

# The Future of Offshore Processing

Written by Nikolas Feith Tan

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NIKOLAS FEITH TAN, JUL 25 2017

Australian asylum policy looks good on paper. By reintroducing offshore processing and turning back boats, the Australian government has effectively deterred asylum seekers and, in so doing, stopped deaths in and around Australian waters. The numbers support this view. In 2013, twenty thousand asylum seekers reached Australia by boat. In 2014, this figure dropped to 160 and it remains at zero thus far in 2017. Perhaps as a result of this clear deterrent effect, the 'Australian model' remains a prominent policy option in the face of Europe's migration and refugee crisis. The truth behind the Australian model is more complicated. This contribution firstly outlines the history of Australia's offshore asylum policy, secondly explores whether asylum policies in the Pacific are uniquely Australian, and finally considers urgent questions concerning the legality and sustainability of Australia's approach.

### Swings and Roundabouts

Offshore processing, defined here as the removal of an asylum seeker to a third state while their claim for international protection is assessed, has been a central plank in Australian asylum policy for almost two decades.

In 2001, the Tampa affair triggered an ad hoc agreement to transfer asylum seekers bound for Australia to Nauru. This one-off arrangement became the Pacific Solution. Under this policy, in place until 2007, around 1700 asylum seekers were transferred to Nauru and Papua New Guinea and detained while their asylum claims were processed (Bem et al., 2007).

Citing human rights concerns, the newly-elected Labor government ended the Pacific Solution in 2007 and Australia resumed processing asylum seekers arriving by boat onshore. In subsequent years, the number of boat arrivals grew, accompanied by increasing deaths at sea. In August 2012, the Australian government reopened the centres in Nauru and Papua New Guinea, as a 'circuit breaker' to stem the flow of people arriving irregularly (Houston, 2012).

Over time, this temporary measure hardened into permanent policy and in 2013 Operation Sovereign Borders was introduced. The policy rests on three central pillars: the turning back of boats; offshore processing of asylum seekers; and offshore settlement of those asylum seekers found to be refugees.

### The Australian Model?

Offshore processing is not uniquely Australian. The idea seems to have first emerged via a 1986 Danish draft United Nations General Assembly resolution to create regional processing centres administered by the UN (Noll, 2003). The policy dates back to the United States interdiction and transfer of Haitian asylum seekers to Guantanamo Bay, Cuba, which began in the early 1990s (Dastyari, 2007, Dastyari and Effeney, 2012, Léonard and Kaunert, 2016). Under a bilateral lease, the United States used Guantanamo Bay naval base to detain and screen Haitian asylum seekers. Rejected asylum seekers were then repatriated, while refugees were transferred to the United States (Dastyari, 2007).

In Europe, proposals relating to offshore processing date back to the United Kingdom's 2003 New Vision for Refugees, which proposed the establishment of protected zones in origin and transit states for asylum processing (Noll, 2003, den Heijer, 2012). This was followed by a German call for the establishment of asylum centres in North

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Africa in 2005. Since the European migrant and refugee crisis began in 2015, third country processing has been repeatedly put forward as a means to prevent deaths at sea and control migration. (Garlick, 2006, Garlick, 2015).

This very brief overview of the development of offshore processing in the United States, the European Union and Australia points to some policy interaction between the regions. Perhaps most explicitly, former Prime Minister Tony Abbott recommended the Australian model to EU leaders in 2015, saying 'The only way you can stop the deaths is in fact to stop the boats'.

However, offshore processing policies are not simply transplanted across regions. Rather, states 'borrow heavily' from one another, cherry-picking from earlier policy models as required (McAdam, 2013, Noll, 2003). Denmark, for example, has shown particular interest in the Australian approach, with politicians attempting an unsuccessful visit to Nauru and calling for the transfer of asylum seekers arriving to Denmark to Greenland or Tanzania, on the basis of close bilateral ties with the East African country.

Any future European offshore processing policy will need to adapt to address the significant shortcomings of both the Pacific Solution and Operation Sovereign Borders. In particular, issues of legality and sustainability.

## **Questions of Legality**

The 1951 Refugee Convention leaves the manner in which asylum procedures are carried out up to states. The Convention is silent on the question of whether a receiving state can transfer asylum seekers to another state, with the exception of Article 33(1) protecting against forced return of refugees. This means that offshore processing is not per se in violation of international law.

However, the Australian model has involved the protracted detention of asylum seekers for years on end in conditions that raise grave concerns under human rights law. The treatment of asylum seekers in Australian-led offshore detention has been extensively explored elsewhere and criticised by United Nations bodies, international human rights organisations, the Australian Senate and scholars. (Dastyari and O'Sullivan, 2016, Gerber et al., 2016, Nethery and Holman, 2016).

As I have written elsewhere, the differences in legal landscape between Australia and Europe make the Pacific model unfit for transfer. Boat turnbacks on the high seas carried out by Italy to Libya have been held to violate Article 3 of the European Convention on Human Rights (ECHR). While offshore processing has not yet been attempted by the EU, protection from the ECHR and EU Charter of Fundamental Rights make closed offshore detention highly unlikely.

## **Questions of Sustainability**

Today, the future of the Australian model in the Pacific is unclear. With the deterrent aim achieved through a combination of boat turnbacks – 30 since 2013 – and offshore processing, the pressing question is the future of those asylum seekers who have been found to require international protection.

In April last year, the Papua New Guinea Supreme Court found that the detention of around 900 men in the Manus Island processing centre was unconstitutional. The prime minister, Peter O'Neill, asked Australia to make 'alternative arrangements' for the men and the centre is scheduled to close this year.

Most recently, the Australian government and its contractors on Manus Island, G4S and Transfield Services, agreed to settle a class action brought in the Supreme Court of Victoria, Australia, on behalf of 1900 people detained at the centre between 2012 and 2014. The claim, which included allegations of negligence and false detention, was settled for \$A70 million plus costs.

Around 1200 people remain in Nauru and Papua New Guinea and many are unable to stay or go. Refugees, by definition, hold a well-founded fear or persecution in their own country and cannot return. A few dozen refugees have

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chosen to attempt integration in Nauru and Papua New Guinea, but neither country has the capacity to provide protection to such a number. A mere handful of refugees in Nauru have chosen to move to Cambodia, under a 2014 agreement between Phnom Penh and Canberra. In November 2016, President Obama agreed to resettle up to 1250 refugees from Nauru and Papua New Guinea. However, the deal has stalled under President Trump and its future is uncertain.

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