Labor governments over the past 15 years, several core humanitarian policies have endured. These include; offshore processing, mandatory detention and turning back boats. A clear trend emerges of increasingly harsh and punitive approaches, where governments of both the major parties have legislated to narrow Australia's obligations under international covenants and reduce the democratic accountability of agencies acting on their behalf. Preventing deaths at sea has been put forward as one of the main reasons for the harsh policies. The fate of those trying to reach Australian shores is now kept secret from the Australian public. In addition, there have been numerous deaths arising from detention and severe psychological harm done to the women, men and children in offshore and mainland detention centres. The policies have resulted in great cost to the people who are seeking asylum, to Australia's democratic processes and to our international reputation. This paper puts forward an alternative and more humane approach which respects the fundamental human right of people to seek asylum no matter how they arrive.

A long history of accepting refugees

Australia has a long standing practice of accepting refugees for resettlement. Since the Second World War over 800,000 refugees and displaced persons have settled in Australia.[1] Australia's first planned humanitarian program designed to deal with refugee and humanitarian issues was established by the Fraser Government in 1977 following the arrival by boat of Indochinese people fleeing conflict during the Vietnam War. The 2059 Indo Chinese refugees who had

[1] Phillips, Janet. 2015. 'Australia's Humanitarian Program: a quick guide to the statistics since 1947'. Research Paper Series, 2014-15, Parliamentary Library, Canberra, p. 1.

arrived directly by boat between 1976 and 1982 without documents or official permission were allowed to stay permanently in Australia, along with over 200,000 more refugees whose claims were processed in camps in Malaysia, Hong Kong and Thailand.[2] Prime Minister Bob Hawke allowed 42,000 Chinese students to remain permanently in Australia after the Tiananmen Square massacre in 1989.[3] Since the 1990s however, Australia's humanitarian policies have become increasingly harsh towards people seeking asylum, particularly those seeking to come to Australia by boat. This is at a time when the numbers of refugees internationally have reached the highest levels on record at 59.5 million people – 19.5 million refugees, 38.2 million internally displaced people and 1.8 million people seeking asylum.[4] In 2014 Australia was host to around 35,500 refugees representing 0.25% of the total number of refugees placing us 50th in the world or 67th on a per capita basis.[5]

The Howard Government - the 'Pacific Solution'

The Howard Government introduced several pieces of legislation in the late 1990s and early 2000s in response to a jump in the number of people seeking asylum. Whereas just over 2760 people had come by boat over the previous 18 years, this climbed to 9500 during 1999 primarily from the Middle East.[6]

The Government introduced the 'Pacific Solution' in response to the Tampa affair. This occurred when the Government denied entry to the MV Tampa, a Norwegian ship, into Australian waters. The ship was carrying over 400 Afghan people who had been rescued at sea. Under the 'Pacific Solution' the Migration Act was amended to excise certain territories from the Australian migration zone giving effect to a policy of offshore processing. Territories excised included Christmas Island, Ashmore and Cartier Islands and the Cocos (Keeling) islands. 'Non citizens' arriving at one of these excised territories without valid documentation were unable to

[2] Phillips, Melissa and Boese, Martina. 2013. 'From White Australia to stopping the boats: attitudes to asylum seekers' in The Conversation 21/06/13 viewed 04/12/15. https://theconversation.com/from-white-australia-to-stopping-the-boats-attitudes-to-asylum-seekers-15244

[3] Banham, Cynthia. 2003. 'Children of the Revolution' in the Sydney Morning Herald. 26/12/03 viewed 04/12/15. http://www.smh.com.au/articles/2003/12/25/1072308628745.html

[4] UNHCR. 2015. 'World at War'. UNHCR Global Trends Forced Displacement in 2014' viewed 4/12/15. Geneva, Switzerland, p.1. http://unhcr.org/556725e69.html

[5] Asylum Seeker Resource Centre. 2015. 'Australia vs. the World' viewed 14/01/16. http://www.asrc.org.au/resources

[6] Phillips, Janet and Spinks, Harriet. 2013. 'Immigration detention in Australia'. Background Note, Parliamentary Library, Canberra, p. 8. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention

make a valid application for a visa to Australia unless the Minister intervened. They were also denied access to legal assistance or judicial review of negative decisions.[7]

Turning back boats and 'children overboard'

The Government's Border Protection Act gave the Australian Defence Force the power to intercept unauthorised or 'irregular maritime arrival' vessels carrying people seeking asylum and transport them to offshore processing centres in Nauru and Manus Island, Papua New Guinea (PNG). It also allowed for the removal of any ship in the territorial waters of Australia, the use of reasonable force to do so, to forcibly return any person who leaves the ship back to the ship and guaranteed that no asylum applications could be made by people on board the ship. Between 2001 and 2008 a total of 1637 people were detained in the Nauru and Manus facilities. 705 eventually resettled in Australia with the remainder settled in New Zealand and 47 to four other countries – Sweden, Canada, Denmark and Norway.[8]

Under this controversial policy the Australian navy intercepted a total of 17 boats and either towed them back to the edge of Indonesian territorial waters or took the passengers to offshore processing centres such as Christmas Island, Nauru and Manus if the boats sank. When boats sank not all passengers could be rescued and two people died as a result.[9] The intercepts were fraught, requiring navy personnel to manage a situation where passengers threatened to self-harm or sabotage the vessel, desperate to avoid being towed back. The 'children overboard' incident represented a new low in the vilification of people seeking asylum which occurred when the Government accused people on the boat of throwing their children overboard to secure rescue and passage to Australian territory. A Senate Committee later found that no children had been at risk of being thrown overboard and that the Government had known this prior to the 2001 election.

