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Australia's 20-year search for a coherent, workable and moral asylum policy

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Last week's tragedy of another mass loss of life at sea between Indonesia and Christmas Island focuses our minds yet again on an intractable public policy problem for Australia – our search for a coherent, workable and moral asylum policy. Tonight I will be unashamedly simplistic in my conclusion: decent offshore processing wherever it might occur is no solution unless there be a regional commitment to regional resettlement for those proved to be refugees. If there not be a regional commitment to regional resettlement, those found to be refugees will still be guaranteed a first-world migration outcome and that will not stop the boats. Desperate people with the prospect of permanent settlement in Australia will endure a long wait anywhere – whether it be Malaysia or Nauru. What they will not pay for is a boat journey which results in their being put at the end of a queue which is 90,000 long. That's not decent offshore processing. That's indecent offshore dumping.

In 2009, I was privileged to chair the 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.

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:

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 ("refoule") 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 after-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.

The long term work for humane accommodation, transparent processing, and prompt durable solutions still needs to be done in Indonesia which is the main transit country to Australia. DIAC's 2010-11 Annual Report states: "A further $866,000 was utilised for the second year of the UNHCR Refugee Status Determination processing project in Indonesia." Futhermore: "Through the Regional Cooperation Agreement with Indonesia, the department provides funding to IOM to provide practical support, such as accommodation, food and emergency medical assistance to irregular migrants intercepted in Indonesia. This work also arranges voluntary repatriation of irregular migrants."

In the present debate on refugee policy, many people forget that the Howard government created a nexus between the number of successful onshore asylum claims and the number of places available for humanitarian offshore cases. Usually we take 12-13,000 humanitarian applicants each year. 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.

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. 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 accords them natural justice and 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.

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. Let's not forget the honest assessment of immigration detention centres by Professor Patrick McGorry, a previous Australian of the Year: "You could almost describe them as factories for producing mental illness and mental disorder". 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. We always need to 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? Though the

Australian public tends to fixate on the boat people (now called IMAs or "irregular maritime arrivals") for skewing our humanitarian intake, the facts tell another story. In 2009-10, 4591 boat people applied for protection and 5987 plane people applied for protection visas. In 2010-11, it was 5,175 boat people and 6,316 plane people. For the first three quarters of this financial year, it was 4,503 boat people and 5,343 plane people.

The Opposition has recently suggested that the problem with boat people is that they get more favourable consideration by public servants assessing their claims because they arrive without documentation. On 22 May 2012, DIAC officers made it clear to Parliament that this problem was being overstated. Senate Estimates were informed that "people often have left documentation with somebody and they can make a call and get that documentation forwarded". People stepping off a boat often arrive without documentation but "literally within days, or a matter of some weeks, documentation can and does emerge". And it's not as if the public servants are soft on refugee determination. Yes, a high percentage of boat people are found to be refugees – BECAUSE THEY ARE. Those rejected in the first instance enjoy a very high rate of reversal of their rejection on appeal. In 2010-11, 71.9% of those boat people who appealed a rejection succeeded in being accepted as refugees.

Both sides of politics know that the vulnerable will continue to arrive on our shores uninvited. The good, decent top end of town needs to maintain the faith of Petro Georgiou who told our Parliament in his valedictory speech:

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.

Independent Rob Oakeshott has introduced to the House of Representatives his own *Migration Legislation Amendment (The Bali Process) Bill 2012*. If passed, this bill would amend the *Migration Act* removing the peg on which the High Court was able to hang the Malaysia solution out to dry. Under the unamended law, the Minister for Immigration is required to declare in writing that any country to be used for offshore processing provides access to effective procedures for asylum claims, provides protection for asylum seekers while their claims are processed, and meets relevant human rights standards in providing that protection. In August last year, the High Court of Australia ruled that the Minister could not make a valid declaration in relation to Malaysia as it was not a signatory to the Refugees Convention, and the Arrangement between the two governments was not legally binding.

Oakeshott is proposing that a new peg replace the old one, and that the new one be designed such that Malaysia could pass muster without High Court interference. His bill would permit the Minister to designate Malaysia as an offshore assessment country because it is a party to the Bali Process which at its last meeting a year ago included 32 countries working on a Regional Cooperation Framework. If Oakeshott intended meaningful public decision making by the Executive government and appropriate parliamentary scrutiny, he has failed. Participation in the Bali process could not be reckoned a sufficient precondition for a country to pass muster with human rights protection and appropriate asylum procedures. For example, Afghanistan, Iraq and Iran are all participants in the Bali process.

The only other precondition in the Oakeshott bill is that "the Minister thinks it is in the national interest" to designate a country as an offshore assessment country. Anxious

to avoid any further High Court scrutiny, his drafters have stipulated that the international obligations and domestic laws of a country are irrelevant to the process of designation. In considering whether designation of another country would be in Australia's national interest, the Minister is required to have regard to the assurances offered by that country's government about the assessment of asylum claims and the non-refoulement of asylum seekers whose claims have not yet been decided. These assurances need not be legally binding. The Minister is required to place a statement of reasons before Parliament within 2 sitting days of making a designation. He is also required within 14 days to make a request of UNHCR and the International Organisation for Migration (IOM) seeking a formal statement of their views about the arrangements proposed in the designated country. It would make more sense if the minister were required to make the requests and receive the statements before making his decision to designate a country, and before tabling the decision in Parliament. That way the UNHCR and IOM positions could help to inform both the Minster's decision and Parliament's assessment of the decision. The bill provides that "the sole purpose of laying the documents before the Parliament is to inform the Parliament of the matters referred to in the documents and nothing in the documents affects the validity of the designation". Parliament has no power to disallow the designation and a failure to table the documents would not affect the validity of the designation. So the Oakeshott peg is designed to ensure that neither Parliament nor the High Court could hang a designated country out to dry, ever again. The bill is simply a convoluted means for allowing the Executive government to declare an offshore processing country without any meaningful scrutiny by Parliament or the High Court. It does nothing to advance the cause of public scrutiny of government decisions to provide offshore processing of asylum claims.

