

Asylum Seeker and Refugee Policy in Australia Under the Abbott Government

Written by Daniel Ghezlbash and Mary Crock

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DANIEL GHEZELBASH AND MARY CROCK, OCT 30 2013

The question of how to deal with asylum seekers arriving by boat (Unauthorised Maritime Arrivals, or UMAs) has featured as an electoral issue in Australia since the first Vietnamese refugees landed on Australia's shores in 1976. Even so, the recent federal poll broke new ground. The incumbent centre-left Labor government and the opposition centre-right Liberal National Coalition engaged in a veritable 'race to the bottom' as each attempted to outdo the other with harsh border control policies. The rationales given by the two parties varied slightly. For Labor the issue was framed in terms of the need to deter asylum seekers from risking their lives at sea. For the Liberal/National Coalition led by Tony Abbott, boat arrivals were decried more broadly as a threat to public order and national security. The conservatives prevailed handsomely on a platform that included a promise to stop the boats.

In this article we examine the key elements of the new government's border protection policies. We evaluate the compatibility of the new measures with Australia's international legal obligations. The *non-refoulement* obligations contained in the Refugee Convention operate to prohibit the removal of a refugee to place where they will face persecution on one of the five convention grounds (race, nationality, religion, political opinion or membership of a particular social group). Collectively, similar obligations under the major human rights treaties (ICCPR, CRC and CAT) forbid removal of a person to a country where they might face death, torture or other gross mistreatment. These *non-refoulement* obligations also extend to ensuring that a person is not sent to a country which might in turn send that person to a country where they face unacceptable risk. The article concludes with an analysis of the potential impact on Australian society of the government's rhetoric vilifying asylum seekers.

Regional Resettlement and Offshore Processing

The most concerning and expensive of the Abbott government's election commitments is its determination to continue the regional resettlement and offshore processing policies (re)introduced by the Labor government in 2012. Under the Papua New Guinea (PNG) Arrangement, UMAs can be transferred to Manus Island in Papua New Guinea to have their claim for refugee status assessed under PNG law. Those found to be refugees, will then be settled in PNG. The government also inherited an arrangement with the tiny island state of Nauru which allows for the transfer of UMAs for the processing of asylum claims. Nauru has made it clear that it cannot permanently resettle these people. Rather, recognised refugees will be held until a third country can be found to resettle them.

That is the theory. UMA arrivals have slowed markedly since the election in September – down to between 100-200 a week from a peak of over 1500 a week in August. However, global pressures such as the war in Syria mean that 'stopping the boats' is highly unlikely. It is only a matter of time before the smugglers realise that the government's capacity to deflect its boat people is dramatically finite. In fact there is evidence that most of the asylum seekers transferred under the Labor government have since been brought to Australia to make way for the Coalition's crack-down. The exercise in laundering refugees is an expensive one and may explain the price tag of \$11 billion mentioned by the new Immigration Minister as the cost of the outgoing government's asylum seeker policy.

The concern of many is that offshore processing arrangements do not contain adequate safeguards to ensure that Australia complies with its obligations under the Refugee Convention and other Human Rights instruments. Transfers

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to Nauru and PNG are being carried out pursuant to non-binding diplomatic assurances that asylum seekers transferred there will not be sent back to countries where they are at risk of *refoulement*. Such assurances are difficult to monitor and impossible to enforce. Persons transferred to Nauru or Manus Island may indeed be at serious risk of *refoulement*. Those detained in PNG are also at serious risk of physical harm – both from disease that is endemic in the dirt poor state and from the lawlessness of a restive population opposed to accepting the transferees.

There are added problems in the government's stated goal of transferring all UMAs to offshore processing facilities within 48 hours of arrival. Minister Scott Morrison has stated 'if people are fit to get on a boat, they'll be quickly deemed fit to fly.' The 48-hour turn around target, however, has been criticised as it does not provide sufficient time to carry out health checks and to screen for communicable diseases such as tuberculosis or typhoid. Without such testing, there is the risk that persons with acute or chronic illnesses may be sent to remote offshore facilities where they will not have access to required medical treatment, or that there may be break out of communicable disease in these remote offshore centers.