Making it harder to gain permanency - Temporary Protection Visas

Another key element of the Government's approach was the use of Temporary Protection Visas (TPVs). The Government believed that the introduction of this visa type would remove incentives for people to undertake the dangerous journey by sea to Australia. TPVs allowed their holders to stay in Australia for three years, after which time they needed to reapply for refugee status. TPV holders could not sponsor family members for resettlement in Australia, were not allowed to return to Australia if they travelled overseas and had limited access to

[7] Ibid., pp. 9-10.
[8] Ibid., p. 10.
[9] Kaldor, Andrew and Renata, 2014. 'Turning Back Boats Factsheet'. Centre for International Refugee Law, University of New South Wales, Australia. 4/8/14 viewed 4/12/15.
http://www.kaldorcentre.unsw.edu.au/publication/turning-back-boats

settlement services. While TPVs did enable the release into the community of many people in detention who had been granted refugee status, they were criticised for their temporary nature and for not allowing refugees to sponsor family members. It was claimed that TPVs were directly responsible for an increase in family members trying to reach Australia by boat as other channels had been closed off to them. Department of Immigration statistics show a rise in the number of women and children arriving after 1999 which adds some weight to this claim. The sinking of the SIEV X was cited as a tragic example where 146 children, 142 women and 65 men drowned.[10]

Some softening of the Government's approach occurred in 2005 when two backbenchers crossed the floor of parliament.[11] Some people who had been in long term detention were released and a review of future cases by the Commonwealth Ombudsman was agreed to. The longest serving detainee was released into the care of a psychiatric hospital on a bridging visa after a total of seven years in detention. While the Migration Act was amended to allow for the detention of children only as a last resort, in reality families continued to be placed in 'alternative places of detention' where they were still denied freedom of movement and faced strict conditions.

The human cost of the Howard Government's policies

During the Howard years there were protests at detention centres including violence, hunger strikes and lip sewing over the slow processing of applications and poor conditions of the centres. A Pakistani man granted refugee status self-immolated on the steps of Parliament to protest the 5year delay in reuniting with his family and the high level of funds needed to bring his daughter who had cerebral palsy to Australia. The Government received criticism from the United Nations for violating human rights. A report from the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission (AHRC)) found that children in Australian immigration detention centres had suffered numerous and repeated breaches of their human rights and that children detained for long periods of time were at a high risk of suffering mental illness.[12]

The Rudd Government - a new approach?

The Rudd Government came into power with a commitment to make significant changes for people seeking asylum and refugees including an end to the 'Pacific Solution'. While the Government acted promptly to end offshore processing on Nauru and Manus the retention of

[10] Refugee Council of Australia. 2014. 'Timeline', p. 4. viewed 23/12/15. http://www.refugeecouncil.org.au/fact-sheets/australias-refugee-and-humanitarian-program/timeline/

[11] Phillips and Spinks, op. cit., p. 32.

[12] Refugee Council of Australia, op. cit., p. 4-6.

the migration excision policy and use of the processing centre on Christmas Island left it open to criticism that the fundamentals of the 'Pacific Solution' had remained intact. In 2008 the Government took a significant step in abolishing TPVs and replacing them with permanent residency for refugees.[13] A new policy overhauling mandatory detention was introduced which included seven values that would guide new detention policy and practice. While the policy stated that mandatory detention was an essential component of strong border control, the policy aimed to shift the focus so that people would be detained as a 'last resort', for the shortest possible time and in a way which ensured the 'inherent dignity of the human person'. The onus would be on the Department to justify why a person should continue to be detained once identity, health and security checks had been completed.[14]

While people seeking asylum without documentation would still be subject to mandatory detention they would receive publicly funded advice and assistance, access to independent review of unfavourable decisions (although not via the Refugee Review Tribunal) and external scrutiny by the Immigration Ombudsman. This was a change from the previous system where there was no access to independent review or external scrutiny, but it still did not give the same rights as those who arrived and were processed onshore with access to merits or judicial review through the Refugee Review Tribunal and the Courts. Under these principles, children and their families (where possible) would not be held in a detention centre.[15] Other initiatives during the Rudd Government included the introduction of a merit-based appointment process for the Refugee Review Tribunal, the abolition of the 45 day rule bar on access to work rights and basic health care, the replacement of the previous Government's Community Care Pilot with an ongoing program to support people seeking asylum who were living in the community and the abolition of the policy of charging people the cost of their detention which had been introduced by the Keating Government back in 1992. The total Refugee and Humanitarian Program was also increased from 13,000 to 13,750.[16]

Despite the stated change in policy, long-term mandatory detention continued and the Government expanded the capacity of detention facilities in response to a significant increase in the number of boat arrivals during 2009-2010.

The Gillard Government – the search for a regional solution

[13] Phillips, Janet, 2014. 'A comparison of Coalition and Labor government asylum policies in Australia since 2001'. Research Services 2013-14. Parliamentary Library, Canberra, p. 9. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/AsylumPolicies

[14] Phillips and Spinks, op. cit., p. 12.

[15] Ibid., p. 13.