A completely toothless tiger, the bill still provides the opportunity for Parliament to agitate again the debate about Nauru, Malaysia and onshore processing.

We now know that the best advice available from the Commonwealth public service is that Nauru will not work second time around. In October last year, Andrew Metcalfe, Secretary of the Immigration Department under governments of both political persuasions, told Liberal Senator Michaelia Cash in Senate Estimates: "Our view is not simply that the Nauru option would not work but that the combination of circumstances that existed at the end of 2001 could not be repeated with success. That is a view that we held for some time—and it is of course not just a view of my department; it is the collective view of agencies involved in providing advice in this area." Scott Morrison, the Opposition Spokesman, continues to point to the fact that "30 percent of those who went through the Pacific Solution went home". They did – because they got sick of waiting and thought John Howard meant it when he said that they would never get to Australia. But those who waited and were found to be refugees all ended up in Australia or New Zealand, except for a handful who had pre-existing connections with other resettlement countries. So this bluff is unlikely to work next time around. People who are genuine refugees will be sure that they will be resettled, and more than likely in Australia or New Zealand. For non-rugby players from Afghanistan either side of the Tasman trench is a good outcome, worth waiting for.

Malaysia is still problematic when you consider the case of the unaccompanied child who comes to Australia fleeing persecution and who would undoubtedly be found to be a refugee. If you send such a child to the end of a queue which is 90,000 long in Malaysia, the solution is immoral. If you leave the child in Australia, you send a signal to people smugglers that children are exempt from the Malaysia solution and thus you set up a magnet inviting other unaccompanied children to risk the dangerous voyage from Indonesia. The Malaysia solution then becomes

unworkable. In its recently tabled response to the Senate Legal and Constitutional Affairs References Committee Report on the Malaysia Solution, the Government said their pre-removal assessment process "developed in close consultation with UNHCR" demonstrated that "the needs of vulnerable groups such as unaccompanied minors…were considered and would be addressed". So would kids be sent to Malaysia or would they not?

While the offshore processing option has been off the table, the Gillard government has done good work revising its onshore processing arrangements, providing an identical procedure for appeals whether an applicant came by boat without a visa or by plane with a non-protection visa, and providing bridging visas for many asylum seekers once their health, security and identity issues are resolved. Also the government has enacted complementary protection legislation which allows a person in Australia to contest their return home when they will face the death penalty, the threat of death or cruel and degrading treatment.

Rob Oakeshott introducing his bill claimed, "The truth is that 148 of the 150 members of parliament in the House of Representatives agree that offshore assessment should be an option for executive government." Despite the electoral appeal of slogans in this complex policy area, it is time for these 148 members to admit that the existing Malaysia and Nauru options do not pass muster as both moral and workable. Afterall we are one of the few signatories to the *Refugee Convention* in this part of the world; we take our international obligations seriously; and the number of asylum seekers reaching our shores is slight compared with the numbers in Malaysia and Indonesia.

Until we get a truly regional approach to the regional problem of irregular people movement, we Australians need to accept that there is no regional solution just to our Australian problem. While there is no regional approach to the regional problem, we need to do more in co-operation with Indonesia to accommodate asylum seekers humanely in Java with a better resourced IOM, to process them transparently with a better resourced UNHCR, and to resettle them more promptly in a range of countries in the region. Then and only then would we be entitled in co-operation with the Indonesians to return boat people safely to Java before they reached Christmas Island seeking to invoke our protection obligations.

Meanwhile we must expect that the boats will keep coming, reminding ourselves that this island nation continent of Australia has far more robust borders than those first world countries with porous land borders. Consider UNCR's Global Trends 2011 released last week. In Australia, there are 28,676 persons of concern to UNHCR; meanwhile in our two transit countries - in Malaysia, there are 217,618; and in Indonesia only 4,239. Let's look to Western Europe. In Belgium, there are 42,105 persons of concern to UNHCR; in Denmark, 18,009; in Greece, 45,720; in the Netherlands, 87,023; in France, 260,627; in the UK, 208,885; and in Germany, 658,818. And let's consider the two other countries who join us in doing most to accept refugees assessed in faraway places by UNHCR: Canada has 206,735 persons within its borders who are of concern to UNHCR, and the US has 276,484. In a globalized twenty-first century world, hermetically sealed borders are figments of delusional or racist imaginations. We need to maintain a commitment to a humanitarian migration program accommodating those who could never afford a people smuggler. But we also need to honour our obligations to those who head our way seeking asylum unless and until we can improve our bilateral arrangements with Indonesia and our regional arrangements for a regional solution to a regional problem.

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