Turning Back the Boats

Another pillar of the government's border control policy is a commitment to turning back boats to Indonesia where possible. Since being elected, the government has distanced itself from statements made in opposition indicating that they would physically tow boats back to Indonesia. Instead, they assert their policy is to turn boats around to Indonesia where it is safe to do so. The distinction is important when considering the impact of each action from the perspective of the Indonesian government. The act of an Australian vessel physically towing an asylum seeker boat from international waters to an Indonesian port without Indonesia's permission would be a major incursion on Indonesian sovereignty. Returning boats without Australian vessels entering Indonesian waters is less problematic. However, the distinction becomes less important when considering Australia's obligations towards asylum seekers under international law. In either instance Australia will be in breach of its *non-refoulement* obligations if returning a person to a place where they face persecution contrary to the UN Refugee Convention, or to a situation where they are in danger of death, torture or other mistreatment. Either towing or turning back boats may also be contrary to the law of the sea where a boat is unseaworthy such that the lives of passengers may be at risk.

Temporary Protection Visas

The Abbott government has committed to the reintroduction of temporary protection visas (TPVs) for certain classes of asylum seekers. The new TPV regime will target two groups. The first are the more than 30,000 UMAs in Australia awaiting the processing of asylum claims. Second are future arrivals who come to Australia without a visa and/or who are not immigration cleared (whether they arrive by boat or plane). Asylum seekers from these two groups who have their claims for refugee status recognised will be issued with temporary 3-year visas. They will be barred from sponsoring family and will have to make a fresh claim for asylum to obtain a new temporary protection visa once their three year visa expires.

Temporary protection visas were used in Australia between 1999-2007. As we have discussed elsewhere, these visas encourage rather than discourage irregular migration because families cannot be sponsored by regular means. This leads to more women and children making the perilous journey by sea. TPVs also had a devastating impact on the well-being of asylum seekers, with a 2006 study finding that TPV holders had dramatically higher levels of anxiety and post-traumatic stress disorder when compared to permanent visa holders.

Fast-Track Assessments and Removal of Independent Review

Policy documents released by the Coalition government before the September election indicate a commitment to removing access to independent merits review and to introducing a fast track assessment removal process for UMAs. The only avenue of review under the new system will be before a single departmental case officer. A new process will be established to fast track the processing of asylum claims deemed to be without merit. Based on the UK's Detained Fast Track System and the US's Expedited Removal regime, asylum seekers subjected to the process will have the first instance assessment of their claim fast-tracked. An automatic rapid review will follow if the

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initial claim is rejected. Where a claim is rejected upon review, the asylum seeker will be placed in rapid removal procedures.

Robust assessment procedures and access to independent review are essential for ensuring the quality of refugee status determinations. Without such procedures, there is the risk that genuine refugees will not be recognised as such and deported back to a place where they will face harm, placing Australia in violation of its *non-refoulement* obligations. The UK's Detained Fast Track System on which the Coalition's new policy is based has been criticised as being unsuitable for adequately assessing complex cases. The importance of an independent review body for preventing non-refoulement is underscored by the fact that such a high proportion of asylum claims are overturned by the RRT. Between July 2012 and March 18 2013, the RRT overturned 74 per cent of first instance decisions rejecting asylum claims by persons who arrived by boat. That means that without access to such review, a significant portion of asylum seekers may be subject to *refoulement*.

Rhetoric of Exclusion

Alongside the substantive changes in policy, the Abbott government has adopted rhetoric which demonises asylum seekers and risks damaging Australia's multicultural society. The Department of Immigration and Citizenship has been renamed to the Department of Immigration and Border Protection. The new border protection initiative has been named 'Operation Sovereign Borders', and a three star general has been appointed to head up the operation. A recent directive to immigration staff recommends that boat arrivals be referred to as 'illegal migrants', rather than as 'irregular maritime arrivals', while 'clients' are now to be known as 'detainees'. The collective impact of these changes is to portray asylum seekers arriving by boat as a threat to Australia that must be curtailed. Similar tactics employed by the conservative government between 1997 and 2007 had a devastating impact on Australia's multicultural society. It was no coincidence that these years saw an unprecedented number of citizens and permanent residents wrongly arrested, detained and even deported. Many, like Cornelia Rau and Vivian Solon Alvarez were mentally ill and/or physically handicapped. These were also the years that brought inter-racial rioting to Australia. One might well ask whether Australians really have the stomach to return to such divisive and destructive policies. Only time will tell.

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