[16] Refugee Council of Australia. 2010. 'Refugee Policy in the 2010 Federal Election Campaign: What the Parties are saying'. Viewed 4/12/15. http://www.refugeecouncil.org.au/docs/current/2010_party_election_policies.pdf

Asylum policies: How we got into this mess and how we can do better

In light of continuing pressure from the Opposition and an increase in the number of boat arrivals, the Gillard Government proposed a regional solution built on a processing centre in East Timor. When discussions with the East Timorese Government broke down the Government entered an arrangement with Malaysia. This arrangement involved the swapping of 800 people who had arrived in Australia by boat in return for 4000 refugees from Malaysia who would be resettled over a four year period.[17] The High Court ruled the arrangement invalid on the basis that Malaysia was not a signatory to international or domestic laws that would provide protection for the people being transferred.[18] The Government was forced to abandon the arrangement when it was unable to get support from either the Opposition or the Greens for the necessary legislative changes.

Expansion of community processing

In an effort to ease pressure on the detention network the Government further expanded community detention allowing many children and vulnerable family groups to move out of detention into community based accommodation. The Government issued bridging visas to people who had been in long term detention, granting 10,356 bridging visas over a twelve month period up to December 2011[19]. A return to a single system for assessing asylum claims was announced, regardless of whether the person seeking asylum had come by boat or plane. This meant that onshore arrangements for application and independent review through the Refugee Review Tribunal system now applied to all people seeking asylum in Australia regardless of their method of arrival. In response to increasing unrest in detention centres, the Government did, however, introduce a toughening of the character test which barred people who committed an offence while in detention from applying for a permanent protection visa.[20]

Advice from the Expert Panel

The Gillard Government appointed an Expert Panel in June 2012 to combat rising numbers of people coming by boat. (In 2012-2013 more than 25,173 people arrived by sea compared to 7,474 in 2011-2012)**.**[21] The panel was asked to provide policy advice on 'how best to prevent

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[17] Ibid., p.15.

[18] O'Sullivan, Maria. 2013. 'Malaysian Solution High Court Ruling Explained' in the Conversation. 31/8/13 viewed 04/12/15.
http://theconversation.com/malaysia-solution-high-court-ruling-explained-3154

[19] Phillips and Spinks, op. cit., p. 17.

[20] Phillips and Spinks. Ibid.

[21] Phillips, Janet.2014. 'Boat arrivals in Australia: a quick guide to the statistics' Parliamentary Library, Canberra.
http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/QG/BoatArrivals

asylum seekers risking their lives by travelling to Australia by boat.'[22] The Panel's report contained a suite of measures and recommendations covering the short and long term. Short term proposals included disincentives such as the re-introduction of an offshore processing regime to provide a 'circuit breaker to the current surge in irregular migration to Australia' and incentives such as an immediate increase in Australia's Humanitarian Program. Long term proposals included recommendations that the Government create better migration pathways and protection opportunities for refugees coordinated within an 'enhanced regional cooperation framework'. [23]

The 'no advantage test'

Central to the recommendations was the idea of a 'no advantage' test so that refugees arriving by boat do not receive an 'advantage' over refugees awaiting resettlement in a refugee camp. The panel, however, did not specify a waiting time or explain how a fair waiting time could be calculated. The 'no advantage' principle reinforced the idea that there is a queue and that people seeking asylum by sea are 'queue jumpers' and must wait their turn to have their claims processed. The idea of an orderly queue, however, does not accord with the reality of the asylum process as there is no orderly resettlement queue to join. Only a small proportion of people seeking asylum are able to register with the UNHCR and only one per cent of those recognized as refugees are subsequently resettled to another country.[24]

A return to the 'Pacific Solution' and off-shore processing

The Gillard Government accepted the recommendations of the Expert Panel and moved quickly to reintroduce the recommendation regarding offshore processing in Nauru and PNG, transferring people seeking asylum, including families with young children, to the centres. It also suspended the processing of asylum claims made by people who arrived by boat on or after 13 August 2012 until July 2013 in line with the 'no advantage' recommendation. Due to a significant increase in the number of boat arrivals, the Government arranged for some people seeking asylum to be processed on the mainland and released into the community on bridging visas but still subject to the 'no advantage' test and the proviso that they may be transferred to Nauru or Manus at any time. If they were found to be refugees they could be issued with bridging visas, rather than permanent protection, without work rights 'until such time that they

[22] Australian Government. 2012. 'Report of the Expert Panel on Asylum Seekers.' http://apo.org.au/resource/report-expert-panel-asylum-seekers

[23] Phillips and Spinks, op. cit., p. 18.

[24] Spinks. 2015. 'Asylum seekers and refugees: what are the facts?' Research Paper Series, 2014-15 Updated 2 March 2015. Parliamentary Library, Canberra, p. 6. http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/HGNW6/upload_binary/HGNW6.pdf;fileType=application%2Fpdf#search=%22library/prspub/HGNW6%22

would have been resettled in Australia after being processed in our region'.[25] In May 2013 the Government took the Howard Government's excision of territory one step further by extending the policy to the Australian mainland.[26] This meant that people arriving by boat anywhere in Australia were prevented from lodging an application for protection, allowing them to be sent offshore for processing unless the Minister intervened. This change in policy was prompted by the arrival of 66 Sri Lankan asylum seekers at Geraldton in Western Australia.[27]

On his return to the Prime Ministership Kevin Rudd announced a new Regional Resettlement Arrangement with PNG. This meant that from July 2013 all people seeking asylum who arrived by boat would be transferred to PNG for processing, and if they were found to be refugees, permanently settled there. They were not to have the opportunity to seek asylum or settle in Australia. According to the Government there would be no limit on the number of people who could be transferred to PNG under this deal costing $1.1 billion over four years. This was followed by a similar agreement with the Government of Nauru.[28]

The human cost of the Rudd and Gillard Governments' policies

During this period, deaths at sea continued, so too did protests, hunger strikes, destruction of property and deaths in detention centres. UNHCR reports on Nauru and Manus found unsatisfactory temporary facilities with an absence of a legal framework and functional system to assess refugee claims. Particular concerns were raised about the mandatory and indefinite detention of people seeking asylum and for children in the Manus detention centre. A Parliamentary Joint committee on Human Rights reported that the changes introduced in response to the Expert Panel's recommendations carried a significant risk of being incompatible with a range of human rights. Amnesty reported that human rights abuses at the processing facility in Nauru were 'a toxic mix of uncertainty, unlawful detention and inhumane conditions' which 'are creating an increasingly volatile situation'. The Red Cross reported that people seeking asylum living in the Australian community under the 'no advantage test' were living in a state of poverty.[29]

The Abbott and Turnbull Governments - Operation Sovereign Borders

[25] Phillips and Spinks, op. cit., pp 19-20.
[26] Phillips. 2014, op. cit., p. 5.
[27] Gemma Jones, Ashlee Mullany, Stiven Pucar, 2013. 'Asylum boat carrying 66 Sri-Lankan passengers sails into Geraldton in News.com.au 10/04/13 viewed on 04/12/15. http://www.news.com.au/national/asylum-boat-carrying-72-sri-lankan-passengers-sails-into-geraldton/story-e6frfkp9-1226615986980
[28] Ibid.
[29] Refugee Council of Australia. 'Timeline', op. cit., pp 14-17.

Asylum policies: How we got into this mess and how we can do better

The Abbott Government launched Operation Sovereign Borders on the same day it took office. This was, and continues to be a military led, joint agency response to combat people smuggling which includes turning back boats and the use of life boats. While the Government has maintained a strict policy of secrecy regarding all 'on water' activities it recently advised that only one boat has managed to reach Australia since its election with 15 boats turned back.[30] The allegation by Amnesty International and Indonesian police that the Government has sanctioned payments to people smugglers to turn a boat back to Indonesia is of serious concern.[31] The details surrounding turn backs remain unknown with little public discussion or debate on an issue that other countries in the region are dealing with on a daily basis. According to the UNHCR, approximately 54,000 people (predominately Rohingya Muslims originating from Myanmar) embarked on boat journeys in the South East Asian region in 2014. The vast majority (53,000) sought refuge in Thailand and Malaysia with some attempting to reach Australia.[32]

Further narrowing of obligations

The Migration and Maritime Powers Legislation Amendment (Resolving the asylum legacy caseload) 2014 introduced major changes to Australia's migration control, significantly expanding the minister's authority to direct activities at sea.[33] This wide reaching amendment clarifies a number of areas that had been subject to legal challenge in the High Court or rejected by the Senate. The legislation was passed as a result of a deal between a number of cross benchers in the Senate in return for a promise to move 108 children held at Christmas Island to the mainland. It is worth noting that a number of children, even though they were born in Australia, will remain in detention as they are considered to be 'unauthorised maritime arrivals' and therefore 'transitory' persons under the legislation changes.[34]

Under the amendment, decisions to turn back boats, detain people seeking asylum at sea, or transfer them to third countries do not have to take account of Australia's international obligations including the obligation under the Refugee Convention not to send someone back to a place of persecution. The amendment specifies that such directions are not subject to the

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[30] Doherty, B and Medhora, S. 2015. 'Australia confirms 15 boats carrying 429 asylum seekers have been turned back', The Guardian, 28/01/15, viewed 12/10/15.

http://www.theguardian.com/australia-news/2015/jan/28/australia-confirms-15-boats-carrying-429-asylum-seekers-have-been-turned-back

[31] Amnesty International. 2015. 'By Hook or by Crook: Australia's Abuse of Asylum Seekers at Sea.' http://www.amnesty.org.au/refugees/comments/38329/

[32] Spinks. 2015. 'Asylum seekers and refugees: what are the facts?' Op. cit., p. 12.

[33] Mares, Peter. 2015. 'Scott Morrison's unfinished business' in Inside Story 04/02/15 viewed 12/10/15, p.2. http://insidestory.org.au/scott-morrisons-unfinished-business

[34] Asylum Seeker Resource Centre. 2015. 'Timeline of Events', viewed 23/12/15, p. 7. http://www.asrc.org.au/resources/fact-sheet/timeline-of-events/

international obligations or domestic laws of any other country allowing people to be returned to another country without their permission.[35] The amendment tightens the circumstances test for the 'well-founded fear of persecution' claim of protection and allows for the removal of references to the 1951 United Nations Refugee Convention enabling the Government to use their own definition of a 'refugee'.[36] While the minister must believe that the direction is in the national interest (which is not defined) it leaves people seeking asylum who are intercepted at sea very vulnerable and increases the possibility of refugees being returned to their country of origin where they face the risk of death or persecution.[37]

The reintroduction of Temporary Protection Visas and 'fast tracking' claims

TPVs were also reintroduced under this amendment and a new category of visa – the Safe Haven Enterprise Visa (SHEV).[38] The SHEV is a five-year temporary protection visa that requires the holder to reside in regional Australia. As with the previous TPVs, TPV holders are not allowed to sponsor their family members for resettlement and have limited access to settlement services. Unlike the previous policy, TPV holders who are still in need of protections after their visa expires cannot apply for permanent residency. The Minister can grant permanent residency by discretion after a person has held a TPV for five years. While the SHEV does appear to provide a pathway to permanent residency, the likelihood of this being the case for the majority of refugees has been questioned due to high application fees, lack of required English language skills, and a lack of recognised skills required for skilled migrant visas.

The amendment also allowed for the introduction of a fast track system for processing of applications allowing the Government to fast track the 33,000 applications resulting from its own freeze on issuing permanent visas. The legislation codifies and narrows the definition of a refugee in Australian migration law making it quicker and easier for Immigration Department officials to reject claims.[39] While faster processing times are welcome, the changes to the definition of a refugee, the lack of any right of appeal to the Refugee Review Tribunal and a much more limited form of review based on whether the application has been assessed correctly is concerning and may deny people seeking asylum access to due process and procedural fairness.

Increasing the Minister's personal power

[35] Mares, op. cit., p. 3.
[36] Asylum Seeker Resource Centre. 2015. 'Timeline of Events', op. cit., p. 7.
[37] Mares, op. cit., p. 3.
[38] Asylum Seeker Resource Centre. 2014. 'Changes to Refugee Laws in Australia: what it means for asylum seekers and refugees' Information Sheet, viewed 23/12/15.
http://www.asrc.org.au/resources/fact-sheet/update-on-legal-changes-for-asylum-seekers/
[39] Mares, op. cit., p. 2.

Another amendment that significantly increases the personal power of the Minister is the Migration Amendment (Character and General Visa Cancellation) Act 2014. The Minister's power to cancel a visa without natural justice and without review has been expanded, giving the Minister greater discretion to overturn decisions of independent bodies like the Administrative Appeals Tribunal. Under the amendment the Minister can refuse or cancel visas on the basis of a substantially lowered threshold. The minister can cancel a visa if he or she 'reasonably suspects' that a migrant has 'an association' with a group or person that 'has been or is involved in criminal conduct'. Concerns have been expressed at the broad nature of the word 'association' and what this will mean in practice. Another concern is the lowering of the threshold where a visa can be cancelled if the Minister believes that a migrant 'may' be a risk to the health, safety or good order of the Australian community instead of being an 'actual risk'.[40] The Protection and Other Measures Bill which became law in March 2015 also increases the likelihood that people seeking asylum will be returned to danger. Under this law people seeking asylum may face a negative credibility assessment if they did not disclose all the information relevant to their application at the time of applying.[41]

Increasing the secrecy surrounding detention

In 2015 the Government passed legislation making it illegal for employees at detention centres to disclose 'protected information' about the centres to the media, punishable by a maximum of two years in jail. The law has been criticised by staff and rights groups given the serious allegations of abuse and lack of any credible independent oversight of the Nauru and Manus Island detention centres. While some members of parliament have claimed that staff would still be protected by whistle blower legislation, the uncertainty surrounding the potential operation of this provision continues to cause confusion and uncertainty. The refusal of the Government to provide the UN Special Rapporteur on the human rights of migrants with written assurance that no one meeting with him during his official visit to Australia would be at risk of any intimidation or sanctions under the Act, provides evidence of the continued uncertainty surrounding the operation of these provisions.[42]

Resettling refugees in other countries

Like the Gillard Government before it, the Government has also sought to expand efforts to resettle refugees in other countries. An agreement was reached with Cambodia in September

[40] Mares, op. cit., p. 3.
[41] Asylum Seeker Resource Centre. 2015. 'Timeline of Events', op. cit., p 3.
[42] Karlsen, Elibritt. 2015. 'Whistle-blowing under the Border Force Act: Three months on', in Flagpost, Parliamentary library, Parliament of Australia. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2015/October/Border_Force_Act

2014 to accept refugees from Nauru in exchange for an increase in aid of $55 million.[43] Cambodians have protested against the new plans to settle refugees there, arguing that the country already struggles to provide basic services to its own people. To date only five refugees from Nauru have agreed to resettle in Cambodia and two recently opted to return to the country they originally fled. Nauru was declared an 'open' centre in October 2015. Attempts to develop agreements with other countries such as the Philippines and Kyrgyzstan have been unsuccessful. Recent media reports have also indicated that the Government has also decided not to send refugees to New Zealand under an agreement struck with the Gillard Government.[44] The agreement reserved 150 places per year over a three year period in New Zealand's humanitarian program for refugees from Australia's offshore centres.

In relation to Manus Island, only a small number of men with a positive final determination have taken up the option of moving into the transit centre which is meant to ready them for resettlement in the community. The transit centre offers some independence but has a 12 hour night curfew in place.[45] The PNG Government has announced that it will close the Manus Island centre as a result of the recent Supreme Court ruling that the detention centre is illegal and breaches basic human liberty. The resettlement prospects of the men detained there are now uncertain pending the Australian Government's response to the PNG Government's decision

Helping Syrian Refugees

In September 2015, under enormous pressure from backbenchers, state premiers and the Australian public the Government agreed to settle 12,000 Syrian refugees in Australia on permanent humanitarian visas – in addition to the current humanitarian program intake of 13,750. Syrians currently in detention on Manus Island and Nauru, however, will not be included in the resettlement. Prime Minister Abbott said he would 'never ever do anything that encourages the evil trade of people smuggling and all of those who have come to Australia by boat are here as a result of people smuggling.'[46] This conflation of legal activity - people seeking asylum, with the illegal activities of people smugglers goes a long way to explaining the prison like conditions of people held in detention. The Government also announced $44 million in aid to the UNHCR to help support 240,000 people through winter and into next year. The money

[43] Mares, Peter. 2015. 'Another cruel twist in Australia's refugee policy' in Inside Story 24/12/15 viewed 07/01/16, p. 1. http://insidestory.org.au/another-cruel-twist-in-australias-refugee-policy

[44] Salnis, Karna.2016. 'NZ Maintains offer to take refugees' in News.com.au viewed 19/02/16. http://www.news.com.au/national/breaking-news/shorten-supports-nz-deal-on-asylum-seekers/news-story/5207aeb5930ffaa85258ea612403a2e8

[45] Mares, ibid, p. 2.

[46] Doherty, Ben. 2015. 'Australia's generosity to Syrian refugees ignores those still languishing offshore' in theguardian Australia edition 10/09/15 viewed 4/12/15. http://www.theguardian.com/australia-news/2015/sep/10/australias-generosity-to-syrian-refugees-ignores-those-still-languishing-offshore

will come from the emergency fund in the Department of Foreign Affairs and Trade's Overseas Development Aid budget which is used to respond to emergencies like tsunamis and earthquakes.[47]

The human cost of the Abbott and Turnbull Government's policies

Through the Abbott years the UNHCR and rights groups remained highly critical about the conditions in the offshore detention centres and the holding of women, men and children in arbitrary, indefinite detention in breach of international standards. Poor hygiene, cramped conditions, unrelenting heat and a lack of facilities remained areas of concern causing physical and mental health issues. The riot on Manus which resulted in the death of a young man and the injury of up to 60 others, along with the recent death of another young man from a foot infection provide tragic testament to the concerns raised by the UNHCR and others.[48] [49] The recent incidents of self-immolation of a young man and a young woman on Nauru under the Turnbull Government, shows the shocking level of despair that people seeking asylum continue to experience in the offshore centres.

Three significant reports during the Abbott Government highlighted the particular and severe conditions for women and children living in offshore centres. The AHRC's report into the effect on children in long term detention found that one in three children suffered from significant psychological distress as a result of their detainment.[50] The Moss Review reported claims of sexual harassment and abuse of women in Nauru, including three allegations of rape. The Review raised concerns that sexual assault was likely to be under-reported due to family or cultural reasons and fear that reporting abuse may impact on future refugee status. The Review also found a concerning lack of oversight by the private contractor.[51] A Senate Committee found that the conditions on Nauru were 'not adequate, appropriate or safe.' The report noted the inability for vulnerable women and children to be removed from dangerous situations. Broadspectrum Services (formerly Transfield) which operates the centre reported to the Committee that 30 formal allegations of child abuse had been made against staff, 15 allegations of sexual assault or rape and 4 allegations relating to the exchange of sexual favours for contraband.[52] The Committee was highly critical of the Department for not ensuring it received

[47] Ibid.

[48] Asylum Seeker Resource Centre, 'Timeline of Events', op. cit., pp. 4,5,7,8,10 and 13.

[49] Refugee Council of Australia, 'Timeline', op. cit., pp. 14-15.

[50] Australian Human Rights Commission. 2015. The Forgotten Children: National Inquiry into Children in Immigration Detention (2014). https://humanrights.gov.au/publications/asylum-seekers-and-refugees?source=our-work

[51] Moss, Phillip. 2015. 'Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru' http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf

[52] The Senate. 2015. 'Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru'. Parliament House, Canberra, p. 23.

comprehensive reports about incidents from Broadspectrum and said that the Department appeared to be largely unaware of what was happening.[53]

Labor and the Coalition – policies in common

Despite differences in stated approaches, Coalition and Labor Governments alike have implemented increasingly harsh deterrence measures to prevent people seeking asylum from travelling to Australia by boat. Both parties support mandatory detention, offshore processing and more recently boat turn backs.

Mandatory detention and off-shore processing

Over the past 15 years Australia has been found to be in breach of many of its obligations under the Refugee Convention and numerous other international agreements such as the Convention on the Rights of the Child. Concerns have been raised about the arbitrary and indefinite nature of the detainment, the substandard and cruel conditions of the offshore processing centres and the psychological damage of keeping women, men and children in isolated places, free from independent scrutiny or access to Australian legal processes. The case of 'Abyan' who sought medical care in Australia as a result of being raped while on Nauru highlighted an appalling lack of humanity and sensitivity from the Minister and his department. The Government flew Abyan to Australia for a termination of the pregnancy resulting from the rape only to return her a few days later claiming she had changed her mind which was subsequently disputed by Abyan. Following a public outcry, the Government allowed Abyan to return to Australia for counselling and medical care.[54]

Holding children in detention remains a serious concern. The mandatory detention of children continued during the period examined despite the introduction of community based measures during the Howard years which were expanded under the Rudd and Gillard Governments. While both major parties have acknowledged that children should only be detained as a measure of last resort it is salutary to note that the recent report by the AHRC into the effects

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report

[53] Senate. 2015. 'Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru'. Parliament House, Canberra. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report

[54] Symons-Brown, Margaret. 2016. 'Pregnant Somali asylum seeker Abyan had not ruled out abortion, FOI documents reveal', ABC News, 02/01/16 viewed 07/04/16. http://www.abc.net.au/news/2016-01-02/pregnant-asylum-seeker-wanted-an-abortion-foi-documents-say/7064038

of children in long term detainment, some ten years on from an earlier report during the Howard era, was highly critical of the way both major parties have continued to keep children in detainment resulting in significant psychological harm. The Government's recent announcement that all children have been moved out of detention is welcome but it is important to note that this practice does not extend to children in detention on Nauru or the more than 70 babies and children currently in Australia receiving medical support. The Minister has made it clear that they will be returned to Nauru once they are no longer in need of medical attention.[55]

Mandatory detention is also extremely costly. A report from the Commission of Audit has revealed that it costs more than $400,000 a year to keep one person in offshore detention whereas it is estimated to cost around $50,000 to allow a person seeking asylum to live on a bridging visa in the Australian community.[56]

Community processing - an effective alternative to mandatory detention

The AHRC has called for the system of mandatory and indefinite detention to be ended and in its place a greater use of community based alternatives that are cheaper, more effective and more humane than holding people in immigration detention facilities for prolonged periods.[57] Research undertaken by the International Detention Coalition (IDC) over a five year period has also reinforced the need for more humane, community based arrangements.[58] The IDC has provided a detailed guidebook to assist countries in ensuring that detention is only used as a last resort. In its current platform Labor continues to commit to a more humane treatment of detention and spells out a number of ways that this would occur but it remains committed to mandatory offshore detention.[59] The Greens on the other hand have committed to the

[55] Gordon, Michael. 2016. 'Peter Dutton vows children released from detention are still bound for Nauru', The Sydney Morning Herald, 04/04/16 viewed 04/04/16.
http://www.smh.com.au/federal-politics/political-news/peter-dutton-vows-children-released-from-detention-are-still-bound-for-nauru-20160404-gnxklk.html

[56] Chia, Joyce and Higgins, Claire. 2014.' Penny wise, pound foolish: how to really save money on refugees.' 12/06/14 viewed 09/11/15
http://theconversation.com/penny-wise-pound-foolish-how-to-really-save-money-on-refugees-27270

[57] Australian Human Rights Commission, 'Alternatives to detention'
https://www.humanrights.gov.au/alternatives-detention

[58] The International Detention Centre Coalition. 2015. 'There are alternatives'. Australia.
http://idcoalition.org/publication/there-are-alternatives-revised-edition/

[59] Australian Labor Party. 2015. Fact Sheet: A humane and compassionate approach to asylum seekers.
http://www.alp.org.au/asylumseekers viewed 09/11/15.

elimination of mandatory and/or indefinite detention and the abolition of offshore processing and 'other forms of punitive or discriminatory treatment of asylum seekers and refugees'.[60]

Turning Back boats

Turn-backs were a major area of difference between Labor and the Coalition until the recent Labor Party Conference in July 2015 amended the party platform to leave open the option of turning back boats when safe to do so.[61] The Abbott and Turnbull Governments have been successful in sustaining a consistent story in the mainstream media of the benefits of stopping the boats. These include undermining the people smuggling business, preventing loss of lives at sea and preventing an unknowable number of people seeking asylum reaching Australia through tough border control measures.[62] These so called achievements, however, have come at considerable cost. The person seeking asylum to whom Australia has denied entry are left with no resolution to their claim for protection and face the prospect of long detention in barely humane conditions or resettlement in hostile communities. This severe punishment of people seeking asylum by boat contravenes the Refugee Convention which clearly states that refugees must not be penalised or punished for their method of arrival in a country.[63] Countries around the world are well aware of Australia's unique and aggressive tow back policy. More than 60 countries recently urged Australia to end its policies of boat turn-backs, mandatory detention and offshore processing at the UN's Universal Periodic Review of Australia's human rights record.[64]

Turning back boats also has a negative impact on Australia's relationship with transit countries such as Indonesia. Good relationships with Indonesia and other countries in our region are critical to establishing a sustainable, comprehensive approach to regional policy and yet the Indonesian Government has on several occasions had cause to publicly object to frequent breaches of its sovereignty when the Australian navy entered its waters to intercept or tow boats back.[65]

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[60] Australian Greens. 2015. 'Policy on Immigration and Refugees'. http://greens.org.au/policies/immigration viewed 09/11/15.

[61] Australian Labor Party, op. cit.

[62] Reilly, Alex. 2014. 'The Boats may have stopped, but at what cost to Australia' in The Conversation 28/08/14 viewed 14/12/15 https://theconversation.com/the-boats-may-have-stopped-but-at-what-cost-to-australia-30455

[63] Ibid.

[64] Miller, Nick. 2015. 'UN human rights review: Countries line up to criticise Australia for its treatment of asylum seekers' in The Sydney Morning Herald, 10/11/15 viewed 10/11/15

http://www.smh.com.au/federal-politics/political-news/un-human-rights-review-countries-line-up-to-criticise-australia-for-its-treatment-of-asylum-seekers-20151109-gkusj4.html

[65] Wroe, David and Bachelard, Michael. 2014. 'Australian breach of Indonesian territorial waters angers Jakarta'. In The Sydney Morning Herald, 18/01/14, viewed

Cost to democracy

Secrecy, a lack of transparency and accountability have been particular hallmarks of the Abbott and Turnbull Governments which threaten to erode Australia's democratic processes. Strategies such as refusing to release information or answer questions, criminalising the release of information, and increasing ministerial control without reference to independent review rights undermines the principles and processes that Australian democracy is built upon. Allowing private contractors to operate detention centres in a shroud of secrecy with little accountability or transparency contributes to this erosion of democracy. The end result is a community disengaged from any discussion about alternative immigration policies and largely unaware of what is being done in our name.

The Way Forward – a safer and more humane plan

While both Coalition and Labor Governments have pursued regional arrangements in some form, these have largely been conducted as unilateral exercises with Australia seeking to fully exert its own interests. This has led to the current situation where single agreements have been reached with specific countries rather than through a more comprehensive multi country agreement. Resettlement through the arrangements in place has been uncertain and extremely slow, often carried out against the local community's wishes.

Longer term, comprehensive and sustainable approaches

The Asia Pacific region offers very little protection for people seeking safety. Few countries have signed the Refugee Convention or have domestic laws in place that provide legal protection. People seeking asylum living in these countries suffer violent abuse, exploitation and poverty with little access to health, education and other basic services. Under these conditions it is not surprising that journeys are taken by sea in search of safety. Leading non-government organisations such as The Refugee Council of Australia[66], the Asylum Seeker

http://www.smh.com.au/federal-politics/political-news/australian-breach-of-indonesian-territorial-waters-angers-jakarta-20140117-310kk.html

[66] Refugee Council of Australia. 2015. 'Improving refugee protection in Asia-Pacific: How Australia can make a practical difference.'
http://www.refugeecouncil.org.au/wp-content/uploads/2014/08/Australias-response-to-region-150720.pdf

Resource Centre[67] and Amnesty International[68] have all called for comprehensive, sustainable regional approaches that address the reasons why people make dangerous onwards journeys in the first place.

Regional Cooperation

The Regional Cooperation Framework agreed to by the Bali Process in 2011 could provide a vehicle for enhanced regional cooperation[69] It provides a framework for 'interested Bali Process members to establish practical arrangements aimed at ensuring consistent processing of asylum claims, durable solutions for refugees, the sustainable return of those found not to be owed protection and targeting people smuggling enterprises'.[70] While both Labor and the Coalition support the Bali Process, and Australia took a lead in its establishment, there has been little progress to date in implementing its objectives. It would need considerable investment from all signatories to develop the framework into a system which supported enhanced regional processing with the protection safeguards necessary to assure the safety and wellbeing of people seeking asylum.

Labor's current policy specifically refers to the Regional Cooperation framework and commits to taking a leadership role within South East Asia to build a regional humanitarian framework.[71] Labor would increase funding to the UNHCR and work with them on the resettlement of those found to be refugees. Assistance would be offered to countries of 'first asylum' – such as Malaysia, Thailand and Indonesia if they agree to resettle people the UNHCR determines to be refugees. Labor's commitment to increase the annual humanitarian intake to 27,000 by 2025 is integral to their plan to provide more options to refugees, reducing the need for them to take journeys by sea and encouraging resettlement in countries of first asylum. The Greens similarly support enhanced regional cooperation in the Asia-Pacific and increased funding to the UNHCR and an increase in the humanitarian quota but without linking it to onshore arrivals or other programs.[72]

Australia will need to work constructively and proactively with regional countries, the UNHCR and non-government agencies to promote ratification of the Refugee Convention, improve legal protections for people seeking asylum, increase access to basic services such as health and

[67] Asylum Seeker Resource Centre. (Undated). 'myths, Facts + solutions', p. 36. http://www.asrc.org.au/wp-content/uploads/2013/07/MythBusterJuly2013FINAL.pdf

[68] Amnesty International. 2012. 'Amnesty's vision: a regional approach to refugees in the Asia Pacific'. 13/08/2012 viewed 07/12/15. http://amnesty.org.au/refugees/comments/29456/

[69] Report of the Expert Panel on Asylum Seekers. 2012. 'Attachment 6: Australia's International and Regional Engagement on Irregular Movement and International Protections', Parliament House, Canberra.

[70] Ibid., p. 110.

[71] Australian Labor Party, op. cit.

[72] Australian Greens, op. cit.

education and improve prospects for resettlement through more consistent and timely asylum processes. Turning back boats cannot be part of the policy going forward as it undermines the relationships that need to be built with countries in the region which are essential to providing a strong foundation for longer term, sustainable pathways for people seeking asylum.

While a comprehensive regional approach will take time to build there are some immediate actions Prime Minister Turnbull must take. These include; bringing back to Australia those who have been sent to Nauru and Manus Island, releasing all detained people into the community with appropriate supports once health, identity and security checks have been carried out, fast tracking access to work and education rights and reinstating access to permanent protection. Dismantling the secrecy surrounding boat arrivals and the management of people seeking asylum so that there can be full public discussion and greater accountability will also be essential in restoring confidence in Australia's human rights record and our democratic processes.

Conclusion

In reviewing the asylum policies of respective Governments over the past 15 years it can be seen that there are several key elements that have endured across both sides of politics. These are offshore processing, mandatory detention and more recently turning back boats. The approach towards people seeking asylum has become cruel and secretive earning Australia sustained criticism from the United Nations and human rights organisations. The policy efforts of both major parties while in Government to deter people from travelling to Australia by sea have resulted in the creation of an excessively punitive system which violates the basic human rights of women, men and children who are seeking our help and protection. Despite the intentions of the Rudd Government to have a more principled and humane approach to mandatory detention, principles eventually gave way in the face of increased boat arrivals and pressure from the Opposition for a 'tougher stance'. There are existing mechanisms such as the Bali Process that the Government could substantially invest in, and cooperatively work with other countries in the region to increase legal protections and create safer living conditions for people while their refugee status is determined. A return to a moral framework such as the Women's Trust 'Six Point Safety Plan' that puts the safety and rights of people seeking asylum at the centre of our policies and practices would be a good place to start.